

Construction Law Update

Notices of Adjudication: What's in a Name?

Earlier this month, Palmloch Limited (“**Palmloch**”) sought to resist enforcement of an adjudication decision based upon the fact that the claimant, MG Scaffolding (Oxford) Limited (“**MGS**”) had commenced the adjudication against Palmloch’s trading name; MCR Property Group (“**MCRPG**”). The TCC considered the relevant issues.

Background

In early 2018, MGS was engaged to provide a scaffolding scheme by Palmloch, trading under the name of MCRPG. MCRPG was the trading name for a number of companies. Throughout the contract period, correspondence from/to Palmloch had been marked either Palmloch or MCRPG.

A dispute arose and MGS contacted Mr Brown of Palmloch to discuss the same. When discussions amounted to nothing, MGS issued a notice of adjudication to MCRPG and sent it directly to Mr Brown’s email address. An adjudicator was appointed and a referral notice was subsequently issued.

The Adjudication

In response to MGS’ referral notice, Mr Brown wrote to the adjudicator on MCRPG’s letterhead. The letter stated that MCRPG did not recognise any claim against it and that it was no more than a trading name with no assets of its own; any claim should, therefore, be issued to the company who the dispute was with. At this point, based upon the wording in the footer of Mr Brown’s letter, MGS wrote to the adjudicator wrongly identifying MCR Management Limited (another company using MCRPG as its trading name) as the correct responding party.

Despite this error by MGS, the adjudicator was not persuaded by Mr Brown’s jurisdictional challenge and proceeded with the adjudication. Mr Brown then sent a second letter, stating that the correct party to the dispute was Palmloch and that a new notice of

adjudication must be issued. The adjudicator disagreed and gave Palmloch three days to respond substantively. MGS was successful in the adjudication.

Proceedings in the TCC

For an adjudicator’s decision to be enforceable, the parties to the adjudication must also be the parties to the construction contract and the subsequent enforcement proceedings. A legitimate dispute over whether the party to an adjudication is the relevant contracting party, is, therefore, a valid reason to refuse enforcement.

MGS sought to enforce the adjudicator’s decision in the TCC by way of summary judgment. Palmloch, again, disputed the adjudicator’s jurisdiction on the basis that the parties in the adjudication were not the contracting parties.

MGS argued that notices of adjudication should be construed “*broadly and flexibly, avoiding a strict and technical approach*”. Conversely, Palmloch argued, that clarity was required when identifying the parties in a notice and that notices should be interpreted as if by an “*objective third party, not necessarily the ‘recipient’*”.

The TCC did not agree with either of these arguments in whole, holding that how flexibly or precisely a notice should be construed will depend on the circumstances and that “*the proper approach is to consider, objectively, how [the] reasonable recipient of the notice would construe the notice*” and whether it, with all its prior knowledge, would recognise itself as the correct party to the dispute.

The TCC’s decision

The TCC held that a misdescription of a party in a notice did not, in itself, affect the validity of the notice or the adjudicator’s jurisdiction to consider the same. This would be a different story, however, where there was a genuine lack of clarity as to who the parties in dispute

Construction Law Update

were. Despite MGS' lack of clarity in this case, the TCC held that (although MCRPG could have, in theory, been a reference to a number of companies) when the notice was construed as whole, there could have been no lack of certainty to the reasonable recipient (Palmloch) that it was, in fact, the party being referred to. This was demonstrated by the fact Mr Brown correctly identified Palmloch as the correct responding party. Palmloch's jurisdictional challenge was therefore rejected and the adjudicator's decision was enforced.

Analysis

Although the unique circumstances in this case played a large role in Palmloch's jurisdictional challenge being dismissed, the TCC gave useful guidance which can be applied more broadly. It remains crucial to clearly identify the correct contracting parties in any notice of adjudication. However, in circumstances where a company's trading name is used, the key question will be whether the *actual recipient* of the notice – with all of its prior knowledge – would reasonably have recognised the use of the trading name to be a reference to the correct contracting company.

This article contains information of general interest about current legal issues, but does not provide legal advice. It is prepared for the general information of our clients and other interested parties. This article should not be relied upon in any specific situation without appropriate legal advice. If you require legal advice on any of the issues raised in this article, please contact one of our specialist construction lawyers.

© Hawkswell Kilvington Limited 2019