FENWICK ELLIOTT

The construction & energy law specialists

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

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Dispatch

Screenshots & remote court hearings

SLF Associates Inc v (1) HSBC (UK) Bank Plc & Ors

[2021] EWHC 5 (Ch)

The hearing in this matter took place remotely via Skype for Business on both audio and video. In the course of giving judgment, Master Kaye commented on the fact that after the hearing a screen shot image was circulated by one of the attendees. The Master drew the parties' attention to s. 85C of the Courts Act 2003 which provides that it is an offence for a person to make or attempt to make an unauthorised recording or transmission of court proceedings. This includes images. The screen shot circulated was therefore an unauthorised recording or transmission of an image. The Master was clear that:

"The screen shot and/or any other recordings or screen shots taken of the hearing on 27 July 2020 are unauthorised recordings of court proceedings in breach of s.85C. Any person in possession of any unauthorised recording or image of the 27 July hearing should immediately delete it and ask anyone to whom they have sent it to do the same."

A warning to anyone who takes part in a remote hearing.

An unsuccessful adjudication enforcement

Global Switch Estates 1 Ltd v Sudlows Ltd

[2020] EWHC 3314 (TCC)

GSEL sought summary enforcement of an adjudication decision in the sum of just over £5 million plus the adjudicator's costs of £80k. Sudlows said that the adjudicator:

(i) had failed to consider matters of loss and expense relied on as defences to GSEL's claim which was a breach of the rules of natural justice;
(ii) had failed to consider and deal with an allegedly fraudulent call on a bank guarantee, again a breach of the rules of natural justice; and
(iii)had wrongly came to decisions contrary to the decision of a previous adjudicator, thereby acting in excess of jurisdiction.

The dispute arose out of a fit-out project at a specialist data centre in London. The contract was a JCT Design and Build 2011 with amendments. Mrs Justice O'Farrell emphasised that the courts take a robust approach to adjudication enforcement, observing that:

"i) A referring party is entitled to define the dispute to be referred to adjudication by its notice of adjudication. In so defining it, the referring party is entitled to confine the dispute referred to specific parts of a wider dispute, such as the valuation of particular elements of work forming part of an application for interim payment.
ii) A responding party is not entitled to widen the scope of the adjudication by adding further disputes arising out of the underlying contract (without the consent of the other party). It is, of course, open to a responding party to commence separate adjudication proceedings in respect of other disputed matters.
iii) A responding party is entitled to raise any defences it considers properly arguable to rebut the claim made by the referring party. By so doing, the responding party is not widening the scope of the adjudication; it is engaging with and responding to the issues within the scope of the adjudication.
iv) Where the referring party seeks a declaration as to the valuation of specific elements of the works, it is not open to the responding party to seek a declaration as to the valuation of other elements of the works.
v) However, where the referring party seeks payment in respect of specific elements of the works, the responding party is entitled to rely on all available defences, including the valuation of other elements of the works, to establish that the referring party is not entitled to the payment claimed.
vi) It is a matter for the adjudicator to decide whether any defences put forward amount to a valid defence to the claim in law and on the facts.
vii) If the adjudicator asks the relevant question, it is irrelevant whether the answer arrived at is right or wrong. The decision will be enforced.
viii) If the adjudicator fails to consider whether the matters relied on by the responding party amount to a valid defence to the claim in law and on the facts, that may amount to a breach of the rules of natural justice.
ix) Not every failure to consider relevant points will amount to a breach of natural justice. The breach must be material and a finding of breach will only be made in plain and obvious cases.
x) If there is a breach of the rules of natural justice and such breach is material, the decision will not be enforced."

GSEL said that, in the adjudication GSEL claimed payment of the balance due to it from Sudlows based on a true valuation of Interim Applications 27.

In its defence, Sudlows relied on its claims for loss and expense as part of its true valuation case. This included claims in respect of the high voltage cables and overloading of the roof. GSEL's position was that the adjudicator could proceed on the assumption, in Sudlows' favour, that the high voltage cable was not installed defectively by Sudlows and that it had not overloaded the roof. On that basis, questions of liability for these defective works were excluded from the scope of the adjudication.

The Judge agreed that this addressed any claims that might be made by GSEL for contra charges in respect of the defective works but it did not address the claims made by Sudlows for additional payment in respect of the rectification costs and consequential loss and expense. These claims raised a potential defence to GSEL's claim for payment in the adjudication. The adjudicator was required to determine whether, as submitted by GSEL, the loss and expense claims were unsubstantiated and invalid, or whether, as submitted by Sudlows, they amounted to a defence to the sum claimed by GSEL.

Unfortunately, as the Judge said, the adjudicator did not consider these arguments because he assumed, wrongly, that he did not have jurisdiction to do so.

The Judge accepted that the adjudicator was entitled to limit the declaratory relief to the issues of valuation identified by GSEL but the determination of the claim for payment required the adjudicator to consider all of the matters raised by Sudlows in support of its case that it was entitled to additional sums as part of the valuation. The failure to take into account Sudlows' defence based on its additional claims for loss and expense amounted to a breach of the rules of natural justice.

This plain and obvious breach of natural justice arose as a result of GSEL's erroneous submission that the adjudicator did not have jurisdiction to consider Sudlows' claims for loss and expense. GSEL's position was that Sudlows should pay to it the sum of £6.8 million; Sudlows' position in the adjudication was that GSEL should pay the sum of £5.5 million. The adjudicator awarded GSEL £5 million. The adjudicator's jurisdictional error precluded any consideration of a very substantial part of the defence. In those circumstances, that amounted to a material breach of the rules of natural justice and rendered the decision unenforceable.

In respect of the bank guarantee issue, the adjudicator did consider the substance of Sudlows' claims, holding that the material presented by Sudlows in the adjudication did not demonstrate that the call on the guarantee was illegitimate. That was a finding of fact that he was entitled to make on the evidence before him. It was irrelevant whether that finding was right or wrong because the adjudicator asked the right question. It follows that this issue would not render the decision unenforceable.

Sudlows also said that the adjudicator wrongly came to decisions that were contrary to the decisions of a previous adjudicator and so exceeded his jurisdiction. Once an adjudicator has reached their decision then, unless and until challenged in arbitration or the courts, it is binding on the parties: it is the decision that binds the parties; that includes the essential components or basis of the decision but not the adjudicator's reasoning for the decision.

This was not a case in which the adjudicator "trespassed" on an earlier decision. The second adjudication was solely concerned with determining Sudlows' entitlement to extensions of time in respect of the main fit-out works. The adjudicator did not consider or adjudicate on Sudlows' entitlement to loss and expense. In the current adjudication, the adjudicator valued Sudlows' claims for loss and expense in respect of the extensions of time, rejecting most of them.

The Judge stressed that those findings were ones that the adjudicator was entitled to make on the evidence. Even if he was wrong in the contractual analysis or assessment of the evidence, those errors would amount to errors of law and/or fact which on their own would not render the decision unenforceable.

In conclusion, the Judge held that the adjudicator was misled by GSEL and wrongly failed to consider and deal with matters relied on by Sudlows as defences which amounted to a breach of the rules of natural justice. Crucially, this jurisdictional error was critical to the determination of the dispute as it led to the exclusion of loss and expense claims which were material to the true valuation of Interim Applications 27 and the amount of any payment due between GSEL and Sudlows.

Costs: alleged failure to mediate

Patel & Anr v Barlows & Ors (No. 2)

[2020] EWHC 2795 (Ch)

The Claimants were successful but the Second Defendant argued that they were not entitled to costs because of an alleged failure to engage in mediation. HHJ Mithani QC agreed that there was "no question" that parties should consider the resolution of a case by an appropriate ADR procedure and that the unreasonable failure on the part of a party to do so may be visited by a sanction in costs. However, the Judge also said that the failure to do so will not always result in such a sanction (see *Northrop Grumman Mission Systems Europe Ltd v BAE Systems*, Dispatch Issue 172).

Here, the Judge said that the claim against the Second Defendants was very strong and other settlement methods had been attempted which did not work; the costs of the mediation would have been high, and:

"the plain fact is that it is difficult to see how the ADR would have succeeded".

Further, the Judge noted that the Claimants did not reject the offer of mediation outright. The Second Defendants had made an offer of £40k, which was rejected. Then they suggested mediation. The Claimants said:

"My client is not against Mediation per se. However, in an attempt to keep costs down, we are working with Counsel to see if we can put forward a possible offer. I will of course keep you updated as to how we get on but should this not be possible, I would be happy for you to suggest 3 mediators from whom we can select one."

The Second Defendants were prepared to "pause" the mediation, and the Claimants served a Part 36 Offer of £315k. This was formally declined, and the Claimants asked whether the Second Defendants wished to make a counter-offer. The Second Defendants said that:

"the parties are simply too far apart to engage in sensible discussions" and the Part 36 Offer was *"beyond reason". ". . . and further that any settlement would include the Trustees retaining a significant percentage of sums held on account. Moving forward, perhaps you could take instructions and provide an indication as to whether a without prejudice telephone conference would be a productive use of time and resources in all of the circumstances."*

In those circumstances, the Judge thought it difficult to see what else could have been achieved by mediation and there was no basis upon which the Claimants could be criticised for refusing to mediate when without prejudice communication had been attempted and proved wholly unsuccessful. Either party could have improved on the offer which they had made. Neither did so.

The costs' argument accordingly failed.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

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