Sloan Plumb Wood

SOLICITORS

Legal Update

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Case Law Updates

Introduction

Welcome to the Autumn edition of the Sloan Plumb Wood LLP legal update.

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If you would like any advice or further information on any of the topics in this issue, or would like to suggest any subjects that you would like to see covered in future issues please get in touch with one of the following:

Martin Wood
martin.wood@spw-law.co.uk
Philip Sloan
philip.sloan@spw-law.co.uk
Emma Hayward
emma.hayward@spw-law.co.uk
Philip Vickers
philip.vickers@spw-law.co.uk

Sloan Plumb Wood LLP
Apollo House
Isis Way
Minerva Business Park
Lynch Wood
Peterborough
PE2 6QR

Telephone:
01733 302410

Email:
enquiries@spw-law.co.uk

www.spw-law.co.uk

Breach of Natural Justice – What becomes of the Adjudicator's fees?

Systech International Ltd v PC Harrington Contractors Ltd [2011] EWHC 2722 (TCC) (27 October 2011)

In this case the court was asked to consider whether an adjudicator could seek to recover all his fees from the Respondent party to an adjudication in circumstances where the party referring the dispute to adjudication had entered administration and the decision rendered by the adjudicator had been judged to be a breach of natural justice and therefore unenforceable.

In an earlier decision in the TCC, PC Harrington Contractors Limited v Tyroddy Construction Limited [2011] EWHC 813, Harrington asked the court to consider whether an adjudicator's failure to properly consider defences put forward by it in an adjudication with Tyroddy rendered the decision reached by the adjudicator a breach of natural justice and therefore unenforceable. The court concluded in that case that the adjudicator had failed to follow rules of natural justice by failing to properly consider the responding party's defences. As such, the adjudicator's decision was a breach of natural justice and unenforceable. Tyroddy then entered administration.

In this case, Systech International Ltd ("Systech"), is the employer of the adjudicator that dealt with the adjudication giving rise to the earlier decision referred to above. In this case, Harrington argued that, notwithstanding that the adjudicator's terms and conditions of appointment (which the parties agreed had been incorporated in their agreement with the adjudicator) provided that the parties to the adjudication would be jointly and severally liable for the adjudicator's fees, Harrington should not have to pay all those fees as the adjudicator's decision was unenforceable and therefore in effect no decision at all. Harrington argued that there had been a total failure of consideration as the adjudicator had not done what was required of him by producing a decision that was unenforceable.

Mr Justice Akenhead considered that this was a novel and important question that did not appear to have been addressed by the courts before. He concluded that the role of an adjudicator was much greater than simply that of producing a decision. The adjudicator had acted in good faith and whilst he had erred in failing to consider defences put forward by Harrington in the adjudications he decided, he should be paid for the work that he had performed.

Breach of Natural Justice – Unfair timetable for Adjudication a breach of natural justice?

NAP Anglia Ltd v Sun - Land Development Co Ltd [2011] EWHC 2846 (TCC) (03 November 2011)

In NAP Anglia Ltd v Sun - Land Development Co Ltd [2011] EWHC 2846 the process leading to adjudication was lengthy and complicated. The parties had sought to resolve the dispute which was in respect of an unpaid Interim Certificate via the courts.

Proceedings were commenced by NAP in the Norwich County Court in Autumn 2008 resulting in adjourned trials in both November 2010 (after 5 days of trial) and February 2011 (after 3 days of trial). The court listed the final 3 days of trial to take place between 3-5 October 2011, however, NAP decided to commence an adjudication in June 2011.

Breach of Natural Justice – Unfair timetable for Adjudication a breach of natural justice? - Cont'd

The adjudicator awarded NAP £96,334.41 and directed that *"provided that payment to me has been made by NAP, the amount of my fees and expenses shall be paid by Sun-Land to NAP".* He assessed these fees and expenses in the sum of £9,855.

NAP then applied to the TCC to enforce the adjudicator's award. Sun-Land sought to avoid enforcement of the adjudication decision on 3 grounds:

1. That the adjudicator's decision breached the rules of natural justice as the adjudicator's timetable and directions favoured NAP and/or as the adjudicator failed to address issues raised by Sun-Land; and/or

2. That execution of the judgment should be stayed pending judgment in the proceedings in the Norwich County Court; and/or

3. That NAP's financial position was such that it may not be able to repay the amount of the adjudicator's award if it is subsequently reversed by the county court.

Mr Justice Edwards-Stuart held that the adjudicator's directions appeared to him to be quite unexceptional.

Sun-Land's second argument as to an alleged breach of natural justice was that the adjudicator failed to address issues raised by Sun-Land. In particular this related to Sun-Land's criticism of the calculations submitted to the adjudicator by the Quantity Surveyor instructed by NAP. Notwithstanding that Sun-Land had not obtained an independent report that dealt with NAP's QS report, even though it had that report from March 2011, Sun-Land complained that the adjudicator had failed to take its criticisms of NAP's QS report into account. Mr Justice Edwards-Stuart held that the adjudicator had considered the criticisms made by Sun-Land, and rejected them, and that the adjudicator was not obliged to set out in detail his reasons for doing so in a Decision which had to be prepared under a very tight timetable.

As to the submission by Sun-Land that there should be a stay on execution of the judgment until the proceedings in the Norwich County Court were resolved, Mr Justice Edwards-Stuart held that it was clearly established in Herschel Engineering Ltd v Breen Property Ltd [2000] BLR 272, that a party to a construction contract may refer the dispute to adjudication even though the same dispute is the subject of current litigation. This is because there is a statutory right to refer a dispute to adjudication "at any time".

However, Sun-Land relied on one paragraph of Dyson J's judgment where he said:

"[Counsel for the unsuccessful party] points out that, if his first submission is wrong, it is possible to conceive of absurd situations arising. For example, he suggests that the hearing in the county court may be adjourned part heard for several weeks. The judge may have made adverse comment on the claimant's case. The claimant might decide to use the period of the adjournment to refer the dispute to adjudication in the hope of obtaining a favourable provisional decision from the adjudicator. As I said in the course of argument, if an extreme case of this kind were to occur and the claimant were to succeed before the adjudicator, the most likely outcome would be that the defendant would not comply with the adjudicator's decision. If the claimant then issued proceedings and sought summary judgment, the court would almost certainly exercise its discretion to stay execution of the judgment until a final decision was given in the county court proceedings. In any event, the fact that it is possible to conceive of far-fetched examples like this does not deflect from the view that I have already expressed."

Mr Justice Edwards-Stuart considered that Dyson J's comments above must have been made in contemplation of a situation where both (a) the judge in current litigation had made some adverse comment on the claimant's case (or there had been some similar development adverse to the claimant's case) and (b) the litigation was likely to be concluded fairly soon after the date when the adjudicator would be likely to give his decision. In this case it had not been suggested that the judge in the proceedings in Norwich had made any adverse comments regarding NAP's case and the trial, due to be heard from 3-5 October 2011 had recently been put off for a period of 4 months.

Sun-Land also argued that there was a real doubt as to whether NAP will be able to repay the amount of the judgment if it loses in the county court. Mr Justice Edwards-Stuart considered relevant caselaw and found that he must consider (1) whether or not NAP would be able to repay the judgment sum if the county court decides that NAP is not entitled to it and (2) the extent to which, if at all, NAP's present financial situation is the same or similar to its position at the time when the contract was made. Mr Justice Edwards-Stuart found it established that NAP was in a less healthy financial position than it was in January 2005, before this contract was entered into. He did not however consider the present position so bad that NAP would be unable to repay at least a significant proportion of the sum awarded by the adjudicator if required to do so. Execution of the judgment sum was stayed above £65,000.

Stay of enforcement of an Adjudicator's award

Partner Projects Ltd v Corinthian Nominees Ltd [2011] EWHC 2989 (TCC) (23 November 2011)

The Claimant in this case sought to enforce the award of an adjudicator in the sum of £850,509.35 against the Defendant. The Claimant company, a building contractor and the Defendant company, wholly owned and controlled by its sole director, a solicitor, Mr David Conway, entered into a building contract dated 10 October 2003 for the construction of a new five bedroom house at St John's Wood, London with a contract sum in the region of £1.6 million.

The Defendant resisted enforcement of the adjudicator's award on the ground that the adjudicator exceeded his jurisdiction in making his award as the adjudicator's award included a sum in respect of interest which, the Defendant alleged, the adjudicator was not asked to consider as part of the referral to adjudication.

Alternatively, the Defendant argued that due to the Claimant's current financial position enforcement of the adjudicator's award should be stayed as, if it were later determined that the adjudicator's award was repayable, the Claimant would not be able to repay it at the time when it would fall due to be repaid.

As to the jurisdictional challenge, the Defendant submitted that the adjudicator would always have been without jurisdiction to award interest because the adjudicator did not have the power to award interest on sums which had not been certified by the Contract Administrator (but only on sums which had been certified).

Mr Justice Edwards-Stuart agreed with the Defendant that the relevant clause in the contract did not confer a power to award interest on sums which have not been certified. However, Mr Justice Edwards-Stuart considered that the adjudicator was able to award sums greater than those certified because the contract gave him the power to open up and review certificates issued by the Contract Administrator (in this case the Architect).

Mr Justice Edwards-Stuart held:

"In my view, what the adjudicator must be taken to have done is to have opened up, reviewed and revised the architect's certificates and to substitute for the sums actually certified the sum that he considered should have been certified. Thus the effect of the adjudicator's decision is to substitute for the sums certified by the architect in the certificates the sums found due by the adjudicator. Once this has been done, the adjudicator must be entitled to award interest on the sums due under the corrected certificates. This was not an excess of jurisdiction."

As to the Defendant's application for a stay in enforcement of the adjudicator's award, Mr Justice Edwards-Stuart agreed that the question was not whether the Claimant could repay the award now, but whether or not it is likely to be able to repay it at a time when it is likely to fall due for repayment which was estimated to be October 2012.

The court heard evidence of the Claimant's current poor financial position and expectations for future trading and concluded that it is more likely than not that the Claimant would not be able to repay the whole of the award if ordered to do so in October 2012, but that it would be able to repay a major part of it.

In exercising his discretion, Mr Justice Edwards-Stuart decided that the finding that the Claimant would probably be unable to repay the full amount awarded by the adjudicator if ultimately ordered to do so was not decisive of the application for a stay as he concluded that the Claimant's poor financial position was caused in part by the Defendant's failure to pay sums due to the Claimant.

Mr Justice Edwards-Stuart also took into account the Defendant's general conduct and in particular the appearance that the Defendant had itself, between 2003 and 2006, traded whilst insolvent.

Mr Justice Edwards-Stuart had also noted earlier in his judgment that the Defendant had made arrangements with regard to the building contract and its assets with the ultimate effect *"that Mr Conway can effectively walk away from Corinthian's debts by the simple expedient of leaving them unpaid and letting Corinthian's creditors put it into liquidation if they so wish."*

Mr Justice Edwards-Stuart refused the Defendant's application for a stay.

Pre-Litigation non-compliant Part 36 offers

French v Groupama Insurance Company Ltd [2011] EWCA Civ 1119 (11 October 2011)

The Court of Appeal was asked to consider the weight and consequences to be attached to a non Part 36 compliant offer made by the Respondent, Groupama, to the Claimant, Miss French, before the Claimant had commenced proceedings in which she was ultimately successful in November 2010.

Groupama made a settlement offer by letters dated 22 December 2006 and 15 February 2007 in the sum of £115,000. Miss French ultimately succeeded at trial and was awarded £132,247.41 (inclusive of interest), however, Groupama argued and the court at first instance accepted that had Miss French accepted the offer she would have been some £20,000 better off.

The court at first instance had held that Groupama's second offer letter, which had allowed 21 days for acceptance of the offer therein, met the conditions laid down by the Court of Appeal in Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc [2005] EWCA Civ 854, and was therefore a quasi Part 36 offer and accordingly Miss French should recover none of her costs of the litigation and should pay the whole of Groupama's costs.

In *Stokes* a claim for £780,000 by the Claimant had been preceded by an offer of settlement of £35,000 by the Defendant. The Claimant eventually succeeded and was awarded damages in the sum of £25,600. The trial judge awarded the Claimant only half of its costs to take account of its unreasonable approach to the litigation (which included abandoning the majority of its claim in closing speeches). The Court of Appeal held that notwithstanding that the Defendant had not paid the offered sum into court (as had then been a requirement of a valid Part 36 offer of settlement but which is no longer a requirement), the offer made was a quasi Part 36 offer and accordingly the usual Part 36 cost consequences could be applied.

The Court of Appeal was somewhat hampered by its decision in *Stokes* and sought to confine that decision to situations in which an offeror had failed to make payment of the offered settlement sum into court as had been a requirement under the earlier Part 36 rules.

The facts of this case were highlighted including that the offer made by Groupama was time limited and made before the commencement of proceedings at a time when Miss French was a litigant in person and that Groupama did not repeat the offer as a formal Part 36 offer during those proceedings. The Court of Appeal held that the offer was not a quasi Part 36 offer and that the offer could only be considered under Part 44 of the Civil Procedure Rules which give guidance on the assessment of cost awards, not Part 36. The Court of Appeal concluded that *"fairness in all the circumstances is the essence of the Part 44 regime"* and accordingly made no order as to costs save that Groupama was ordered to pay Miss French's costs prior to the expiry of the February 2007 offer.

Same Dispute, Different Adjudication

Carillion Construction Ltd. v Stephen Andrew Smith [2011] EWHC 2910 (TCC) (10 November 2011)

We have discussed this case in a recent blog post on our website (see http://www.spw-law.co.uk/blog-posts/same-dispute-different-adjudication.html).

In this case the court was asked to consider whether a dispute referred to adjudication by the defendant in 2011 was in substance the same as a dispute referred to adjudication in 2003. A dispute may only be referred to adjudication once. More than one adjudication is permissible, provided a second adjudicator is not asked to decide again that which the first adjudicator has already decided.

Mr Justice Akenhead set out a number of factors the Court should consider in forming a view as to whether the same or substantially the same dispute has been referred to adjudication before. These included:

(1) a consideration of what is and was the ambit and scope of the disputed claims which is being and was referred to adjudication.

Same Dispute, Different Adjudication – Cont'd

(2) the fact that different or additional evidence, be it witness, expert or documentary, over and above what was relied upon in the earlier adjudication, is deployed in the later claim to be referred to a second or later adjudication, will not usually alter what the essential dispute is or has been.

(3) the fact that different or additional arguments to support or enhance a claiming party's position are deployed in the later adjudication will not usually of itself mean that it is a different dispute to that which was referred earlier.

(4) the fact that the quantum is different or is claimed on a different quantification basis in the later reference to adjudication from that claimed in the earlier adjudication is not necessarily a pointer to the referred disputes being in substance different.

(5) a consideration of the expressed motivation by the party in the later adjudication for bringing it and the given reasons for the basis of formulation of the later adjudication claim.

(6) that Notices of Adjudication and Referral Notices are not required to be in any specific form; they may be more or less detailed and they may or may not be drafted by people with legal expertise. They do not need to be interpreted as if they were contracts, pleadings or statutes.

(7) whether essentially the same causes of action are relied upon in the earlier and later Notices of Adjudication and Referral Notices.

Mr Justice Akenhead held that the dispute referred to adjudication in 2011 was the same as that referred to adjudication in 2003 and therefore the adjudicator in 2011 did not have jurisdiction to adjudicate in 2011.

Wishing you a Merry Christmas and a Happy New Year from all at Sloan Plumb Wood LLP.

We hope that you will continue to enjoy our newsletters and blogs in 2012!

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Peterborough
PE2 6QR

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Email:
enquiries@spw-law.co.uk