



LEGAL BRIEFING

Arcadis UK Ltd v May And Baker Ltd (t/a Sanofi) [2013] EWHC 87 (TCC)

This decision concerns issues raised in adjudication enforcement proceedings as to the extent to which it is legitimate or unfair for an adjudicator to take into account or adopt the reasoning of a previous adjudicator's decision.

The Facts

During March 2011, May and Baker Ltd, trading as Sanofi-Aventis ('Sanofi') entered into a contract with Arcadis UK Ltd ('Arcadis') for soil remediation works at Sanofi's site in Dagenham. The contract incorporated the NEC3 Engineering and Construction Contract June 2005 (with June 2006 amendments) and plans outlining the site for Arcadis' works ('the Contract'). The work was to be completed within 42 weeks.

Section 6 of the Contract provided for Arcadis to claim for Compensation Events such as variation instructions. In late 2011, Arcadis identified that work was needed beyond the Northern and Southern boundaries, albeit on land owned by Sanofi. In September 2011, the Project Manager obtained quotations from Arcadis for work outside the Northern Boundary and then through Project Manager Instructions (PMI Nos. 26, 33, 34 and 44 issued during September and October 2011) he instructed Arcadis to carry out that work. The Project Manager initially accepted that the work qualified as a Compensation Event and certified a valuation of over £300,000. The work outside the Northern Boundary was completed by the end of 2011.

In November 2011, Arcadis issued an Early Warning that the contaminated ground extended beyond the Southern Boundary. On 15 November 2011 the Project Manager instructed Arcadis to provide a quotation. Arcadis provided a quotation on 2 December 2011 in the sum of £456,111.24 and indicated that an extension of time of 16 days would be required. On 5 December 2011, the Project Manager issued PMI 51, instructing Arcadis to proceed with the work, but assessing the amount due as £326,877.41. This figure excluded any costs associated with prolongation. Following discussions, Arcadis submitted a revised quotation in the sum of £541,898.10 indicating an extension of time requirement of 29 days. This was rejected by the Project Manager on 18 January 2012.

On 27 January 2012, the Project Manager purported to withdraw PMI Nos. 33, 34, 44 and 51. The Project Manager adjusted the payment certification by removing what had been allowed for the Northern Boundary work. Nothing was ever certified for the Southern Boundary work, which was undertaken during March/April 2012. Disputes arose between the parties in relation to Arcadis' entitlement to payment for the Northern and Southern Boundary work.

On 18 August 2012, Arcadis commenced an adjudication ('the First Adjudication') regarding payment for the Northern Boundary work, seeking a decision: (a) that the Project Manager was not entitled to reverse his decision that a matter constituted a Compensation Event and/or his assessment of the effects of a Compensation Event, (b) an assessment of the works to the Northern Boundary did in fact constitute a Compensation Event, and (c) assessing the resultant change to the contract price and the completion date if the works were a Compensation Event.

The First Adjudicator found in favour of Arcadis, declaring that the Northern Boundary work was a Compensation Event and that the appropriate compensation was a change in the price of £412,060.78 and an extension of the completion date by 12 working days. The First Adjudicator also found that the Project Manager was not entitled to withdraw his

acceptance of the Northern Boundary work as a Compensation Event nor reassess its effect on the price and he stated as a matter of principle that:

"...prior to the implementation of the Compensation Event, the Project Manager may reverse his decision that the matter constituted a Compensation Event. However, after the Compensation Event has been implemented, as defined in the Contract, the Project Manager may neither reverse his decision that the matter is a Compensation Event, nor reassess the effects of the Compensation Event."

On 23 October 2012, Arcadis commenced adjudication ('the Second Adjudication') in relation to the Southern Boundary work raising similar issues to the First Adjudication. A different adjudicator was appointed. Arcadis argued that because there had already been an adjudication in respect of additional works at the Northern Boundary on a similar factual basis, which had not been set aside by the courts, the Second Adjudicator was bound by that decision by virtue of Section 23(2) of the Scheme for Construction Contracts and should therefore decide that the Project Manager was not entitled to withdraw a Compensation Event once it had been implemented. Sanofi argued that the First Adjudicator's decision had no relevance and was not binding save with regard to the extension of time of 12 days on the basis that the Scheme for Construction Contracts did not bind an adjudicator in a successive adjudication to the reasoning or analysis employed by an earlier adjudicator.

The Second Adjudicator decided that if the Southern Boundary works had been properly implemented under the Contract as a Compensation Event then he was bound by the First Adjudicator's decision that the Project Manager was not entitled to withdraw his acceptance of that Compensation Event. However, his conclusion was that the Southern Boundary works had not been properly implemented under the Contract.

The Second Adjudicator also decided amongst other things that: the Project Manager was neither entitled to reverse his decision that the matter constituted a Compensation Event nor entitled to reverse his assessment of the effect of a Compensation Event; that the additional works to the Southern Boundary constituted a Compensation Event; and that the Project Manager's assessment of the Compensation Event should have produced a change in the price of £480,231.44 plus VAT and delay to the completion date of 29 days.

Arcadis issued proceedings to enforce the decision. Sanofi's defence to Arcadis' summary judgment application was that the Second Adjudicator made an error in his jurisdiction and/or breached the rules of natural justice by treating an earlier decision as binding and did not allow Sanofi to address that issue fully.

The Issues

- 1 Did the Second Adjudicator take an erroneously restrictive view of his own jurisdiction?
- 2 Was the Second Adjudicator's decision invalid on the grounds of apparent bias because he was put in a position in which he had to have regard to the First Adjudication decision?
- 3 Did the Second Adjudicator go off on a frolic of his own in relation to quantum by splitting the difference between the Project Manager's and Arcadis' forecast figures?
- 4 Did the Second Adjudicator fail to consider Sanofi's defence on delay?

The Decision

In finding for Arcadis that the Second Adjudication decision should be enforced, Mr Justice Akenhead answered each of issues 1 to 4 in the negative and ordered summary judgment for the full amount claimed.

With regard to issue 1, the Judge held that there was nothing improper or contrary to the rules of natural justice either in the decision in the First Adjudication being put before the Second Adjudicator or in the Second Adjudicator having regard to that earlier decision. Further, the Judge found that the Second Adjudicator did not consider that he was bound by the earlier decision: he made it clear that he would only be bound if he found that the Southern Boundary work had been properly implemented under the Contract as a Compensation Event. He ultimately found that it was not properly implemented, but then decided that it was a Compensation Event anyway by assessing the issue on its own merits. In relation to the question of bias (issue 2), the Judge again held that it was not improper for Arcadis to provide the First Adjudicator's decision to the Second Adjudicator. Any fair-minded and informed observer, having considered all the circumstances in this case, would conclude that there was no real possibility that the adjudicator was biased as a result.

With regard to issue 3, the Judge held that the Second Adjudicator had not breached the rules of natural justice. The Second Adjudicator had decided that the forecast basis for assessing quantum advanced by Arcadis was the right one. Although his "splitting the difference" method was simplistic, he was effectively choosing between two figures, both of which had an evidential basis. He was therefore not coming up with some basis of assessment which the parties had not had an opportunity to comment on; he was basing his assessment on the quantum approach specifically put forward by Arcadis and actually addressed by Sanofi.

With regard to issue 4, the Judge held that even though the Second Adjudicator was persuaded by a combination of the two approaches to delay put forward by Arcadis, he had still considered Sanofi's contentions. It is not necessary for an adjudicator to address each and every point, piece of evidence or argument raised by each party unless and then only to the extent that it is necessary to resolve the dispute. There had not been any breach of the rules of natural justice by the Second Adjudicator in relation to his findings on delay.

Comment

This judgment provides further support to successful parties seeking to enforce adjudication decisions by confirming that the Court will pay short shrift to losing parties *"scrabb[ing] around to find some argument, however tenuous, to resist payment"*.

Although the Judge did state that each case in which there is a substantive criticism of the adjudicator's conduct needs to be looked at on its merits, the Judge also observed that:

"when the Court comes to consider what an adjudicator has said and done, it needs to bear in mind that often adjudicators are not legally qualified . . . , that . . . there was limited time for the adjudicator to produce his decision and to digest the substantial amount of material before him and that one should not seek unfavourably to compare a decision of an adjudicator with a detailed reserved judgment of the High Court."

Finally, Section 23(2) of the Scheme for Construction Contracts provides that the decision of the adjudicator is binding on the parties, and they must comply with it until the dispute is finally determined by legal proceedings, by arbitration or by agreement between the parties. The Second Adjudicator had stated that he was bound by a previous adjudicator's decision, and whilst he was not entitled to decide his own jurisdiction, he stated that he had a duty to consider the matters raised regarding whether, and to what extent, he should be bound by the previous adjudication. He then noted that the First Adjudicator's decision would not prevent him from making his own assessment of the effect of the Southern Boundary works. That approach was acceptable and it was not unfair for an adjudicator to take into account or adopt the reasoning of the previous adjudicator's decision, especially where the First Adjudicator's findings were at least relevant and/or persuasive.