

Legal Briefing

Ted Lowery considers a case in which the adjudicator appeared to have ignored a witness statement

J J Rhatigan & Co (UK) Ltd v Rosemary Lodge Developments Ltd [2019] EWHC 1152 (TCC)

Before Mrs Justice Jefford DBE

In the Technology and Construction Court

Judgement delivered 8 May 2019

The facts

In 2016 RLD entered into a contract with Rhatigan to construct six new homes in Wimbledon. The works were completed during 2018. On 4 June 2018 Rhatigan issued a draft variation showing a final account value of £8.6m that they said had been agreed at a meeting on 30 May. On 6 June RLD e-mailed to acknowledge the agreed £8.6m figure but mentioned that it would be premature and misleading for Rhatigan's contractor's reports to refer to the agreement until it had been finalised and executed as a variation deed.

During September 2018 Rhatigan made an application for payment based upon a gross sum of £8.6m. RLD denied that this figure had been agreed and in October 2018 Rhatigan submitted a further application for payment claiming a gross sum of £12.4m. RLD then commenced adjudication in respect of the proper valuation of Rhatigan's October payment application.

In the adjudication Rhatigan's position that the gross valuation of £8.6m had been agreed on 30 May 2018 was supported by witness statements from two of its representatives at the meeting. In reply RLD contended that the email of 6 June made it clear that no agreement could have been reached pending the execution of a deed. RLD's surrejoinder included three witness statements that concerned the 30 May meeting, but only one of these, by a Mr Morgan, asserted that RLD had made it clear at the meeting that it would be up to their funders to decide whether or not there could be an agreement on the final account valuation.

In a decision dated 22 November 2018 the adjudicator found that the figure of £8.6m had been agreed at the meeting on 30 May leaving a balance due of £1.7m. He did not think the absence of an executed deed of variation detracted from the binding nature of the oral agreement reached at the meeting. The decision included a statement that the adjudicator had considered all of the evidence and submissions, whether or not specifically referred to, but had confined his explanations to the essentials only. In his decision the adjudicator expressly referenced the statements provided by four of the witnesses but made no mention of Mr Morgan's evidence.

Rhatigan commenced enforcement proceedings to recover the £1.7m awarded by the adjudicator. RLD contended that a material breach of natural justice had occurred where the adjudicator had failed to deal with the potentially determinative argument that there had been no intention to enter into legal relations and where Mr Morgan's statement, including the references to the need for funders' approval, had apparently been ignored.

The issue

Was Rhatigan entitled to summary enforcement?

The decision

The judge found that RLD's submission that there had been no intention to create legal relations on 30 May was an issue which the adjudicator had addressed: where the adjudicator had decided that a binding oral agreement had been created without an executed deed this indicated that the adjudicator had in mind but had rejected the argument that there could have been an agreement in principle that was not binding.

On RLD's second ground, the judge considered that the adjudicator had overlooked Mr Morgan's witness statement. She noted that the adjudicator's statement confirming consideration of all evidence and submissions could not be relied upon if the balance of the decision indicated otherwise.

However, the adjudicator's disregard of Mr Morgan's statement did not amount to a failure to address a key defence synonymous with a breach of natural justice. This was firstly because the question of funders' approval mentioned by Mr Morgan was encompassed by the adjudicator's dismissal of RLD's submission that it had not intended to create legal relations. Second, the funders' approval point had been

Legal Briefing

mentioned only in Mr Morgan's statement and therefore could not be considered a key issue. Third, whilst Mr Morgan was the only witness to say that the need for funders' approval had been communicated to Rhatigan, in reality this added nothing to the substance of the other witnesses' evidence.

Commentary

It will be unusual for an adjudicator's decision to make it obvious that a discrete element of the evidence has been overlooked. Even so, this in itself may not be enough to show a material breach of natural justice. The court must still consider if there is a real prospect of defending the claim to enforce the decision.

Here the adjudicator's omission was an error but not one that would have impacted the outcome of the adjudication.

Ted Lowery
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