



LEGAL BRIEFING

CJP Builders Ltd v William Verry Ltd

[2008] EWHC 2025 (TCC), Mr Justice Akenhead

The Facts

William Verry Ltd (“Verry”) engaged CJP Builders Ltd (“CJP”) under a subcontract to undertake brickwork, blockwork and stonework. The subcontract was based upon an Order issued by Verry incorporating DOM/2 terms and conditions and other “Sub-Contract Documents”. CJP submitted an interim application for payment. It was not paid and no payment or withholding notice was issued. CJP brought adjudication proceedings and CJP served its Referral. Under clause 38A of DOM/2, the response is to be served within 7 days of the Referral. Verry requested an extension of time to serve the response. The adjudicator stated that he had no power to go behind clause 38A and that Verry was obliged to enter the response in accordance with the timetable in the contract unless the parties agreed otherwise. CJP agreed an extension of time to 12pm on 14 May 2008. Verry served the Response document at about 5.30pm on 14 May 2008. CJP submitted to the adjudicator that he could not consider the response because it had not been served within the timeframe agreed between the parties. Verry disagreed. The adjudicator informed the parties that he had no discretion under the adjudication agreement in clause 38A to extend time for service of the response and would therefore not consider the Response in making his decision.

The adjudicator made his decision awarding CJP the full value of interim application. Meanwhile, Verry had started a second adjudication based upon its defence in the rejected Response concerning defects. Part-way through that adjudication, Verry attempted to abandon that adjudication but the adjudicator went on to make a finding against Verry. Verry did not honour the award in the first adjudication and CJP commenced enforcement proceedings. Verry defended these on the basis that there had been a breach of natural justice in the adjudicator not considering the Response. CJP’s position was that there was no such breach but even if there had been a breach of natural justice it was not a material breach because the outcome of the second adjudication showed that Verry’s defence in the first adjudication would have failed.

The Issues

- (i) As William Verry had not raised a reservation as to the adjudicator’s jurisdiction when they argued that alternative adjudication rules applied, were they estopped from asserting this claim?
- (ii) As a matter of contractual construction, did the adjudicator breach the rules of natural justice when he disregarded William Verry’s late Response as he had determined that he did not have discretion to extend the time for service?

The Decision

Mr Justice Akenhead held that as Verry had belatedly raised the possibility that the TeCSA Rules applied, having previously supported the nomination of the adjudicator by the RICS, they were estopped from asserting this claim.

Furthermore, the Judge held that as Very did not raise a reservation as to the adjudicator's jurisdiction when they asserted that the TeCSA Rules applied, the adjudicator did in fact have jurisdiction and Verry would therefore be bound by his decision.

With respect to a breach of natural justice, Mr Justice Akenhead held that, as a matter of contractual construction of the adjudication procedure, since the adjudicator was given the power to "set his own procedure" and had "absolute discretion" in ascertaining the facts and the law, he therefore had the power to grant an appropriate extension of time. By not doing so, he was wrong to disallow the late Response and failed to apply the rule of natural justice that each party has a right to be heard and to have its evidence and arguments considered by the tribunal. Mr Justice Akenhead concluded that:

"One of the entitlements of parties to an adjudication is a right to be heard, that being the rule of natural justice. There is thus a reasonable expectation of parties to an adjudication that, within reason and within the constraints of the overall requirement to secure the giving of a decision within the requisite time period, each party's submissions and evidence will be considered by the Adjudicator. It is a draconian arrangement (which the parties are of course free expressly to agree) that a party is denied its right to be heard unless it has been given a fair and clear opportunity to put its case. Very clear wording would be required to ensure that such a right was to be denied."

CJP's claim was therefore dismissed.

Comments

Many contracts only give a responding party 7 days in which to respond. In this case concerning for the large part the effect of service of a late response, the Court upheld the principle that an adjudicator does have a wide discretion as to the timetable of the adjudication, including the power to extend time for service of the response, unless clearly expressed to the contrary. Thus although adjudication may commonly be known as "rough justice", this case is a reminder to all that if, as here, the basic principles of natural justice are materially breached, the adjudicator's decision will not be enforced.

Stacy Sinclair
September 2008
