



LEGAL BRIEFING

Hyder Consulting (UK) Ltd v Carillion Construction Ltd [2011] EWHC 1810 (TCC), Mr Justice Edwards-Stuart

In this case, the Court considered whether an adjudicator's decision should be enforced given the adjudicator's adoption of a particular methodology.

The Facts

Carillion Construction Ltd (the "Contractor") engaged Hyder Consulting (UK) Ltd (the "Consultant") to provide design works for Network Rail's East London Line. The agreement between the parties dated 25 August 2009 (the "Agreement") provided for the Consultant to be paid substantially on the basis of actual costs according to an agreed schedule of rates subject to a deduction for disallowed costs. The Agreement was subject to a pain/gain share mechanism.

A dispute arose regarding the amount of the Consultant's fees, in particular the amount of disallowed costs. On 4 April 2011 the adjudicator convened a meeting with the parties. Following the meeting the adjudicator asked the parties for certain information. In response, the Consultant submitted over 20 spreadsheets containing target cost details. The Contractor also provided a response.

The adjudicator issued his decision on 2 May 2011 finding disallowed costs in the sum £1,527,457 (compared with the Contractor's figure of £4,950,553) and a revised target costs figure of £17,082,944, resulting in a sum of £3,104,400 being due to the Consultant.

The Contractor resisted enforcement of the adjudicator's award arguing that the adjudicator had breached the rules of natural justice as his assessment of target costs was the result of adoption of a methodology which the parties had not commented upon. If the Contractor had been provided the opportunity to comment it would have pointed out that the figure did not provide a like for like comparison unless certain adjustments were made.

The Consultant denied any breach of natural justice by the adjudicator on the basis that following the meeting it was reasonably apparent that the adjudicator would be considering the parties' submissions on target costs and that the adjudicator had only used information which was provided to him by the parties as part of the adjudication.

The Issue

Whether there had been a breach of the rules of natural justice by the adjudicator as a result of the methodology he had adopted, which had not been commented on by the parties.

The Decision

The Judge decided that there had not been a breach of the rules of natural justice and the adjudicator's decision was enforced. In reaching his decision the Judge considered that an adjudicator's decision consists of (a) the actual award (i.e. that A is to pay £X to B) and (b) any other finding in relation to the rights of the parties that forms an essential component of or basis for that award (for example, in a decision awarding prolongation costs arising out of particular events, the amount of the extension of time to which the referring party was entitled in respect of those events). In this case, the adjudicator had decided the amount due to the Consultant in respect of its Application 21a, interest and apportionment of his fees between the parties. Therefore the adjudicator's conclusion in relation to the value of the target cost was not a binding decision.

The Judge referred to authorities, in particular the case of *Balfour Beatty Construction Ltd v LB of Lambeth*¹ where enforcement of the adjudicator's decision was resisted on the ground that the adjudicator had made his own analysis of the critical path without giving either party an opportunity to comment on his methodology or calculations. The Court also considered *Cantillon Ltd v Urvasco Ltd*² and *Primus Build v Pompey Centre*³. The Judge noted that this was not a case where the adjudicator took into account material that was not before the parties, or where he applied his own experience in order to resolve a particular question.

The Judge held that the adjudicator was not obliged to choose between one set of submissions over the other, it was open to him to adopt his own approach if he had decided to reject the submissions of both parties. The Judge found that the Contractor had not demonstrated that the adjudicator's failure to allow the Contractor to comment on his methodology in arriving at his valuation of the target cost amounted to a breach of the rules of natural justice as:

- (i) the calculation of the target cost was always an issue in the adjudication;
- (ii) at the meeting with the parties, the adjudicator made it clear that he wanted further information to enable him to reach a conclusion about the target cost;
- (iii) the adjudicator's calculation of the target cost was driven primarily by his construction of clause 9.5 of the Agreement, on which both parties had made submissions;
- (iv) the figures used by the adjudicator when calculating the target cost were ones that were agreed between the parties or put forward by the Consultant. Therefore the adjudicator did not use any information that the Contractor had not had an opportunity to consider;
- (v) the arguments put forward to the Court in relation to the Consultant's actual cost of carrying out the original work were arguments that could have been put to the adjudicator in the adjudication; and
- (vi) the Contractor had requested, and been granted, further time to deal with the additional material in the adjudication and did not complain to the adjudicator that it had not been able to deal with it.

Comments

The case demonstrates the careful balancing act between an adjudicator using the material before him, against taking account of material that was not before the parties, or applying his own experience in order to resolve a particular question. It was noted in this case that the adjudicator conducted the adjudication with care and considerable diligence.

The case raises an interesting point about the extent to which an adjudicator is required to invite comments on proposed methodology for arriving at a decision. Practically, to avoid potential challenges to enforcement, an adjudicator would be well advised to err on the side of caution and notify the parties of his proposed methodology.

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¹ [2002] EWHC 282

² [2008] BLR 250

³ [2009] BLR 437