MC MS Blog

Adjudicator avoids being sent to Coventry!



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A couple of weeks ago, Matt posted a review about our upcoming book, *Reflections on Construction Adjudication: The MCMS Blogs*, by Alexander Nissen KC. Alexander very kindly said that *"...No case of significance is overlooked..."*, and, without wishing to get ahead of ourselves, I started to wonder whether he'd say the same if we ever published another book of blogs in, say, 15 years' time? So, keen to keep on top of recent cases, I thought one that deserved some commentary was the recent judgment of Mr Justice Eyre in *Coventry & Warwickshire Development Partnership LLP (CWDP) v Avison Young (UK) Ltd.* This is an adjudication enforcement case in which Avison Young (AY) resisted enforcement on three grounds, namely that: 1) the adjudicator had failed to give adequate reasons; 2) the adjudicator had failed to address the dispute which had been referred to him; and 3) the adjudicator had breached the rules of natural justice. AY also argued that, even if the Decision as a whole was not unenforceable, parts of it should be severed.

I suspect most of you will have read about the case by now, but, spoiler alert, the adjudicator's Decision was enforced and was not severed. The Judge's general comments at paragraph 52 on what is required from an adjudicator when it comes to reasons are worth reading as they provide a useful reminder that it is *"...sufficient if the reasons enable the parties to understand what it is the adjudicator has decided and why..."*. Interestingly, the Judge also said that *"...A party who can say in detail how an adjudicator erred will find it hard to show that the reasons given did not enable that party to understand what the adjudicator had decided and why..."*; parties wishing to rely on a lack of reasons should take heed of this warning!

However, it's the alleged breach of the rules of natural justice that I want to comment on, because it was said that the adjudicator had essentially gone off on a frolic of his own. The suggestion that an adjudicator has "gone off on a frolic" is, of course, nothing new and is something we've returned to several times over the years, including in a number of blogs in the new book (did I mention we'd written another book...!). I'll let you read them for yourselves when the book comes out in November, but some of the featured blogs are particularly relevant here ....

- Back in 2012, in *Adjudication "torpedoed" by adjudicator's frolic*, Matt looked at *Herbosch-Kiere Marine Contractors Ltd v Dover Harbour Board*. The adjudicator adopted his own method of assessing the financial consequences of delay, rather than either of the approaches advanced by the parties, without giving them an opportunity to comment. The court found that this was a material breach of natural justice and did not enforce the Decision.

- The issue arose again in *ABB Ltd v BAM Nuttall Ltd*, which I covered in *Read all about it: adjudicator commits serious breach of natural justice rules*. I'll come on to some of the specifics below, but the adjudicator relied on a contractual provision which neither party had referred to or relied upon and, importantly, did not invite submissions on it before issuing his Decision. Again, the Decision was not enforced.

- However, as the title of my follow-up blog, *Read all about it: adjudicator didn't commit a serious breach of the rules of natural justice*, sort of gives away, not every departure from the parties' arguments amounts to a frolic. In *CG Group Ltd v Breyer Group plc*, Akenhead J concluded that the adjudicator's Decision was based on the submissions actually put before him. Where an adjudicator's conclusion is a permutation covered by the parties' arguments, he said it should be *"a rare case for a natural justice breach to be found"*.

- There's also *Brims Construction v A2M Development,* which I covered in *Waive goodbye to your jurisdictional challenge*. When a point arose concerning a clause of the contract, the adjudicator acted very sensibly by asking the parties for further submissions before making his Decision. **The subsequent natural justice challenge failed and the Decision was enforced.**

- Matt subsequently brought a number of these authorities together (as well as *Farrelly (M&E) Building Services v Byrne Brothers* and *Hyder Consulting v Carillion*) in *Adjudicator using own knowledge and experience, acceptable behaviour or a frolic?* in January 2014. While the principle that an adjudicator should not go off on a frolic is "clear and well established", he described the boundary as a "fuzzy line": adjudicators can legitimately apply their knowledge and experience, but should not introduce a new point or approach without giving the parties an opportunity to address it.

So, what was the alleged frolic in *Coventry*?

CWDP engaged AY to act as NEC project manager and supervisor on development works at Gateway South in Coventry. CWDP alleged that AY had failed to properly perform those roles, including by over-certifying sums payable to the contractor. The adjudicator ultimately awarded CWDP damages of £8,729,179.33 plus interest.

Paragraphs 74 to 88 of the judgment set out the key facts on the alleged frolic, but in short, the main natural justice complaint concerned the adjudicator's use of an assessment prepared by Gardiner & Theobald (the "G&T Assessment"). The adjudicator used the experts' figures where they were agreed and, in relation to disputed matters, made use of the G&T Assessment. AY argued that he had therefore adopted an approach which neither party had advanced.

Eyre J rejected that argument. Importantly, the G&T Assessment had not appeared for the first time in the Decision. The adjudicator had identified its potential relevance, indicated that he was considering using it and invited submissions. AY had argued that it should not be relied upon, but did not advance an alternative case as to how it should be used if the adjudicator disagreed.

Similar complaints about the adjudicator's approach to retention and defects were also rejected. In relation to retention, Eyre J described his approach as a "classic example" of considering the competing arguments, accepting aspects of each without accepting either in full, and reaching his own conclusion. He considered the same analysis applied to the adjudicator's treatment of defects.

How does *Coventry* compare?

I think the contrast with *Premier Modular v Maidstone and Tunbridge Wells NHS Trust* is useful here. Eyre J referred to it as illustrating the "stark circumstances" in which an adjudicator can be said to have gone off on a frolic. There, the adjudicator decided the central issue on a basis which neither party had advanced and which was "directly contrary" to their common position. The losing party only discovered that basis when it received the Decision. As Eyre J noted, the question is whether the relevant issues have been "fairly canvassed".

That distinction also takes us back neatly to *ABB v BAM* in which the adjudicator relied on clause 11.1A of the parties' NEC3 sub-contract when, as Akenhead J put it, neither party had "argued let alone mentioned" it, and did not raise the point before issuing his Decision. As Akenhead J also stressed, *ABB* was one of those "relatively rare cases" where the breach was material to the outcome. This must be distinguished from cases where the alleged frolic is not material and would have made no difference to the outcome.

Coventry seems much closer to *CG Group*. In both, the adjudicator reached his own conclusion from the arguments and material before him, even though neither party had articulated the precise combination ultimately adopted. In *Coventry*, the adjudicator had not introduced a wholly new factual or legal basis; he considered what was before him, accepted some parts, rejected others and reached his own conclusion.

My thoughts on the approach adjudicators should take

This latest judgment reinforces that there is a relatively high bar when it comes to a party demonstrating that an adjudicator has gone off on a frolic. Eyre J reiterated that an adjudicator can reach a conclusion for which neither party has contended, provided the parties have had a fair opportunity to address the relevant matters.

So, for the Bucks Fizz fans among you, perhaps it's ultimately a case of "*Making Your Mind Up*". *Premier Modular* and *ABB* fell on one side of Matt's "fuzzy line"; *Coventry* and *CG Group* on the other. An adjudicator is entitled to make up their own mind from the arguments and material before them; what they can't do is decide the dispute on a new basis without giving the parties an opportunity to address it.

That said, taking a step back, I acknowledge that parties and their representatives must sometimes get frustrated when, despite the cases they have put forward, an adjudicator decides the dispute on a different basis. After all, the parties have chosen to have their dispute resolved by adjudication, rather than expert determination, where the expert has more leeway to decide the dispute on a basis not put forward by the parties. Therefore, whilst Eyre J also made it clear that an adjudicator does not need to invite submissions on the particular approach they propose to adopt because "*…Such a two-stage process would prolong the period of the adjudication*…", it might arguably be prudent for them to do so in appropriate cases, not least to maintain confidence in the process.

