

Defences in Adjudication - Shona Frame

The issue of what material can be considered by Adjudicators, whether that be material submitted by a Referring Party or defences put forward by Respondents, has come before the courts on a number of occasions. The position does now appear to have been clarified following a string of cases.

Edmund Nuttall Limited v R G Carter Limited [2002] EWHC400(TCC), concerned enforcement of an Adjudicator's decision. The issue which arose was whether new material submitted by the Referring Party for the first time in the course of the Adjudication should have been considered.

Nuttall had submitted a claim in May 2001 seeking an extension of time and payment of loss and expense. The claim was rejected, thereby triggering a dispute. Nuttall referred the dispute to Adjudication. In the Adjudication, Nuttall submitted a report dated December 2001. The justification for the claim for extension of time and the sums claimed for loss and expense within that report were different from those in the May claim.

Carter submitted that the Adjudicator should not consider this new report because it constituted a new claim which Carter had not seen before. However, the Adjudicator disagreed and made his Decision on the basis of it.

In reaching his decision, HH Judge Richard Seymour QC considered authorities which defined what constituted a "dispute". Reference was made to Lord Denning MR in *Monmouthshire County Council v Costelloe and Kemple Limited* (1965) where it was accepted that for a dispute or difference to arise there must be a claim and a rejection of that claim.

Reference was also made to HH Judge Thornton QC in *Fastrack Contractors Limited v Morrison Construction*, again regarding the meaning of the word "dispute" in the context of Adjudication. In that case, it was said that a dispute could only arise once the subject matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion. Further, if the submission being made was that what had been referred to the Adjudication was broadly the same dispute but that there were amendments of detail and degree, it might be that there would be a common core of disputed material which could legitimately be dealt with in an Adjudication.

In the Nuttall decision, the judge considered that the real question he had to answer was whether the dispute which the Adjudicator decided upon was the one which existed at the time of the Referral. He drew a distinction between a dispute and a claim. A dispute could be about a claim but there was more to a dispute than simply a claim which had not been accepted.

He came to the view that for there to be a dispute, there must have been an opportunity for the parties each to consider the position adopted by the other and to formulate arguments. He thought there was a dispute where a party had been

afforded an opportunity to evaluate the position of the other party and that they either failed to do so or refused to advise of the results of the evaluation.

However, where the party had an opportunity to consider the position of the other party, what constituted the dispute was not only the claim which was rejected but the whole package of arguments advanced and relied upon by each side.

He did recognise that for an Adjudication, a party could refine its arguments and abandon points without fundamentally altering the nature of the dispute. However, he considered that a party could not abandon wholesale facts previously relied upon or arguments previously advanced and contend that because the claim remains the same, the dispute is the same.

He considered the whole concept underlying Adjudication is that the parties should first themselves have attempted to resolve their differences and only if they were unable to do so should the facts and arguments previously rehearsed be referred to an Adjudicator. If this was not the case, then there was a risk of premature and unnecessary Adjudications in cases where one party had not had a proper opportunity to consider the arguments of the other and there was the risk of ambushing a party by new arguments and assessments which may have impacted on the way they dealt with the claim, had this information previously been available.

On the facts in the Nuttall case, he considered that what was referred to Adjudication in December 2001 was the dispute in relation to the May claim submission and comprising the facts relied upon by each side and the arguments which had been rehearsed up to the Referral in December. That package did not include the December report which post-dated the Referral. The December report might itself, in due course, become a new dispute but it was not part of the dispute which existed at December 2001. On this basis, the Adjudicator's Decision was found to be unenforceable.

This approach would work best in the context of full and frank exchanges between the parties where the arguments are rehearsed. It could cause difficulties where one party simply rejects a claim without giving much in the way of reasoning. Further, the idea of "refined" arguments being allowed but wholesale change not gives rise to uncertainty about where the line is and whether it has been crossed.

The position was developed further in *Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC)*.

Urvasco engaged Cantillon to carry out demolition, piling and other works. Disputes arose which were dealt with in Adjudication. These concerned Cantillon's claims for extension of time and loss and expense. Sums were awarded to Cantillon by the Adjudicator but Urvasco refused to pay, claiming that the Adjudication had no jurisdiction and had breached the rules of natural justice in relation to a claim for 13 weeks extension of time. It was argued that Cantillon had claimed for a specific 13 week period and for associated costs. Given this, it was argued the Adjudicator did not have jurisdiction to allow costs for a different 13 week period and that he should at least not have done so without giving Urvasco the opportunity to submit evidence in relation to the costs for that other period.

Mr Justice Akenhead considered the issue of how and when a dispute can arise having considered cases such as *AMEC Civil Engineering Limited v Secretary of State for Transport* and *Collins (Contractors) Limited v Baltic Quay Management*. He considered that courts (and also Adjudicators and Arbitrators) should not adopt an

overly legalistic analysis of what the dispute between the parties is. It is necessary to determine in broad terms what the disputed claim or assertion is. It cannot be said that this is necessarily defined or limited by the evidence or argument submitted by either party to each other before the referral to Adjudication or Arbitration. The reference to Arbitration or Adjudication may be widened by the nature of the defence put forward in the course of the proceedings. This was contrary to the position advanced in *Nuttall v Carter*.

The judge considered that it was necessary to look at the claim which had been made and the fact it had been challenged as opposed to the precise grounds on which it had been rejected. It was therefore open to a defendant to raise any defence to the claim when it was referred to Adjudication or Arbitration. In the same way, the claiming party would not be limited to the arguments, contentions and evidence put forward before the dispute crystallised. The Arbitrator or Adjudicator had to resolve the referred dispute which was essentially the challenged claim but would be able to consider any argument, evidence or other material for or against the claim in resolving the dispute.

It was said that the Responding Party can put forward any defence in an Adjudication, whether argued previously or not. It followed from that though, that the Adjudicator could rule not just on that defence but also on the ramifications of that defence in so far as it impacts upon the fundamental dispute. Where parties put forward arguments, the Adjudicator could not be said to be going off on a frolic of his own if he addressed these.

In this case the Adjudicator considered the dispute to be related to a claim for loss and expense for 13 weeks due to a piling variation, not loss and expense for a specific 13 week period. Urvasco's defence had been that the losses claimed could not be recovered because they related to a later period. That was effectively an acceptance that there were losses and the Judge found that the Adjudicator could deal with that issue, it having been raised.

The *Cantillon* case was followed a few months later by *Quartzelec Limited v Honeywell Control Systems Limited [2008] EWHC 3315 (TCC)*.

In the course of an Adjudication, Honeywell put forward a new ground of defence. Quartzelec had argued in the Adjudication that because this defence had not been raised prior to the Notice of Adjudication, it could not form part of the dispute which was referred to the Adjudicator.

The judge, HH Judge Stephen Davies, agreed with Akenhead J's assessment in the *Cantillon* case. He considered that where the dispute referred to Adjudication was one involving a claim to be paid money, it was difficult to see why a respondent should not be entitled to raise any defence open to him to defend himself against that claim, regardless of whether that had been raised prior to the Adjudication, although subject to considerations of natural justice.

He considered the Adjudicator not only had jurisdiction to consider such defence but that he should consider such defence. The Adjudicator should consider the validity of the defence in all the circumstances. That amounted to a decision about the merits of the defence as opposed to a decision as to whether or not the Adjudicator had jurisdiction to consider the defence in the first place.

Given that the Adjudicator should consider such defences, the judge decided that if he failed to do so, he was not properly performing the task he had been appointed to

do. Further, he would not have been acting in accordance with natural justice. This was on the basis that the respondent would not have been heard on all the defences which he put forward.

On the basis of these two later cases, a much wider approach is being taken to what may be submitted and considered in Adjudications. In terms of defences, the Adjudicator is obliged to consider any arguable defence submitted to the claim. In doing so, however, Adjudicators do have to be alive to considerations of natural justice and give parties sufficient opportunity to present and respond to the cases put forward.

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