

## Evidence: In? Out? Can an adjudicator shake it all about?

### ***Cynthia Jacques and Elsie Jacques Grombach (t/a C&E Jacques Partnership) v Ensign Contractors Limited [2009] EWHC 3383 (TCC)***

#### INTRODUCTION

The recent TCC case of *Jacques v Ensign* provides a useful summary of the Court's application of the concept of natural justice to adjudication proceedings. The decision:

- Confirms that adjudicators enjoy a wide jurisdiction in considering evidence;
- Provides an example of the Court's discretion regarding the granting of a stay of execution;
- Gives a salutary reminder of the costs consequences of failing to beat a settlement offer.

#### THE FACTS

- In May 2006, the Employer, trading as C&E Jacques Partnership, engaged the Contractor, Ensign Contracts Limited, to renovate a number of flats in an apartment block in Liverpool for a contract sum of £339,000.
- There were a number of disputes and adjudications between the parties; the fourth adjudication concerned alleged deficiencies in the Contractor's work, claiming overpayment of £198,000.
- The Adjudicator's decision of October 2007 directed that the Contractor should re-pay to the Employer an overpayment of £29,000 plus VAT.
- The Contractor raised a series of jurisdictional objections to the fourth Adjudication decision and following a further abortive adjudication, the parties agreed to a Consent Order that the fourth adjudication decision should be declared "*null and void*".
- The fifth adjudication commenced the day after the date of the Consent Order. The dispute related, essentially, to what constituted the value of the Contractor's final account.
- The Employer sought re-payment of £187,000 and the Referral dated 6 August 2009 made reference to substantial defects in the works. The Contractor provided a detailed response seeking payment of £98,700 and made a number of references to the "*null and void*" decision in the fourth adjudication.
- Following the Employer's challenge to the references made to the fourth adjudication decision, the Adjudicator confirmed: "*I must make my decision based on my view of the evidence and submissions as presented to me. I find therefore that the previous Adjudicator's Decision is irrelevant and therefore inadmissible as evidence and consequently I should not even read it let alone have regard to it. It is part of an Adjudicator's role to exclude inadmissible evidence from his considerations.....*"
- Predictably, the Contractor reserved its rights to subsequently challenge the decision.
- Further pleadings were exchanged and the Adjudicator's decision of 26 October 2009, directed that the Contractor should pay £97,000 and the Adjudicator's fees of £26,000.

Beale and Company Solicitors LLP

London: Garrick House · 27-32 King Street · Covent Garden · London · WC2E 8JB · T: +44 (0)20 7240 3474

Bristol: Venturers House · King Street · Bristol · BS1 4PB · T: 0117 915 4021

Dublin: Hamilton House · 28 Fitzwilliam Place · Dublin 2 · T: +353 (0) 1 775 9505

- The Contractor failed to pay and the Employer commenced enforcement proceedings on 19 November 2009.

## **The decision: the Adjudicator did not breach the rules of natural justice by refusing to consider the previous adjudication decision**

Akenhead J's decision dated 22 December 2009 provides a very useful summary of the application of the rules of natural justice to adjudication. Essentially, the Court made a distinction between an adjudicator failing or refusing to consider a substantive defence and failing/refusing to consider all the evidence provided in support of that defence. Paragraph 26 of the judgement applied the principles of natural justice to the facts of the case:

- The Adjudicator must consider defences properly put forward by a defending party in adjudication.*
- However, it is within an adjudicator's jurisdiction to decide what evidence is admissible and, indeed, what evidence is helpful and unhelpful in the determination of the dispute or disputes referred to that adjudicator. If, within jurisdiction, the adjudicator decides that certain evidence is inadmissible, that will rarely (if ever) amount to a breach of the rules of natural justice. The position is analogous to a court case in which the Court decides that certain evidence is either inadmissible or of such little weight and value that it can effectively be ignored: it would be difficult for a challenge to such a decision on fairness grounds to be mounted.*
- Even if the adjudicator's decision (within jurisdiction) to disregard evidence as inadmissible or of little or no weight was wrong in fact or in law, that decision is not in consequence impugnable as a breach of the rules of natural justice.*
- ..... It is simply not practicable, usually, for every aspect of the evidence to be meticulously considered, weighed up and rejected or accepted in whole or in part. Primarily, the adjudicator needs to address the substantive issues, whether factual or legal, but does not need (as a matter of fairness) to address each and every aspect of the evidence. The adjudicator should not be considered to be in breach of the rules of natural justice if the decision does not address each aspect of the evidence adduced by the parties.*

## **THE PARTIAL STAY OF EXECUTION**

The Court was satisfied that there was a real risk that the Employer would not be in a position to repay the judgement sum or at least a significant part of it. The Court referred to the decision in *Wimbledon Construction Company 2000 Ltd v Derek Vago [2005] BLR 374* regarding the Court's discretion to grant a stay and imposed a stay of execution for £60,000 of the total judgement sum including interest.

In doing so, the Court was critical of the Employer's attempt to adduce further evidence regarding the stay following circulation of the judgement in draft. The Court, in any event, concluded that the further evidence was "at best inconclusive" and "inherently unreliable".

## **COSTS: THE EMPLOYER'S FAILURE TO BEAT THE CONTRACTOR'S OFFER**

The Court concluded that, in the ordinary course of events, the Employer would recover 80% of its costs as it had been successful in its application for summary judgement (the 20% discount reflecting the fact that the Contractor had been successful in respect of the stay of execution).

However, the Court identified three other factors:

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- Firstly, both the Contractor and Employer had made further applications following the circulation of the draft judgement (which they had both lost); the parties should bear their own costs of this;
- Secondly, the Contractor asked the Court to reflect its disapproval of the “misleading” factual evidence adduced by the Employer; the Court refused to do so as this had already been taken account of in the decision on the stay of execution;
- Thirdly and most significantly, the parties had entered into settlement discussions in which the Contractor had made a series of offers of settlement including an offer to pay the sum claimed in full by staged payments. The first payment of £50,000 was to be paid on 8 January 2010 and with further payments at £10,000/month thereafter. The offer was expressed to be open for acceptance until the date of the hearing on 14 December 2009.
- The Employer had requested personal guarantees to support the offer of staged payments. The Court concluded that this was not unreasonable but that such guarantees would never have been available from the Court, so the final outcome was that the Employer did not do better, and arguably did worse than the Contractor’s offer. However, as the offer was open for acceptance until the date of the hearing, the Court concluded that the large bulk of the costs would have been incurred in any event.

The Court concluded that the Employer should only be entitled to 50% of its costs entitlement up to 14 December 2009, which equated to 40% of its costs (i.e. 50% of 80%). The Court made a further reduction to the Employer’s costs, reducing them on summary assessment from £27,000 to £20,000. The Contractor was therefore ordered to pay £8,000 (i.e. 40% of £20,000).

## CONCLUSION

The case demonstrates the wide discretion which Adjudicators have regarding conduct of an adjudication. This includes the discretion to disregard evidence as inadmissible or of no weight. Even if such a decision is wrong in fact or in law, that decision does not amount to a breach of natural justice.

For further information please contact Mark De Freitas on 020 7420 8652 or [m.defreitas@beale-law.com](mailto:m.defreitas@beale-law.com)