



Adjudicator's alternative decision enforced despite breach of natural justice

In an unusual turn of events, the TCC in *Sudlows Ltd v Global Switch Estates 1 Limited* [2022] found that an adjudicator's alternative decision was enforceable despite his primary decision being unenforceable because of a breach of natural justice.

Background

Pursuant to a JCT Design and Build 2011 contract, Sudlows Ltd ("**Sudlows**") was engaged by Global Switch Estates Limited ("**Global**") to undertake fit out and enabling works (the "**Works**") for a new electricity substation at East India Docks House, London (the "**Site**"). Among other things, the Works involved substantial electrical (ductwork and high voltage cabling) works at the Site.

Following damage to one of the cables for which Sudlows held Global responsible, replacement cables were provided and pulled through by an alternative contractor. Sudlows subsequently refused to terminate, connect and energise the replacement cables, which caused delay to the Works. The Works were eventually completed in June 2021 (not February 2018 as originally envisaged) and the power supply to the Site was finally achieved in August 2021.

Adjudication 5

In a previous adjudication (No.5), the adjudicator held Global liable for delays caused by the defective duct network up to 18 January 2021. On this basis alone, Sudlows was entitled to refuse to connect and energise the cables on Site. Sudlows was granted an extension of time ("**EOT**") of 482 days and the Date for Completion of the Works was revised from 14 August 2019 to 8 December 2020.

Adjudication 6

In a subsequent adjudication (No.6) Sudlows sought a further EOT from 19 January 2021 to 7 June 2021 together with additional payments (including a loss and expense claim) pursuant to its Interim Payment Application 46. Sudlows relied on the same Relevant Events as it had in Adjudication 5 (i.e. the provision of defective ductwork by Global and its subsequent failure to complete the enabling works timeously) and on the previous adjudicator's Decision in that adjudication.

By a decision dated 9 September 2022 (the "**Primary Decision**"), the Adjudicator granted Sudlows a further EOT of 133 days, revising the Date for Completion from 8 December 2020 to 20 April 2021. Pursuant to the Primary Decision, Sudlows was also awarded the sum of £997k plus VAT.

Global declined to pay and Sudlows therefore applied for summary judgment to enforce the Primary Decision. In response, Global initiated Part 8 proceedings alleging there had been a breach of natural justice rendering the Primary Decision unenforceable; but that alternative findings (the "**Alternative Decision**") made by the Adjudicator during the course of Adjudication 6 were enforceable in place of the Primary Decision.

Was the Adjudicator bound by the decision reached in Adjudication 5?

The Court found that contrary to the view expressed by the sixth Adjudicator, he was not bound by the decision reached in Adjudication 5 because the dispute referred to him was not the same or substantially the same as that previously determined by the fifth Adjudicator. Acknowledging that the question of whether one dispute is substantially the same as another dispute will always be a question of fact and degree (*Quietfield Ltd v Vascroft* [2006]),

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the Court referred to multiple authorities, the Scheme and the following features of the present case:

- The fact that the same Relevant Events were relied on in both adjudications was not determinative of whether the disputes were the same or substantially the same;
- Both disputes related to underlying EOTs for *different* periods of time;
- Adjudication 6 involved new relevant materials and cable testing, which was and could not have been part of the dispute leading to the prior adjudication; and
- The issues raised in Adjudication 6 were more far-reaching than in the previous adjudication which focused purely on Sudlows' entitlement to an EOT. Adjudication 6 addressed issues relating to the wider dispute between the parties as to the true value of the Works.

Had the Adjudicator breached the rules of natural justice in his Primary Decision?

Given the Adjudicator had wrongly concluded he was bound by the decision reached in Adjudication 5, the Court found that the Adjudicator had taken an unduly narrow view of his own jurisdiction. In so doing, he had breached the rules of natural justice and his Primary Decision could not be enforced.

Interestingly, however, because the Adjudicator had given a detailed Alternative Decision while formulating his Decision - importantly, with the prior consent of the parties - the latter was capable of being enforced in place of the Primary Decision. The Adjudicator had jurisdiction to do this, and these

were not merely obiter findings as had been argued by Sudlows. Pursuant to the Alternative Decision, Sudlows was ordered to pay Global £209k plus VAT, interest and fees.

Analysis

This case illustrates the Court's pragmatic approach to dealing with adjudication enforcement proceedings. The Adjudicator's foresight in offering the parties an alternative outcome should his primary decision be unenforceable was described as a "very sensible approach" by the Court, though it is worth noting the importance of him obtaining each party's consent to proceeding in this rather unusual way.

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