

## Construction Law Update

### Adjudication Enforcement – Guidance on Natural Justice and Jurisdiction

In the case of *Global Switch Estates 1 Limited -v- Sudlows Limited*, the Technology and Construction Court (“TCC”) dismissed an application for summary judgment to enforce an adjudicator’s decision due to material breaches of the rules of natural justice.

#### Background

Sudlows Limited (“Sudlows”) was engaged by Global Switch Estates 1 Limited (“GSEL”) to fit out and upgrade a specialist data centre pursuant to a JCT Design and Build Contract 2011 (the “Contract”).

Disputes arose between the parties and there followed four adjudications. Adjudications No.1 and No.3 concerned whether timely/compliant payment notices were served in respect of interim applications. Adjudication No.2 concerned Sudlows’ application for an extension of time (“EOT”).

Following adjudication No.2, GSEL made a demand under a bank guarantee procured by Sudlows in the sum of £1m, due to Sudlows’ breach of the Contract.

GSEL commenced adjudication No.4 to determine the true value of parts of Interim Application 27 (“Application 27”) and contended that Sudlows was obliged to pay GSEL the sum of £6.8m or such other amount as the adjudicator determined. GSEL wanted the adjudicator to review the value of: (1) the Contract works; (2) changes/variations; and (3) loss and/or expense.

In its Referral Notice, GSEL attempted to exclude certain matters from the scope of the adjudication (i.e. Sudlows’ entitlement to: (1) EOTs relative to different sections of the Contract works and (2) loss and expense for delay, other than in respect of EOTs already awarded).

In its Response, Sudlows disputed GSEL’s attempt to confine the scope of the adjudication, and contended that GSEL’s call on the bank guarantee was not made

with any honest belief that Sudlows was in breach of the Contract (i.e. the demand was based on fraud).

On 17 July 2020, the adjudicator decided that GSEL was entitled to limit his jurisdiction to specific parts of Application 27 and that he did not have jurisdiction to award further EOTs nor determine Sudlows’ entitlement to additional loss and expense. Further, the adjudicator did not consider GSEL’s call on the bank guarantee to be relevant to the valuation of the Contract works; as such, he considered that the issue fell outside his jurisdiction.

The adjudicator awarded GSEL the sum of £5m and directed Sudlows to pay his fees and expenses (the “Decision”). Sudlows failed to do so.

#### Proceedings in the TCC

GSEL issued an application for summary judgment to enforce the Decision, claiming £6m plus interest and costs.

Sudlows resisted enforcement on the basis that:

- (i) the adjudicator had failed to consider matters relied upon by Sudlows as defences to GSEL’s claim; and
- (ii) the adjudicator failed to consider the call on the bank guarantee,

both of which amounted to a breach of natural justice.

The TCC emphasised the courts’ robust approach to adjudication enforcement, noting that *“the grounds for resisting summary judgment are circumscribed and limited.”*

#### Principles of natural justice

Drawing together authorities from the TCC, the Court of Appeal and the UK Supreme Court, the TCC made the following helpful observations:

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- (i) a referring party can, within its notice of adjudication, confine the definition of the dispute to specific parts of a wider dispute, such as the valuation of particular elements of work forming part of an interim application;
- (ii) a responding party cannot widen the scope of the adjudication by adding further disputes arising out of the underlying contract without the other party's consent;
- (iii) a responding party can, by engaging with issues within the scope of the adjudication, raise any defences it considers properly arguable to rebut the referring party's claim(s);
- (iv) where a referring party seeks a declaration as to the valuation of specific elements of work, the responding party cannot seek a declaration as to the valuation of other elements of work;
- (v) where a referring party seeks payment relative to specific elements of work, a responding party can rely on all available defences, including the valuation of other elements of work, to establish that the referring party is not entitled to the payment claimed;
- (vi) it is a matter for adjudicators to decide whether any defences put forward amount to valid defences to the claim(s) in law and on the facts;
- (vii) if adjudicators ask the relevant question, it is irrelevant whether the answer arrived at is right or wrong. The decision will be enforced;
- (viii) if an adjudicator fails to consider whether matters relied on by the responding party amount to a valid defence to the claim(s) in law and on the facts, that may be a breach of the rules of natural justice;
- (ix) not every failure to consider relevant points will amount to a breach of natural justice. Breaches

must be material and a finding of breach will only be made in plain and obvious cases; and

- (x) if there is a breach of the rules of natural justice and the breach is material, the decision will not be enforced.

Applying these principles, the TCC held that Sudlows' loss and expense claims were clearly relevant to the valuation of Application 27 and raised potential defence(s) to GSEL's claim for payment. In failing to take these claims into account, the adjudicator breached the rules of natural justice, rendering the Decision unenforceable.

The TCC also found that, although the adjudicator incorrectly determined that he had no jurisdiction to consider Sudlows' claim in respect of the bank guarantee, the issue would not have rendered the Decision unenforceable as the adjudicator made a finding of fact as to the legitimacy of the call on the basis of the evidence before him; as such, the adjudicator asked the right question (it was irrelevant whether he was right or wrong).

### Analysis

This case emphasises the robust approach adopted by the courts in respect of proceedings to enforce adjudicators' decisions. Namely, that it is only in rare instances that courts will interfere with the decision of an adjudicator. However, in "*circumscribed and limited circumstances*", adjudicators' decisions can be rendered unenforceable where material breaches of the rules of natural justice have occurred. This case concisely considers the fundamental legal principles that apply in cases where breaches of natural justice are alleged by parties to an adjudication.

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