Adjudicator's decision enforced – complaints of unfair procedure rejected

Rydon Maintenance Group v Affinity Sutton Housing Ltd *[2015] EWHC 1306 (TCC)*

HHJ Raeside QC gave short shrift to a party opposing enforcement of an adjudicator's decision on the basis of complaints about the unfair conduct of the adjudication. **Jessica Stephens** represented the claimant and referring party, Rydon.

Rydon, a maintenance and minor works contractor, was engaged by Affinity on a "costs plus" basis. Rydon had under-invoiced over a period of several years and had not recovered all of its costs. Rydon engaged a forensic accountant to identify the extent of the under-invoicing, and commenced an adjudication. This first adjudication came to an early end when Affinity engaged a team of three counsel who raised all manner of jurisdictional issues, including that Rydon had used the wrong nominating body. Rydon halted that adjudication, before immediately recommencing the second, this time using RICS as the nominating body. Tony Bingham was appointed as adjudicator. The rules governing the adjudication were the CIC Model Adjudication Procedure (5th ed, 2011).

Having fought hard to halt the adjudication on jurisdictional as well as procedural grounds, Affinity was ultimately unsuccessful in the adjudication, and was ordered to pay Rydon £2.3m. Affinity challenged enforcement of the decision on grounds of failure to follow the parties' agreed procedure, breach of the rules of natural justice, and apparent bias. Almost every aspect of the adjudicator's conduct was the subject of criticism. The most notable complaints were that the adjudicator had ignored the parties' agreed directions; dispensed with the direction for Rydon to serve a reply; held a unilateral meeting with Rydon's expert; not required Rydon to answer 90-odd questions put by Affinity to Rydon's expert before the final meeting; and predetermined various matters by issuing "preliminary indications" and "observations".

At the hearing of Rydon's application to enforce the decision, HHJ Raeside QC rejected each and every one of Affinity's complaints, both individually and when taken as a whole. The Judge held that the adjudicator's process was entirely in accordance with the CIC procedure, and there was no apparent bias or lack of impartiality, and no pre-determination.

In reaching this decision, the Judge noted that the CIC procedure provided that "*The object of an adjudication is to reach a fair, rapid, inexpensive decision*", and emphasised that the procedure allowed the Adjudicator to "*take the initiative in ascertaining the facts and the law*". Importantly, clause 17 of the CIC procedure gave the adjudicator "*complete discretion as to how to conduct the adjudication*", including to "*establish the procedure and timetable*".

The court drew a distinction between the interrogatory process of adjudication, and the more adversarial processes common in court or arbitration. Provided that the procedure adopted was "*rapid, inexpensive but also, of course, fair*", what the adjudicator considered appropriate was acceptable, and he had complete discretion as to the procedure (save for serving the referral notice, the deadline for which was fixed). There was no system of pleadings, or presumptions as to conduct. Provided the procedure adopted was fair, a party could not insist that its demands and availability be accommodated within the confines of the adjudication.

Affinity had argued that because Rydon had indicated its consent to proposed directions that were then made, the CIC/MAP rules were varied, and this removed the adjudicator's discretion. That

argument was rejected. The court also considered whether it was possible to vary the adjudication rules, and how such variation might be achieved. There could be implied terms that could be added to the dispute resolution clauses. Alternatively, the parties could agree to vary the agreed terms during the course of the reference. Any such variation should be notified to the adjudicator in such a way that the appointed adjudicator understood and appreciated that the applicable rules had been changed, giving him the opportunity to either accept the variation (and the revised terms of his appointment) or reject them.

Affinity's many complaints were dealt with robustly by the adjudicator, and found no favour with HHJ Raeside QC on enforcement. This decision reinforces that adjudication is not a perfect form of dispute resolution. The procedure is governed by rules that were agreed to by the parties (usually before they were in dispute) and a party unhappy with the process cannot regain control by demanding that the adjudication is conducted in a manner more convenient to it.

If parties wish a more leisurely or refined adjudication procedure, they are entitled to agree different procedural rules when first contracting. Such variations may also be permissible after an adjudicator has been appointed, provided he is notified and able to consider whether he can or wants to continue within a different process agreed by the parties. This decision heralds a warning to those already party to an adjudication to consider properly what the agreed procedural rules permit the adjudicator to do before crying foul at each and every turn.

The possibilities of pleading a claim in estoppels

Mears Ltd v Shoreline Housing Partnership Ltd *[2015] EWHC 1396 (TCC)*

In a recent case before Mr Justice Akenhead, **Anthony Speaight QC** succeeded in arguing that the claimant contractor could rely on estoppel to prevent an employer from holding it to a contractual payment regime which had been orally varied before execution of the contractual documents.

The facts were that a housing association invited tenders for a contract whose draft documents provided for it to be operated and paid on a basis involving cost/value reconciliations every six months (Basis A). Mears was the successful tenderer.

There was then a meeting at which the parties orally agreed that the contract would, in fact, be operated and paid on a different basis (Basis B). The housing association indicated that the draft contract documents would not need to be amended. Work started, and the job was operated, invoiced and paid on Basis B.

The formal contract was not executed until about six months later, the contract documents still setting out Basis A as the basis for payment.

At about that time, new managers arrived at the housing association. Comparing the contract documents with what had been happening, they decided that, not only was Mears invoicing on the wrong basis, but the result was a substantial overpayment. Operating the cost/value reconciliations (Basis A), they deducted £300,000 from Mears' account.

Mears now found itself in a difficulty. The terms of the formal contract were retrospective to the start of work, so it could not say that the formal contract applied only from the date of its execution onwards. There was a provision that variations had to be in writing, so it could not say that the oral conversation had varied the contract. And there was an entire agreement clause, so it could not assert that the conversation had formed a collateral contract.

The matter eventually came before Mr Justice Akenhead. Unable to assert a contractual debt, Mears relied principally on estoppel by convention. The housing association responded that this would be to

use the estoppel as a sword, rather than merely a shield. Whilst it was true that it was Mears who was bringing the claim and seeking £300,000 from the court, Akenhead J held that, properly analysed, Mears could say that it was using the estoppel only as a shield to defeat the housing association's deduction. The Judge noted that:

"*There is an added element of unjustness and unconscionability which arises out of the fact that part of the shared common assumption was that there was no need to amend the Contract to reflect the agreement and convention between the parties as to the applicability of the Composite Rates. Whilst it is difficult to know what would have been done in terms of any amendment of the contract, what must be clear by inference is that Mears lost the opportunity to secure amendments to the contract which would have retained its entitlement to be paid by reference to the Composite Code rates at least for the period up to when the Contract was executed*."

Mears also pleaded a claim in estoppel by representation. The housing association retorted that the asserted representation was one of law, and not of fact. However, the judge held (in an interesting part of the judgment) that a representation of fact or opinion could found an effective and operative representation. In this case, Mears could rely upon the representation, which was described as a representation as to practicability rather than law.

Adjudicator's jurisdiction and the recovery of fees

Gary Kitt and EC Harris LLP v The Laundry Building Limited & Etcetera Construction Services Ltd *[2014] EWHC 4250 (TCC)*

In a disputed claim by an adjudicator for his fees, the TCC held that, where parties submit a dispute to adjudication, it would be illogical and unfair for one of them to be permitted unilaterally to limit the adjudicator's jurisdiction. **Thomas Crangle** appeared on behalf of the First Defendant, the Laundry Building ("TLB").

The facts were that, in 2011, TLB engaged the Second Defendant (Etcetera) to carry out building work. A dispute arose in relation to Etcetera's final account, and TLB's contra charges. The Contract Administrator attempted to resolve the disputes by making a series of decisions. Etcetera served a Notice of Adjudication on TLB in which it sought to limit the adjudicator's jurisdiction to those particular decisions of the Contract Administrator with which Etcetera disagreed. Mr Kitt of EC Harris was appointed as adjudicator, and the parties entered into a tripartite agreement by which TLB and Etcetera agreed to be jointly and severally liable for the adjudicator's fees. TLB challenged Etcetera's purported limitation of jurisdiction, and this matter remained in dispute throughout the adjudication.

In his decision, the adjudicator considered that he was unable to limit his review in the manner suggested by Etcetera. He therefore made a decision on each of the disputed items on the final account and contra charges. He decided that TLB was not restricted to putting forward only those defences raised before the dispute crystallised. With regard to the majority of items which Etcetera had sought to exclude from the adjudication, he accepted the valuations provided by TLB in the absence of any other evidence. Finally, he ordered that Etcetera should pay most of his fees.

Etcetera refused to pay the adjudicator's fees on grounds that the adjudicator's decision was unenforceable. Etcetera contended that the adjudicator breached the rules of natural justice, exceeded his jurisdiction, and acted in breach of an implied term of his appointment that his jurisdiction was limited. The adjudicator demanded payment from TLB, on grounds that they were jointly and severally liable for his fees under the contract, and ultimately issued a claim for recovery of his fees. TLB brought a Part 20 claim against Etcetera for the same sum.

Mr Justice Akenhead held that the adjudicator had acted within his jurisdiction, and in accordance with the rules of natural justice. It was not possible to limit the scope of the adjudication in the way that Etcetera had sought, either by seeking to restrict the arbitrator's jurisdiction or limit the defences on which the other party could rely. The Judge said that:

"*One cannot refer to adjudication a disputed claim to payment and dress up the definition of the dispute in such a way as jurisdictionally to prevent a defending party from raising any defence, whether good or bad, in the adjudication… to refer a payment claim and say, at the same time, that the referring party is not referring parts of the claim which might be challenged by the defending party is illogical, unmeritorious and wrong. It is a device which cannot and should not work.*"

It is settled law that an adjudicator has to consider and adjudicate on defences put forward by the responding party, even where that specific defence had not been raised before. The Judge noted that the adjudicator had been open with the parties from the beginning and had given Etcetera time to respond to TLB's case.

The Judge held that TLB was entitled to recover the fees from Etcetera under the Part 20 proceedings pursuant to the contract. Alternatively, those sums could be recovered at common law or under the Civil Liability (Contribution) Act 1978. Where the adjudicator ordered one party to pay his fees, effect should be given to that decision.

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