



Welcome to April's 2015 edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

This issue examines a few interesting adjudication decisions over the past eight months, most importantly those concerning the adjudicator nomination process, staying enforcement on the grounds of "exceptional circumstances" and "manifest injustice", and adjudicator's errors.

Will there be a breach of the rules of natural justice if the adjudicator fails to notice a crucial document upon which the adjudication turns?

Broughton Brickwork Limited v F Parkinson Limited [2014] EWHC 4525 (TCC)

No, unless there was a deliberate decision on the part of the adjudicator to disregard it.

The decision

This was an application to enforce an adjudicator's decision¹ that F Parkinson Limited ("Parkinson") should pay its subcontractor, Broughton Brickwork Limited ("Broughton"), the sum of £96,000, being the amount claimed in Broughton's interim payment application IA12 ("IA12"). Parkinson had not issued a Payless Notice in response to IA12 but maintained that this was of no concern since it had served Payless Notices in response to the subsequent interim payment applications IA13 and IA14.

Parkinson included copies of its Payless Notices for IA13 and IA14 in its bundle in the adjudication but failed to refer to them in its Response. The adjudicator accepted he should take into account developments in subsequent payment cycles for IA13 and IA14 and noted that whilst neither party had made submissions as to the validity of the Payless Notices for IA13 and IA14, he considered he had sufficient documentation to consider whether those notices were valid. The adjudicator concluded that the subsequent Payless Notices had been served out of time and made an award in respect of IA12 in favour of Broughton.

Once the decision had been issued, the adjudicator admitted he had not spotted the IA14 Payless Notice in the bundle, and said that had he been aware of it, he would have found in favour of Broughton as the Payless Notice in response to IA14 had been served in time. No payment was made by Parkinson and

Broughton commenced enforcement proceedings.

Parkinson opposed enforcement on the grounds that (i) the adjudicator ought to have invited submissions from the parties regarding the validity of the Payless Notices for IA13 and IA14, and (ii) that in failing to appreciate the validity of the IA14 Payless Notice, the adjudicator had failed to consider the documents properly, which constituted a real and serious breach of the rules of natural justice.

In relation to the first issue, the Judge found that the adjudicator was not under a positive obligation to ask the parties to clarify their respective positions on the validity of the Payless Notices. The parties had lodged submissions and submitted all relevant material, and the adjudicator was therefore entitled to reach his decision based on the evidence and submissions before him. In relation to the second issue, the Judge accepted that the failure to spot the valid Payless Notice was a procedural error in that it was a document that the adjudicator had failed to consider. However, there was no deliberate decision on the part of the adjudicator to disregard the Payless Notice, and Parkinson had caused or at least materially contributed to the procedural error by failing to bring the IA14 Payless Notice that was served by email to the adjudicator's attention.

The Judge therefore concluded that the adjudicator's approach did not amount to a serious breach of the rules of natural justice, nor did it render the adjudication process obviously unfair, and so the adjudicator's decision should be enforced.

Practice points

- Adjudicators are regularly swamped with masses of documents and it is not their job to trawl through them.
- Make sure you clearly draw the adjudicator's attention to all key documents and explain exactly why they are important in your

Insight

Adjudication practice points over the past eight months

There have been a fair few interesting adjudication decisions over the past eight months, but probably the most important and noteworthy have been those concerning the adjudicator nomination process, staying enforcement on the grounds of "exceptional circumstances" and "manifest injustice", and adjudicator's errors. This 46th issue of *Insight* examines each of these decisions in turn and considers what can be learnt from them in practice.



Insight

submissions. You will only have yourself to blame if you fail to guide the adjudicator through the evidential maze.

- As a belt and braces measure, number all pages in your adjudication bundle and double-check the numbering carefully to make sure there are no errors. Cross-reference all key documents in your bundle to your submission to ensure no important evidence is missed.

If a party falsely asserts a conflict of interest where none exists, will the adjudicator nomination process by an impartial independent body be invalidated?

Eurocom Limited v Siemens PLC [2014] EWHC 3710 (TCC)

Yes.

The decision

The facts of this case are well known. In brief, Knowles Limited (“Knowles”) represented Eurocom Limited (“Eurocom”) in adjudication proceedings against Siemens PLC (“Siemens”) in relation to disputes that arose following the installation of communication systems by Eurocom at Charing Cross and Embankment underground stations.

Knowles submitted a request for the nomination of an adjudicator to the RICS which included a list of adjudicators Knowles did not want appointed because they would have a conflict of interest. The RICS did not provide a copy of Eurocom’s completed application form to Siemens until Siemens specifically requested it. Siemens subsequently wrote to Knowles in relation to the various conflicts of interest that were alleged but Knowles failed to respond.

The adjudicator awarded Eurocom around £1.6 million but Siemens declined to make payment on the basis that the nomination process for the appointment of an adjudicator was flawed.

The Judge held that the question “*Are there any Adjudicators who would have a conflict of interest in this case?*” was answered falsely by Knowles in a deliberate or reckless manner that amounted to a fraudulent representation. The false statement was material, and was made improperly in the context of nomination by an impartial adjudicator nominating body to eliminate candidates on the basis that they had a conflict of interest when there was none. The fraudulent misrepresentation invalidated the appointment process and made it a nullity such that the adjudicator had no jurisdiction.

It is worth mentioning that *Eurocom v Siemens* was relied upon in the later case of *CSK Electrical Contractors Limited v Kingswood Electrical Services Limited* [2015] EWHC 667 (TCC) in which CSK’s representatives had asserted that they preferred that the adjudicators on an attached list were not appointed. Kingswood argued that there had been a fraudulent misrepresentation, but despite CSK’s assertion, no list was actually attached and on the facts therefore the adjudicator’s appointment was valid.

Practice points

- Do not try and manipulate the adjudicator appointment process by presenting spurious reasons why certain individuals should not be appointed.
- If there is a genuine conflict, you should provide full details in writing of the parties and dispute giving rise to the conflict and provide a copy of the nomination form to the other party.²
- Rather than risk calling a conflict of interest that later transpires

to be invalid, provide the names of, say, three to five adjudicators who you consider would be suitable to be appointed to avoid finding yourself in a false conflict scenario.

- If you are on the receiving end of an alleged conflict of interest during the nomination process, ask for full details of the nature of the conflict and, if necessary, approach those named and ask whether they are in fact conflicted.

Can enforcement be stayed on the basis of “exceptional circumstances” or “manifest injustice”?

Galliford Try Building Limited v Estura Limited [2015] EWHC 412 (TCC)

In theory it can, yes, but much will depend on the facts and circumstances.

The decision

Estura Limited (“Estura”) engaged Galliford Try Building Limited (“GTB”) under a JCT Design and Build Contract 2011 (“the Contract”) to carry out certain works at the Salcombe Harbour Hotel in Devon.

Towards the end of the project, GTB submitted its Interim Application 60 (“IA60”) which was in excess of £12.5 million, almost £5m more than the contract sum and only around £4,000 less than the amount of GTB’s anticipated final account. Estura failed to serve a Payment Notice or Payless Notice and therefore the sum claimed by GTB became the notified sum. Estura failed to make payment and GTB referred the dispute to adjudication. The adjudicator found that since Estura had failed to serve either a Payment or Payless Notice, GTB was entitled to the notified sum claimed.

Estura refused to make payment and commenced a second adjudication seeking a declaration as to the true value of the works. The second adjudicator resigned on the basis that



Insight

he lacked jurisdiction as the dispute had already been decided, and GTB commenced enforcement proceedings in respect of the sum it was awarded in the first adjudication.

Estura submitted that as a result of the earlier decision in *ISG Construction Limited v Seevic College*,³ it was not possible for it to ask another adjudicator to correct the payment position between the parties, but that here there were “exceptional circumstances” which meant that the adjudicator’s decision should not be enforced. Alternatively, the court should exercise its discretion to stay enforcement where there was a risk of “manifest injustice”.

The exceptional circumstances claimed was the substantial windfall that was obtained by GTB in the first adjudication: IA60 had claimed a valuation that was very close to the anticipated final account which gave GTB little incentive to invoke the final account process, allowing the true value of the works to be established and a balancing payment ordered. Estura was also concerned about the impact of the first adjudicator’s decision on its cash flow, since compliance with the contractual final account process would prevent any payment to Estura until the end of the 12-month rectification period at the earliest, which would have caused Estura serious financial difficulties, and given rise to “manifest injustice” since it was not financially viable for Estura to seek to reverse the adjudicator’s decision, given its financial situation and the costs that would be involved.

GTB resisted a stay of enforcement on the basis it would be inconsistent with the robust policy of the court to require compliance with adjudicators’ decisions, right or wrong.

Specifically warning that his decision

arose from the “very unusual” circumstances of the case, the Judge ordered summary judgment for GTB in the sum claimed and noted he had two alternatives available in relation to the stay: (i) to take a robust approach and refuse a stay on the basis that to do otherwise would be contrary to the usual policy of the court to enforce adjudicators’ decisions, or (ii) to stay enforcement of part only of the awarded sum. The Judge concluded that in the “very unusual” circumstances of the case, the former would be unfair to Estura and the Judge therefore adopted the latter, staying enforcement above the sum of £1.5 million which was payable to GTB subject to certain conditions.

Practice points

- Employers may start to use this first instance decision to resist enforcement on the grounds of their impecuniosity in the absence of proper notices more often.
- Contractors should take note and seek to obtain evidence challenging the facts relied upon in order to cast doubt on any similar arguments that are raised by employers.

Conclusion

The decision in *Broughton Brickwork Limited v F Parkinson Limited* is unsurprising and serves to reinforce the policy of the Technology and Construction Court to ordinarily enforce the decision of an adjudicator, save where a properly arguable case can be made out that there has been a breach of natural justice, or that the adjudicator lacked the necessary jurisdiction to reach the decision.

The decisions in *Eurocom Limited v Siemens PLC* and *Galliford Try Building Limited v Estura Limited* are unique in that they deal with matters that have not previously been considered by the courts. They are both fact specific, and the former is as would be expected, but it will be interesting to see if the latter survives the test of time, particularly if

other employers claim “very unusual” circumstances and “manifest injustice” in order to avoid the consequences of their own failures to follow the required contractual mechanisms.

Footnotes

1. The adjudicator’s decision turned out to be correct in light of the decision seven days later in *Harding (t/a MJ Harding Contractors) v Paice* and another [2014] EWHC 3824 (TCC) in which Mr Justice Edwards-Stuart confirmed that the amount due in a contractor’s final account was payable in circumstances where there was no valid Payless Notice, albeit it did not constitute “the amount properly due” which was still open to challenge during the final account process.
2. The RICS amended its nomination form in light of the decision in *Eurocom v Siemens* and now requires the parties to indicate whether there are any adjudicators who would have a conflict, and provide clear reasons.
3. For a full summary of the case, see http://www.fenwickelliott.com/files/insight_issue_42.pdf. In *ISG v Seevic*, it was held that a paying party was not able to frustrate the effect of an adjudicator awarding the sum that had been applied for following its failure to issue a Payment or Payless Notice by commencing a second adjudication as to the true value of the works at the time of the interim application, albeit the Judge confirmed that the true value of the works could be established at a later date.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston. lkingston@fenwickelliott.com. Tel +44 (0) 207 421 1986

Follow us on  and  for the latest construction and energy legal updates

Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN
www.fenwickelliott.com