

Construction Law Update

Natural Justice: it must be done

Questions of procedural fairness remain important in adjudication. In the recent case of *Liverpool City Council -v- Vital Infrastructure Asset Management (VIAM) Ltd (In Administration) [2022]* the Technology and Construction Court provided declaratory relief rendering an adjudicator's decision unenforceable because it found these rules of 'natural justice' had been breached.

The Proceedings

Liverpool City Council ("LCC") was the respondent to an adjudication brought by Vital Infrastructure Asset Management (VIAM) Ltd (in Administration) ("Vital"). In the adjudication Vital sought additional payment pursuant to the terms of a contract. Mr Klein was the appointed adjudicator (the "Adjudicator") and despite LCC's jurisdictional objections, issued a decision in Vital's favour. In the event, Vital had entered administration the previous day.

LCC did not make payment and brought Part 8 proceedings seeking declaratory relief, asserting the Adjudicator had no jurisdiction. Vital's Administrators took no part in the proceedings.

Grounds for Declaratory Relief

LCC contended that the adjudicator's decision was unenforceable as:

- (a) The dispute arose under two separate contracts (the "Two Contracts Issue");
- (b) The Adjudicator was not validly appointed (the "Service Issue");
- (c) The Decision was a nullity; and/or
- (d) There had been a breach of natural justice

The Two Contracts & Service Issues

The Court essentially dealt with these two issues together. It was clear that there were two contracts, a bespoke framework agreement (the "FA") and a bespoke 'call-off' contract, in the form of NEC3 Construction & Engineering (the "Call-Off").

The FA stated it was to "supplement and to compliment" the provisions of the Call-Off and both contained provisions for the conduct of disputes, service of notices and appointment of an adjudicator.

Having considered the dispute resolution provisions, the Court found that disputes arising under the FA & Call-Off should be resolved in line with the Call-Off, and disputes arising *solely* under the FA, pursuant to the provisions of the FA. In this instance, Vital had referred to 'the contract' as being both the FA & the Call-Off and had sought declarations for financial remedy under the Call-Off and declarations under the FA. LCC contended that in line with established principle, a dispute arising under more than one contract could not be the subject of a single adjudication reference.

In the Court's judgment this general rule did not apply in this case for 3 reasons:

1. The contractual provisions expressly contemplated a dispute might arise under both the FA & Call-Off (and be referred under the Call-Off).
2. Whether there is more than one dispute is a question to be determined on the facts. If one disputed claim cannot be decided without determining part or all of the other disputed claim, there is a clear link which points to there being only one dispute (*Witney Town Council v Beam Construction Cheltenham 2011*)
3. The terms of the FA were incorporated into the Call-Off. On a proper analysis, Vital did not need to seek a declaration as to the FA to obtain the relief sought.

On the Service Issue, while the terms of the Call-Off applied, LCC argued the Notice had been served in line with the FA. The Court held the fact the Notice was addressed in line with the FA (to the Head of Procurement) was immaterial. The Notice was received and passed to the appropriate person/department. LCC appointed solicitors and responded without delay

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(See University of Brighton v Dovehouse Interiors Ltd 2014 - "the omission of the contractually specified address was irrelevant because the first notice was brought to the attention of the University at the correct time").

Nullity

Notwithstanding it had failed in relation to the Two Contracts & Service Issues, LCC nevertheless contended the Adjudicator's Decision was a nullity, as the Adjudicator had failed to answer the question put to him and/or had answered the wrong question.

The Court found LCC's argument was misconceived. The essential dispute referred to the Adjudicator was whether Vital was entitled to additional payment and if so, how much. As the Court had already decided, the legal and factual grounds in the Notice were not separate disputes *"but steps along the way to Vital securing the essential relief of a decision."* The Adjudicator had clearly set out the reasons for his Decision and it is well established that *"the Court should not decide on an enforcement claim or on a Part 8 claim of this kind whether or not the adjudicator's decision was right or wrong. The Court can only decide whether or not the decision is unenforceable on well-established and limited grounds such as lack of jurisdiction or procedural unfairness."*

Even if the Adjudicator had been wrong to conclude LCC had agreed the FA rates entitling Vital to further payment, it was an error within his jurisdiction as *"the decision of an adjudicator is not to be treated like an answer to an exam paper, where they have to answer every single point raised. It is enough that they decide the dispute referred to them and do not fail to deal with the key points raised by the parties in such a way as to breach natural justice"*.

Natural Justice

In the event, this latter point as to the overarching need to observe natural justice was to prove important.

LCC contended the Adjudicator had breached natural justice by finding that LCC had agreed that there was an error (in the FA rates) which should be amended in circumstances where, on LCC's case, not only was this not true, but something which Vital had not contended was an issue for the Adjudicator's determination.

The relevant principles are well established, *"The common law rules of natural justice or procedural fairness are twofold. First, the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made. Secondly, the person affected has the right to an unbiased tribunal"* (AMEC v Whitefriars [2004]).

For there to be a breach of the rules of natural justice, the breach must be more than peripheral, it must be material. It will be material if the adjudicator failed to bring to the parties' attention a point/issue that they ought to have been given an opportunity to comment on, provided the omission is either decisive or of considerable importance to the outcome of the dispute, and is not irrelevant (*Cantillon Ltd v Urvasco Ltd* [2008]).

In this case, the Schedule of Rates ("**SoR**") in the FA included 4 rates. The first three were stated to be £X per metre per day; whereas the fourth was simply £2 per metre. In the Court's view, the fourth rate - which would have meant a contractor would receive the same for maintaining the same length of fence for a year as for a day - was an obvious mistake, but the Adjudicator had not decided it on this basis, neither had he engaged with the points raised by LCC in its Response. LCC had not admitted that there was an error in the SoR. Neither had Vital advanced this case.

The Adjudicator had sought to overcome this problem by determining LCC had, in the compensation event, made an implicit, if not an explicit, concession that the rate in the SoR, expressed as a rate per metre rather than a rate per metre per day, was a mistake. Again, this was not advanced by Vital and the Adjudicator did not give notice to LCC that he was considering it or allow LCC to make submissions on the point before

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making his decision. He did not engage with LCC's Response, where it addressed in detail the analysis of Vital's case.

The Court held these were fundamental departures from the obligation to follow a fair procedure. Although LCC failed on the first three grounds, it was therefore entitled to a declaration that the Decision was unenforceable as a matter of law, as the same had been reached in a procedurally unjust manner. No sum was due from LCC to Vital.

Analysis

This case serves as an important reminder of an adjudicator's obligation to follow fair procedure and the importance of their allowing the parties the opportunity to make submissions on points material to their decision.

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