

## Legal Briefing

### Ted Lowery considers the possibility of apparent bias in an adjudication

AZ v BY [2023] EWHC 2388 (TCC)

In the Technology and Construction Court

Before Mr Justice Constable

Judgment delivered 27 September 2023

#### The facts

During 2021-2023 AZ and BY engaged in both open and without prejudice exchanges in connection with a proposed contract for works to replace stair core pressurisation systems. In early 2023 AZ commenced an adjudication against BY. One of the issues in the adjudication was whether a contract was finalised between the parties.

In its adjudication submissions, AZ relied upon comments made by BY's representatives at a meeting as supporting AZ's position regarding the formation of a contract. BY contended that the meeting had been convened in order to reach a commercial settlement on the overall contract and was without prejudice. In a decision issued on 7 June 2023, the adjudicator determined that there was a finalised contract: he found that the relevant meeting had been open and technical/commercial in nature with the aim of finding a way forward and was not intended to compromise all matters on the contract.

BY commenced Part 8 proceedings seeking declarations that the decision was unenforceable because of the reference to inadmissible without prejudice material.

#### The issue

Should the adjudicator's decision be enforced?

#### The decision

The judge commenced with a review of the leading authorities on the without prejudice rule and the rationale for same. He explained that the usual

rule against the admissibility of without prejudice communications was subject to exceptions so that such communications could be considered by a tribunal, for example in order to establish whether or not the parties had reached a completed compromise agreement or where one party argued that statements made during the course of without prejudice exchanges gave rise to an estoppel. The judge noted these exceptions created a practical difficulty in that if, having examined the without prejudice material, the tribunal found that there was no concluded agreement or no estoppel, the underlying dispute could have been compromised because the tribunal had seen without prejudice material potentially adverse to one of the parties. The judge said that in this scenario, the tribunal would be obliged to apply the test for apparent bias, i.e. could the tribunal continue to decide the dispute fairly notwithstanding its sight of the without prejudice communications?

Turning to the authorities concerning adjudicators who had been privy to without prejudice material, the judge rejected AZ's submission that the test of apparent bias could not be satisfied if the without prejudice communications were not material to the adjudicator's decision: the communications do not have to be material in the sense that they can be shown to have informed a particular conclusion, rather, they have to be material in the sense they give rise objectively to a legitimate fear of partiality.

The judge noted that whilst adjudicator's decisions will ordinarily be enforced notwithstanding errors of law, mistakes by adjudicators concerning the admissibility of without prejudice material comprise errors of law that could potentially impact the fairness of the decision-making process, in breach of the rules of natural justice. Hence if the court concludes, contrary to the determination of the adjudicator, that material deployed in the adjudication was without prejudice and the test of apparent bias is made out, the decision should not be enforced.

On the facts of this case, the judge was satisfied that the relevant documents submitted to the adjudicator by AZ were without prejudice and privileged. He further decided that the negotiations had not resulted in any concluded agreement. Where AZ had deployed the without prejudice material to evidence an alleged inconsistency in BY's asserted contractual position, that was not a purpose for which without prejudice material could be legitimately deployed.

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Applying the test for apparent bias, the judge found that a fair-minded and informed observer, considering all of the circumstances of the case, would conclude there was a real possibility that having seen the without prejudice material, the adjudicator was unconsciously biased. This was where the material had been placed in front and centre by AZ and where the material contained implicit admissions by BY that were inconsistent with its pleaded position. Therefore there had been a breach of natural justice by reason of apparent bias and the decision would not be enforced.

### Commentary

As the judge observed, in cases where without prejudice material may be deployed in line with the exceptions to the general rule of admissibility, the apparent bias test should remain the touchstone vis-à-vis the manner in which the underlying dispute should thereafter be determined. This approach is consistent with the public policy underpinning the without prejudice rule and with the need for decision-making processes, whether adjudication or otherwise, to be conducted with fairness and in compliance with the rules of natural justice.

Ted Lowery  
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