

Legal Briefing

Ted Lowery considers whether in a recent case the pupil had become the master?

Dickie & Moore Ltd v Ronald James McLeish, Mrs Diane

McLeish and Catriona Watt as Trustees of The Lauren McLeish Discretionary Trust

Before Lord Doherty

In the Outer House, Court of Sessions

Judgement delivered 12 September 2019

The facts

During August 2016 the respondents, acting in their capacity as the Trustees of The Lauren McLeish Discretionary Trust, engaged D&M to construct a large house at Armadale in Lothian. D&M commenced works in 2017 and in October 2018 submitted interim application no 17 claiming a gross valuation of £2,264,609.73. Application no 17 included a claim for an extension of time of 17 weeks with associated loss and expense of circa £67k.

In response, the Trustees issued a final adjustment statement proposing a valuation of £1,894,186.92 which included some £22,934.10 for loss and expense. On 24 October 2018 D&M challenged the final adjustment statement on a number of grounds but later that same day the architect issued a final certificate that adopted the Trustees' valuation.

On 19 December 2018 D&M commenced adjudication. Both the notice and the referral identified the responding party as "The Lauren McLeish Trust". The claim set out in the notice and referral was based upon D&M's application no 17 but also included two additional claims for extensions of time and loss and expense, respectively for 16.2 weeks and £116k and for 30.3 weeks and £174k. The adjudicator was appointed by agreement and neither party objected to the adjudicator's proposal to involve a pupil adjudicator – a quantity surveyor – in the process. The Trustees advanced an initial jurisdictional challenge on two grounds: that The Lauren McLeish Trust did not have legal capacity and that the dispute described in the notice had not crystallised. The adjudicator rejected this challenge.

In a decision dated 15 March 2019 the adjudicator awarded D&M another £324,492.60 plus interest including a further extension of time of 11 weeks. He directed that the parties should each pay 50% of his fees. The adjudicator's invoice included charges for time spent by the pupil adjudicator working on the Scott Schedule, taking notes of a meeting on 20 February, producing action points and proof-reading the decision.

The Trustees challenged the decision on four grounds: that it was not enforceable against them; that the adjudicator had failed to exhaust the jurisdiction he did have; that there had been a breach of natural justice where it appeared that the pupil adjudicator had assumed some of the responsibilities of the adjudicator; and, that the decision encompassed issues that had not crystallized at the date of the notice.

The issue

Should the adjudicator's decision be enforced?

The decision

The judge dismissed the Trustees' first ground: on a proper construction of the contract and during the execution of the works, references to "The Lauren McLeish Trust" had been taken as meaning the Trustees and where both the notice and the referral had been sent to and received by the Trustees at their respective addresses, it would have been understood that the Trustees were the intended recipients. The judge likewise rejected the second ground finding that there was no suggestion that the adjudicator had failed to exhaust his jurisdiction by not addressing as a discrete defence the legal incapacity of "The Lauren McLeish Trust".

Having heard oral and written evidence from both the adjudicator and the pupil, the judge concluded that essentially, the pupil had carried out administrative and checking tasks that did not amount to quantity surveying work on any material point. Albeit noting that the parties should have been told what the pupil was doing, the judge found there had been no breach of natural justice because all material decisions on the matters in issue in the adjudication had been made by the adjudicator on the basis of on the information the parties had put before him.

The judge did agree with the Trustees that D&M's claims for extensions time and loss and expense as set out in the notice appeared to be of a different nature and order of magnitude to the preceding claims and as such could not be said to have

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been part of the crystallised dispute referred to adjudication. It was left up to D&M to apply for an order for severance.

Commentary

Questions were understandably raised when the adjudicator's fee note suggested that the pupil had been more than simply a passive observer. It took witness evidence from both the adjudicator and the pupil to show that whilst the pupil had provided significant assistance, that assistance had not comprised material input into the decision making process.

It follows that adjudicators should always promptly inform the parties of the intended scope of the pupil's role and also whether or not the pupil's time will be invoiced.

Ted Lowery
November 2019