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This week's update revisits a noteworthy case: *Flexidig Ltd v M&M Contractors (Europe) Ltd* [2020] EWHC 847 (TCC)

[*Flexidig Ltd v M&M Contractors \(Europe\) Ltd* \[2020\] EWHC 847 \(TCC\)](#)

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Key Words:

Adjudication Enforcement, Jurisdiction, Proper Forum, Service of Process, Contractual Interpretation, Pay Less Notice, Scope of Adjudicator's Powers, Natural Justice

Summary

Flexidig Ltd sought enforcement of an adjudicator's decision awarding them £223,597.21 plus VAT from M&M Contractors. M&M resisted enforcement, citing jurisdictional and adjudicator overreach objections. The court addressed and dismissed these objections, upholding the adjudicator's decision.

Key Themes:

1. **Enforcement of Adjudication Awards:** *The case highlights principles governing the enforcement of adjudication decisions in construction disputes.*
2. **Jurisdictional Challenges:** *The dispute involved parallel proceedings in Northern Ireland and England, requiring the court to decide the appropriate forum.*
3. **Interpretation of Contractual Provisions:** *The judgment examined subcontract clauses on adjudication, notices, and payment terms.*
4. **Scope of Adjudicator's Powers:** *The court considered the adjudicator's authority to make a positive award despite a valid "pay less notice."*

Background

Flexidig and M&M subcontracted civil works for a Virgin Media underground infrastructure project in Louth, Lincolnshire [2]. The project, completed in 2018, led to disputes over defects and payments. Following three prior adjudications, the current dispute arose from Flexidig's Application for Payment No. 70 (AFP), which sought £2.5 million. M&M had paid £1.742 million, leaving £673,374 outstanding [18].

M&M issued a notice disputing the amount and claiming a set-off for defect rectification costs [18-19]. Flexidig argued the notice was invalid due to insufficient cost breakdowns, while M&M maintained its

validity by referencing prior documentation [19-30].

Flexidig commenced the fourth adjudication, seeking the outstanding amount [16, 19-22]. The adjudicator found M&M's notice to be valid but reduced its claimable set-off to £449,776.98, awarding Flexidig the remaining balance of £223,597.21 [35-40]. While M&M sought to declare the adjudicator's decision unenforceable in Northern Ireland [44], Flexidig applied for enforcement in England [44].

Legal Issues and Analysis

A. Jurisdiction

M&M argued that the English court lacked jurisdiction, citing a clause specifying Northern Irish courts and M&M's domicile in Northern Ireland [8-10, 4-9]. Flexidig countered that England was the proper forum due to the contract's performance location and M&M's significant business presence in England [55-59]. The court ruled in favour of England as the forum, considering the project's location, M&M's activities, the convenience of prior hearings in England, and the potential for further adjudications related to the project [55-62].

B. Timeliness of the Referral

M&M claimed Flexidig's adjudication referral was untimely based on the notice of adjudication's date [72-73]. The court rejected this, ruling that the relevant date was when the notice was received or deemed served, which was within the contractual timeframe [76-80].

C. Adjudicator's Power to Make a Positive Award

M&M argued the adjudicator exceeded jurisdiction by awarding Flexidig a sum despite finding M&M's "pay less notice" valid [70(2)]. The court disagreed, referencing Section 111(8) of the Housing Grants, Construction and Regeneration Act 1996, which permits awards exceeding the sum specified in a "pay less notice" [82-83].

The court held the decision was within the scope of the notice of adjudication [88-89] and adhered to natural justice principles [93-98]. It clarified that the adjudicator assessed only the maximum amount M&M could withhold, leaving defect claims open for further adjudication or agreement [94].

Conclusion

The court dismissed M&M's jurisdictional objections, confirmed the timeliness of Flexidig's adjudication referral, and upheld the adjudicator's authority to make a positive award despite a valid "pay less notice." It ordered M&M to pay the awarded sum to Flexidig.

Key Takeaway:

The judgment highlights the pro-enforcement stance of English courts toward adjudication decisions. It affirms that even with a valid "pay less notice," adjudicators can determine the allowable withheld amount, ensuring fairness. It also emphasises the importance of contract performance location and business presence in jurisdictional considerations.

Ratio Decidendi & Obiter Dicta:

Ratio:

1. England as the Proper Forum:

- **Place of Performance:** The contract was performed in England, with ongoing defect rectification work [55-56].
- **M&M's Presence in England:** M&M's significant business activities in England outweighed its domicile in Northern Ireland [56-58].
- **Practical Considerations:** The case had already been argued in England, avoiding inconvenience or duplication [59-61].

2. Timeliness of Referral to Adjudication:

The court ruled that the relevant date for the referral was when the notice was received or deemed served, within the contractual timeframe [72-80].

3. Adjudicator's Power to Make a Positive Award:

- **Statutory Provision:** Section 111(8) of the Housing Grants, Construction and Regeneration Act 1996 supports adjudicators awarding sums exceeding a "pay less notice" [82-83, 89].
- **Scope of the Dispute:** The decision fell within the notice of adjudication's scope [88-89].
- **Natural Justice:** The adjudicator adhered to natural justice principles, ensuring all relevant information was considered [93-98].

Obiter:

1. **M&M's Conduct:** The judge criticised M&M's pre-emptive Northern Ireland legal actions as tactical manoeuvres [49-50].
2. **Language in Adjudication:** The judge preferred "going off course" over "frolic of his own" for describing adjudicators exceeding their jurisdiction [92-93].
3. **Catch-All Clauses:** Catch-all provisions in notices should not grant unlimited power beyond the dispute's scope [90-92].

Parting Thoughts - Navigating Legal Technicalities: A Matter of Context

This case underscores the primacy of substance over procedural technicalities in construction disputes. The court rejected M&M's attempts to exploit legal formalities, focusing on practical considerations and ensuring Flexidig received the payment it was due. It serves as a reminder that prioritising substantive resolution leads to fairer and more sustainable outcomes.

**#Adjudication #AdjudicationEnforcement #Jurisdiction#ForumNonConveniens
#ContractualInterpretation #PaymentDisputes#PayLessNotice #AdjudicatorsPowers
#NaturalJustice #ConstructionLaw #UKConstructionIndustry #ConstructionDisputes
#HousingGrantsConstructionandRegenerationAct1996 #TCC #HGCRA**

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Arbitrator Assessor for the CIArb
ICE DRC Member
ICE DRC CPD Committee Chairman

Adjudicator Exam Question Setter for the ICE
CIArb Adjudication Panel Member since 2006
CIArb Arbitration Panel Member since 2006
CIC Adjudication Panel Member since 2010
Law Society Panel Arbitrator
RIBA Adjudication Panel Member since 2018
RICS Adjudication Panel Member since 2006
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FIDIC Adjudication Panel Member since 2021
ICE Adjudication Panel Member since 2021
RICS Dispute Board Registered since 2013

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