Issue 176 February 2015

Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Adjudication: natural justice and adjudicators' errors
Broughton Brickwork Ltd v F Parkinson Ltd
[2014] EWHC 4525 (TCC)

This was an application to enforce a decision of an Adjudicator, who decided that Parkinson should pay BBL £96k. Enforcement was resisted on the grounds there had been a real and a serious breach of natural justice. As put by Parkinson this was:

"a case where something has genuinely gone seriously wrong, and where what has occurred was not rough justice, which…cannot prevent a decision being enforced, but no justice at all."

There were two specific points. First, that the Adjudicator had decided a particular point which was of considerable importance to the determination of the dispute on a basis that was not the way in which the parties had argued it, and without first giving the parties the opportunity to comment. Second, that in deciding that point the Adjudicator had inadvertently failed, to address a particular document which had been placed before him and which, had he considered it, would have led to his reaching a different conclusion.

BBL said that there was no breach of natural justice at all, let alone a real or a serious breach. The Adjudicator was not just entitled but required to decide the point that he did, and there was no need for him to revert to the parties before doing so. Further, the inadvertent error in not seeing and, therefore, not considering the particular document was largely contributed to, if not wholly caused, by Parkinson's own conduct and also was no more than a mere procedural error which did not invalidate the decision.

HHJ Davies QC said that he was satisfied that BBL had made an error during the adjudication which caused, or at least materially contributed to, the problem that subsequently emerged. That error was threefold: (i) the failure specifically to assert in the body of the response that pay less notice 14 was, in fact, served by email as opposed to any other means; (ii) the failure in the body of the response specifically to draw to the Adjudicator's attention the existence or relevance of the email; (iii) the misnumbering of the page references, so that if the Adjudicator was looking for himself for evidence in relation to service of pay less notice 14 they would naturally look at page 184 onwards rather than to page 183.

On receipt of that decision BBL's solicitors communicated their concern about the failure to refer to the email to the Adjudicator. He replied that, having checked the hard copy documents in his possession, he found that page 183 was loosely adhered to the preceding page 182. He had not seen it when making his decision, since he used the hard copy documents rather than the electronic versions with which he had also been supplied. He also said that as the pay less notice did not indicate on its face that it was sent by email and because he did not see the e-mail, it had appeared that the letter had been sent by post only in the same manner as the two previous pay less notices, which is why he had concluded that it was served late. The Adjudicator considered that he had no jurisdiction to correct that error, and he went on to say that:

"Had I seen document 183 then Broughton's claim would have failed because a subsequent valid pay less notice had been served, but it appears to me that I do not have the power to correct the reasoning in my decision thereby resulting in a different outcome."

As the Judge said, an adjudicator is entitled to make mistakes, whether of fact or law, even ones which are fundamental, without rendering his decision unenforceable, so long as he acted within his jurisdiction. The Judge considered that in principle an inadvertent error might suffice to do this, if it was sufficiently serious. However, that said, the question as to why the breach occurred will usually be a material consideration. If it was deliberate that might justify a conclusion that there was a breach, whereas if it was inadvertent then that might be less likely to produce that result.

The Judge accepted that the failure to have regard to the email at page 183 could properly be categorised as a procedural error, in the sense that it was a document put before the Adjudicator which he did not consider. However it was plainly not a deliberate decision on his part to disregard it. The Judge also felt that it was difficult to be critical of the adjudicator. It was, in the Judge's view substantially Parkinson's fault that it had not drawn the existence or the importance of this document to the Adjudicator's attention. Thus he could not be criticised for not "*trawling*" through the totality of the documents before him to decide whether or not pay less notice 14 had been served on time.

Therefore the Judge did not consider that the Adjudicator's approach was one which amounted to a serious breach of the rules of natural justice, or rendered the adjudication process obviously unfair. It was from BBL's point of view a decision which was wrong, due to an inadvertent procedural error caused or substantially contributed to by the defendant itself. The Judge concluded:

"I accept that this may leave the defendant with a sense of injustice but that, I am afraid, is part of the rough and ready nature of the adjudication process. It is an interim remedy, it provides and it is intended to provide a decision in relation to cash flow which can, of course, if wrong be put right in later legal proceedings so as to put right any real injustice."

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Adjudication: cherry picking

St Austell Printing Company Ltd v Dawnus Construction Holdings Ltd

[2015] EWHC 96 (TCC)

St Austell relied on two grounds in support of their case that the adjudicator did not have the necessary jurisdiction. The first was the "*well-worn suggestion*" (the words of Mr Justice Coulson) that the dispute had not crystallised between the parties at the time of the notice of adjudication. The second was the "*rather more novel*" submission that, because the claim that was referred to adjudication related only to a part of Dawnus' original interim application, and expressly excluded other elements of that application, the Adjudicator was not empowered to order the payment of any sums which he found due.

The Judge noted that the crystallisation argument is almost never successful and this point was promptly dismissed. For example, the Judge noted that here the detail of Dawnus' outstanding claims had been the subject of discussion before they were formally advanced in application 19, which was the subject of the adjudication.

The Judge also noted that it was not uncommon for employers to say that no dispute has arisen because there were elements of the contractor's claim that required further particularisation or explanation. He referred to the case of *Gibson (Banbridge) Ltd v Fermanagh District Council* (Issue 173) where Weatherup J had said that it was clear that the claim should have been assessed long before it eventually was, and that if supporting documentation was missing, that would no doubt be reflected in any subsequent assessment by the employer or his agent.

The second jurisdictional objection was that the Adjudicator did not have the power to order St Austell to make any payment, because the dispute that was referred was strictly limited to just one part of interim application 19. Here the Judge referred to the 2000 decision of HHJ Thornton QC in *Fastrack Contractors Ltd v Morrison Construction Ltd* where the Judge referred to the "pruning" that may be made by the referring party of any existing claim before it was referred to the adjudicator and said this:

"21. Fastrack suggested that the reference that I am concerned with consisted of a number of disputes, each of which was one of the individual heads of claim that had been referred. Fastrack also suggested that the dispute that could be referred to an adjudication pursuant to the HGCRA need not be identical to the pre-existing dispute, it need be no more than a dispute which was substantially the same as that pre-existing dispute.

22. Neither of these contentions of Fastrack is sustainable. The statutory language is clear. A "dispute", and nothing but a "dispute", may be referred. If two or more disputes are to be referred, each must be the subject of a separate reference. It would then be for the relevant adjudicator nominating body to decide whether it was appropriate to appoint the same adjudicator or different adjudicators to deal with each reference. Equally, what must be referred is a "dispute" rather than "most of a dispute" or "substantially the same dispute."

23. In some cases, a referring party might decide to cut out of the reference some of the pre-existing matters in dispute and to confine the referred dispute to something less than the totality of the matters then in dispute. So long as that exercise does not transform the pre-existing dispute into a different dispute, such a pruning exercise is clearly permissible. However, a party cannot unilaterally tag onto the existing range of matters in dispute a further list of matters not yet in dispute and then seek to argue that the resulting "dispute" is substantially the same as the pre-existing dispute."

Following Fastrack, the Judge considered that a referring party is entitled to prune his original claim for the purposes of his reference to adjudication. So if his interim application for payment is for measured work and loss and expense, he may decide that, because the loss and expense claim could be difficult to present in an adjudication, he will instead focus in those proceedings on just the straightforward claim for measured work. Indeed, Mr Justice Coulson said:

"That is not only permissible, but it is a process that is to be encouraged. Claims advanced in adjudication should be those claims which the referring party is confident of presenting properly within the confines of that particular jurisdiction. What if, in my example, the claim for loss and expense is recognised by the referring party as being very difficult to sustain. What if he in fact decides that he no longer intends to pursue it? It would be a nonsense if he had to include such a claim in his notice of adjudication merely because that claim formed part of his original interim application."

Further, the adjudicator's decision will therefore be a decision reflecting St Austell's existing liability to pay. It manifestly does not create a liability to pay when none existed before.

The Judge also gave the following example. First one should assume, in St Austell's favour, that they had some sort of cross-claim, whether by reference to a claim for overpayment, or a claim for liquidated damages, or a claim for damages for defects which arose for assessment at the same time as interim application 19. Second, assume that the cross-claim would have reduced or even extinguished the sum due by reference to the measured work element of the 115 changes. In the view of the Judge, the mere fact that Dawnus had limited their own claim to the measured work value of the 115 changes, did not and would not in any way limit or prevent St Austell from defending that claim, and raising their own cross-claim by way of set-off: *"That would have been an entirely legitimate defence to the claim in the adjudication, whatever the notice of adjudication or the referral might have said."*

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