MC MS Blog

Adjudicator reaches decision in "procedurally unjust manner" so not enforced

JUNE 21, 2022

Sometimes it feels that, as an adjudicator, you are damned if you do and are also damned if you don't. In this case – *Liverpool CC v Vital Infrastructure Asset Management (Viam) Ltd (In Administration)* – it was both what the adjudicator did do and what he didn't do that led the judge to issue a declaration that his decision was unenforceable.

But how did the judge, HHJ Stephen Davies, arrive at this point?

Liverpool CC v Vital Infrastructure Asset Management (Viam) Ltd (In Administration)

In May 2019, the parties entered into a *framework agreement* in relation to highways planned work projects. It was based on the *NEC3 engineering and construction contract* (ECC), as amended by the framework agreement. In September 2021, the parties entered into a call-off contract for "framework lot 1".

Thus, we have two contracts, and this gave rise to an issue over the applicable dispute provisions and where notices should be served. It also gave rise to a *jurisdictional issue* over whether this was a case of one contract or two contracts, but I'll come to that in a minute.

Dispute resolution and service provisions

The relevant parts of the framework agreement provided that:

- Disputes should be resolved in accordance with the dispute resolution provisions of the call-off contract if the dispute related to the framework agreement or to works and services for projects (*clause 47.1*) but if the dispute related solely to the framework agreement, then the dispute resolution provisions of the framework agreement (*clauses 47 to 48*) applied.
- Under clause 50, disputes could be referred to adjudication at any time and the *Scheme for Construction Contracts 1998* applied.
- The *adjudicator nominating body* (ANB) was RICS.
- Notices, certificates and written instructions had to be sent by first class post, email or by hand to the employer, "The Head of Procurement" at Liverpool City Council at an address in the Cunard Building.

The relevant parts of the call-off contract identified:

- *Option W2* as applying to disputes.
- The ICE as the ANB.
- The employer as Liverpool City Council at the same address in the Cunard Building, but also identified the employer's representative as "Andy Barr (LCC Divisional Manager – Highways & Transport)".
- Clause 13.2 of the NEC3 contract dealt with communications and said the address was the "last address notified" or the address stated in the contract data (which was the same address in the Cunard Building).

Was notice of adjudication served correctly?

When it referred the dispute to adjudication, Vital addressed the covering letter to the Head of Procurement, as specified in clause 53 of the framework agreement. It said it would be applying to the ICE for an adjudicator appointment. The notice of adjudication also referred to both the framework agreement and the call-off contract, as well as the dispute provisions of both (in clause 47 and W2). It also referred to the contract data in the call-off contract.

In other words, there seemed to be some confusion over which contract applied to the dispute and, if not confusion, certainly some inconsistency over what provisions were thought to apply.

This was something that Liverpool CC sought to exploit in its *Part 8 declaratory relief proceedings*, where it argued that Vital should have given its notice of adjudication addressed to Andy Barr. However, the judge rejected this. He said it was wrong to argue that a specified person or a person occupying a specified position had to be given notice. There was nothing in the call-off contract about this. Clause 13.2 dealt with the "recipient" and, in the context of clause 13.2 and option W2, that meant the employer at the address in the Cunard Building. This was in contrast to where the contract referred to a project manager or supervisor, who were specified, identified recipients. As the notice provisions of the call-off contract had been followed – the notice was sent to Liverpool CC in the Cunard Building – it was an immaterial mistake that it was addressed to the Head of Procurement. Further, applying Carr J's judgment in *University of Brighton v Dovehouse Interiors Ltd*, it was clear the notice of adjudication was received and passed to the appropriate person or department within Liverpool CC and it was able to respond without delay or difficulty.

One contract or two?

The judge accepted that although it was said in the notice of adjudication that the dispute related to both contracts, the dispute was about the sum claimed for the maintenance of temporary fencing: "the ultimate remedy claimed is a financial payment under the call-off contract". He gave three reasons for rejecting the two contracts argument:

- The parties had expressly provided for circumstances where there might be an issue under both the framework agreement and the call-off contract, and said the adjudication provisions of the call-off contract would apply.
- On the question of whether it was one dispute or more, the judge applied the principles set out in *Witney Town Council v Beam Construction (Cheltenham) Ltd*, and concluded it was clear the dispute related to a further payment under the call-off contract.
- The terms of the framework agreement were incorporated into the call-off contract.

Pausing there, I do wonder why parties make life more complicated that perhaps it needs to be by having different dispute resolution rules applying to disputes under the different contracts they enter into. I realise it isn't always possible to have consistency across different contracts but it would prevent such arguments even if, like here, both the adjudicator and the court reject the arguments.

Nullity or breach of natural justice?

In the Part 8 proceedings, Liverpool CC argued that the adjudicator failed to answer the questions put to him in the notice and/or answered the wrong question and so his decision was a nullity. However, the judge felt the basis of this argument was misconceived. The adjudicator's decision set out how he reached his conclusions. On *enforcement* or in Part 8 proceedings, it does not matter if an adjudicator's decision is right or wrong, only whether there is a lack of jurisdiction or procedural unfairness. Here, if the adjudicator erred, it was an error made within his jurisdiction.

However, the judge didn't stop there. He went on to consider whether the adjudicator had *breached the rules of natural justice* by making a finding on an issue that, on Liverpool CC's case, was not true and was something Vital had never contended for. He considered a number of judgments, including *AMEC v Whitefriars* and *Cantillon Ltd v Urvasco Ltd*. Ultimately, he concluded that the adjudicator had breached the rules of natural justice. However, he should have given notice that he was considering the point and allowed Liverpool CC an opportunity to make submissions on it. Consequently, the judge found there were "fundamental departures from the obligation to follow a fair procedure" which meant the adjudicator's decision was unenforceable.

I know what it is like to be in a position where you contact the parties seeking guidance on the way forward from them. It is never easy. Here the adjudicator had emailed the parties and identified three options as to the way forward. One of those was asking the parties to agree to him making a decision on the basis of his analysis and another was for Vital to discontinue and serve a fresh notice of adjudication. However, instead, Vital rejected the adjudicator's analysis and insisted he proceed in accordance with how its case was put in the notice. As the judge acknowledged, "the adjudicator was left in a difficult position" and was acting "on the basis of his genuine view as to the merits of the case". However, by seeking to "overcome this problem by finding a way around it", he went too far.

One final thing to note. Vital went into *administration* the day before the adjudicator's decision was made and it took no part in the Part 8 proceedings (which Liverpool CC needed the court's permission to bring). That may not seem unusual but what did stand out was the fact that the adjudicator was permitted to see the skeleton arguments and additional material, and put in his own witness statement to address the natural justice points, which Liverpool CC's counsel responded to. This might have been because natural justice was an issue the judge raised (not Liverpool CC), and the judge had requested the additional material, but it still struck me as unusual. I was also curious as to why the judge ended with the comment "nothing in this decision is in any way binding upon the adjudicator" and I wonder what he means by that. After all, we all know that an adjudicator's decision is only interim binding it if is enforceable, which this one isn't.

As I said at the start, you are damned if you do (the adjudicator departed from the obligation to follow a fair procedure) and damned if you don't (he didn't allow the responding party (Liverpool CC) to make submissions on a point before making his decision).