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BRIEFING

CHALLENGING BEHAVIOUR- CHALLENGING ENFORCEMENT OF ADJUDICATION AWARDS

FEBRUARY 2018

- HIGH COURT CONFIRMS THAT DISPUTES UNDER ORAL CONTRACT COULD BE DETERMINED IN ADJUDICATION
- NO LACK OF NATURAL JUSTICE IN AWARDING SUM NOT CONTENDED FOR BY EITHER PARTY

"THIS BRIEFING … CONSIDERS THE RISKS OF CHALLENGING ENFORCEMENT OF AN ADJUDICATION AWARD."

The Technology & Construction Court ("TCC") recently considered an adjudication enforcement application brought by PFG Design Ltd ("PFG") against Masma Ltd ("Masma") in respect of claims for payment arising under an oral contract for the provision of architectural design services[1]. This Briefing addresses Mr Justice Fraser's decision and considers the risks of challenging enforcement of an adjudication award. In addition, we consider his commentary on the recent decision in *Enviroflow Management Ltd v Redhill Works (Nottingham) Ltd*[2] which dealt with the recoverability (or otherwise) of adjudication costs (in the absence of an express agreement between the parties to the adjudication).

The dispute

PFG agreed to provide architectural design services to Masma in respect of a proposed residential housing development in Sussex. In 2011, PFG commenced work in support of an initial application for planning permission. A further application was submitted thereafter and planning permission was obtained. A dispute then arose as to the success fee payable to PFG in respect of its work, with PFG issuing an invoice for £48,500 and Masma claiming (among other things) that there had never been any agreement between the parties as to the amount of any such fee. PFG referred the dispute to adjudication.

[1] *PFG Design Ltd v Masma Ltd* , 15 November 2017 (TCC)
[2] [2017] EWHC 2159 (TCC)

The adjudication

Masma raised "a vast number" of jurisdictional challenges to the adjudication, including that there was no contract between the parties, or that, if there was one, it was an oral contract formed before 1 October 2011 and thus did not constitute a construction contract for the purposes of the Housing Grant Construction and Regeneration Act 1996 (pursuant to section 107, the 1996 Act required contracts to be in writing, but section 107 no longer applies to contracts formed after 1 October 2011).

However, on the evidence, the adjudicator determined that an oral contract had been concluded in January 2012 pursuant to which the parties had agreed that PFG would provide architectural services with a significant but unquantified sum payable on successful receipt of planning permission. The adjudicator went on to find that the parties had reached an understanding as to the level of a reasonable success fee and found that PFG was entitled to a payment of £20,000. The adjudicator also found that PFG was entitled to be paid interest on the success fee, together with a statutory payment of £100 under section 5A of the Late Payment of Commercial Debts Interest Act 1998 (the "Late Payment Act"), and ordered Masma to pay his fees. PFG then applied to the TCC to enforce the adjudication decision.

The TCC proceedings

Masma raised numerous challenges in an effort to resist enforcement, including repeating its argument that no contract had been formed. Whilst "dressed up as jurisdictional challenges", Mr Justice Fraser considered that in reality these were disputes about the adjudicator's findings and stressed that the court would not hear challenges to an adjudicator's findings of fact, law or reasoning, irrespective of error. In any event, he was quickly able to dismiss Masma's "no contract" argument as there had been "ample material" set before the adjudicator which enabled him to find that an oral contract had been formed in January 2012 and thus jurisdiction to refer the matter to adjudication.

"THE COURT WOULD NOT HEAR CHALLENGES TO AN ADJUDICATOR'S FINDINGS OF FACT, LAW OR REASONING, IRRESPECTIVE OF ERROR."

Masma also complained that two distinct disputes had been referred to the adjudicator: the non-payment of the invoice and whether the claim was made on a quantum meruit basis and drew the judge's attention to conclusions reached in *Witney Town Council v Beam Construction (Cheltenham) Ltd*[3] about the proper approach to adopt when determining whether there is more than one dispute or what the true dispute is (summarised below):

1. A dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted.
2. A dispute can change into something different to that which it was originally.
3. A dispute can comprise a single issue or any number of issues within it. However, a dispute does not necessarily comprise everything which is in issue between the parties at the time that one party initiates adjudication (although it may do so).
4. What a dispute in any given case is will be a question of fact albeit that the facts may require to be interpreted. Courts should not adopt an overly legalistic analysis, bearing in mind that parties cannot broadly have contemplated that every issue would necessarily attract a separate reference to adjudication.

[3] [2011] EWHC 2332 (TCC)

5. The Notice of Adjudication and the Referral Notice are not necessarily determinative of what the true dispute is or as to whether there is more than one dispute. One also needs to consider the background facts.
6. Where, on a proper analysis, there are two separate and distinct disputes, only one can be referred to one adjudicator unless the parties agree otherwise. An adjudicator who has two disputes referred to them does not have jurisdiction to deal with both.
7. Whether there are one or more disputes again involves a consideration of the facts. It may well be that, if there is a clear link between two or more arguably separate claims or assertions that may well point to there being one dispute. A useful if not invariable rule of thumb is that, if disputed claim No 1 cannot be decided without deciding all or parts of disputed claim No 2, that establishes such a clear link and points to there being only one dispute.

Again, Mr Justice Fraser was not persuaded by Masma's argument and held that "it is without doubt ... that there was one single dispute ... and that was the amount of fees to which the claimant was entitled for its work on the scheme".

"IT IS NOT UNUSUAL FOR TRIBUNALS TO BE FACED WITH TWO COMPETING ARGUMENTS AS TO QUANTUM AND DECIDE THAT THE CORRECT ANSWER IS IN FACT A FIGURE WHICH IS NOT DIRECTLY CONTENDED FOR BY EITHER PARTY."

Masma further argued that there had been a breach of natural justice because the adjudicator had decided the adjudication on grounds which had not been advanced by either party, namely that PFG was entitled to £20,000 rather than the amount stated on its invoice. Mr Justice Fraser considered this challenge by reference to the legal principles discussed in *Cantillon Ltd v Urvasco Ltd*[4] which can be summarised as follows:

1. It must be established that the adjudicator failed to apply the rules of natural justice;
2. Any breach must be material rather than merely peripheral;
3. A breach will be material where the adjudicator fails to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant;
4. Determining whether an issue is decisive or peripheral is a question of degree; and
5. An adjudicator will, effectively, need to go off "on a frolic of their own" and decide a case upon a factual or legal basis which was not argued or put forward by either side, without giving them an opportunity to comment or put in further evidence. "It follows that, if either party has argued a particular point and the other party does not come back on that point, there is no breach of the rules of natural justice."

Mr Justice Fraser also noted, by reference to *Roe Brickwork Ltd v Wates Construction Ltd*[5], that it is not unusual for tribunals to be faced with two competing arguments as to quantum and decide that the correct answer is in fact a figure which is not directly contended for by either party. Indeed, "there is no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before him … provided that the parties were aware of the relevant material and that

[4] [2008] EWHC 282 (TCC)
[5] [2013] EWHC 3417 (TCC)

the issues to which it gave rise had been fairly canvassed before the adjudicator". Mr Justice Fraser therefore held that Masma's arguments stretched "challenges of natural justice far beyond their natural meaning" and rejected that head of challenge as well. He also firmly rejected Masma's argument that there was no crystallised dispute, referencing the simple fact that an invoice had been raised by PFG and Masma had refused to pay it.

Finally, Mr Justice Fraser considered the adjudicator's decision to award PFG a statutory payment of £100 under section 5A of the Late Payment Act. The low amount at stake, and the limited legal arguments advanced by the parties on this issue, meant that he did not address whether the adjudicator was mistaken in law in making the award. However, he did confirm his agreement with the approach taken in *Enviroflow Management Ltd v Redhill Works (Nottingham) Ltd*[6] (in which a successful adjudicating party's claim for costs under section 5A (2A) of the Late Payment Act was rejected) and the finding that an adjudicator would not have the power to make an award in respect of the successful adjudicating party's costs, absent express agreement.

"CHALLENGING FACTUAL FINDINGS IS NOT A GROUND FOR RESISTING ENFORCEMENT OF A DECISION."

Conclusion

As identified by Mr Justice Fraser, the majority of Masma's alleged "jurisdictional challenges" were in reality disputes about the adjudicator's findings and, as such, could not provide Masma with grounds to resist enforcement of the adjudicator's decision. Put simply, challenging factual findings is not a ground for resisting enforcement of a decision. For that reason, Masma's challenges were always likely to fail and it had to pay both the adjudication sums and PFG's costs of bringing the enforcement application. As noted by the judge, "when the amount at stake … is as little as £20,000 it can be seen that behaving in this way is clearly not the most cost-effective way of resolving what is a relatively modest dispute". Parties should therefore think carefully about the merits of challenges to adjudication decisions, particularly in circumstances where comparatively low amounts are in dispute, and ensure that otherwise avoidable costs are not incurred pursuing challenges which are, in reality, unlikely to succeed.

This case also provides a helpful reminder about the importance of documenting commercial terms and agreements and ensuring (so far as careful drafting will allow) that you can avoid diverting time and money away from projects in order to adjudicate in respect of what was ultimately agreed between you and your contractual counterparties. This is particularly relevant in circumstances where (as held in *Enviroflow* and cited with approval in *PFG v Masma*) the successful party in an adjudication is unlikely to succeed in claims for costs of the adjudication under section 5A of the Late Payment Act.

[6] [2017] EWHC 2159 (TCC)

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with the authors below or your regular contact at Watson Farley & Williams.

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