



LEGAL BRIEFING

David and Teresa Bothma (t/a DAB Builders) v Mayhaven Healthcare Limited

Waller, LJ, Dyson LJ, [2007] EWCA Civ 527 (CA)

The Facts

This is a Court of Appeal decision. At first instance, the Judge had refused to enforce the adjudicator's Decision. This was because he came to the conclusion that there was more than one dispute. The contractor's notice of adjudication identified a dispute about the date for completion of the contract, and also the sum of Valuation No. 9. The adjudicator dealt with both of these issues and made a decision. At enforcement, the first instance Judge concluded that there were two separate disputes and therefore refused to enforce the decision. Under the Act, it is only possible to refer "a dispute" not multiple disputes.

The Issue

Dyson LJ gave the leading judgment. He concluded that the first instance Judge was entirely correct. The question as to whether more than one dispute had been referred was a question of fact. In this instance, there were two unrelated disputes. While the completion date was in dispute, there was no link between that dispute and Valuation 9. The contractor argued that one of the items in the valuation relating to the supply of a portakabin (being a time related item) meant that there was some link between the valuation and the completion date. The contractor argued that the role of the adjudicator was inquisitorial, and therefore the adjudicator whilst acting in this way would have realised that the time related portakabin had some impact on the completion date.

Dyson LJ considered that the portakabin had no materiality to the issues that had been raised with the adjudicator. He said that if Valuation 9 had included the claim for extended preliminaries relating to the completion date, then there would have been a clear link, and so there would have been one dispute. He noted that the time related claim was in fact included in Valuation 10 which had not been referred to adjudication.

The Decision

In respect of the inquisitorial function of an adjudicator, His Lordship said:

"the adjudicator may, in some circumstance, have to perform an inquisitorial role to some extent but, in the first instance, the dispute is defined by what is referred to in the adjudication notice. In this case, there was a dispute as to pure valuation in relation to parts of Valuation 9."

The inquisitorial role of the adjudicator appears therefore to be limited to the precise issues in dispute between the parties.

Waller LJ agreed with Dyson LJ. The application was therefore refused.

Comment

This is a Court of Appeal decision relating to the enforcement of an

adjudicator's Decision. It is interesting because the decision was not enforced. It all relates to the meaning of "a dispute". The Housing Grants, Construction & Regeneration Act allows "a dispute" to be referred to adjudication. Note that this is in the singular; it does not allow more than one dispute to be referred to adjudication.

In this case the Court of Appeal held that more than one dispute had been referred to adjudication, and therefore the adjudicator's Decision was unenforceable. The disputes that had been referred concerned the valuation of the work carried out and also the date for completion. The valuation did not relate to the date for completion. Therefore there were two separate disputes, one relating to the valuation, and a second relating to the date for completion.

However, we should all remember that many matters can be referred as a single dispute. Therefore, a contractor can refer a dispute relating to the date for completion, an extension of time and the prolongation costs associated with it, providing that all of the issues are linked. In other words, the valuation includes money relating to the prolongation cost for the extension of time, which in turn identifies the date for completion. If all the matters are linked together as a single dispute, then it can be referred to adjudication.

Nicholas Gould
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