

Adjudication – When Will an Adjudicator’s Decision Not Be Enforced?

The recent case of RBG Ltd v SGL Carbon Fibers Ltd is of interest partly because it is one of the very few decisions dealing with NEC3, but also because it is one of the rare instances of the Court refusing to enforce an Adjudicator’s decision.

The parties were in dispute over payment of sums set out in invoices. The Adjudicator ordered payment of certain sums. SGL refused to pay and RBG therefore raised a Court action for enforcement of the Adjudicator’s decision. SGL defended this on the basis that the Adjudicator had failed to exhaust his jurisdiction by failing to consider all the evidence put to him and by misconstruing the extent of the dispute between the parties. It was also argued, as an alternative, that the Adjudicator was in breach of natural justice which required him to hear both parties.

The Notice of Adjudication referred to the dispute as including payment of sums set out in invoices and interest. SGL argued that this meant the Adjudicator had to consider their argument that there had been overpayments so that, even if the sums in the invoices were due, no further payment required to be made.

There was consideration of the contractual mechanism for payment in NEC3 Option C. This sets out how to assess the amount due at each assessment date. The amount due is the Price for Work Done to Date (PWDD), plus other amounts to be paid to the Contractor, less amounts to be retained. The assessment involves calculating an accumulating total and allows for corrections in that the assessment includes, as a potential deduction, cost which should not have been paid.

The Adjudicator had regard only to the sums sought in the invoices but he declined to have regard to disallowed costs or overpayments at an earlier stage of the works. He considered earlier overpayments would have to be dealt with in a separate Adjudication.

The judge (Lord Menzies) took the view that the question in the Notice of Adjudication raised the issue of RBG’s entitlement to payment of the sums in the invoices. The contractual mechanism which regulated assessment of the entitlement was on an accumulating PWDD. Entitlement to payment depended on the total of the PWDD being accurate. The PWDD was allowed, in the contract, to be reviewed and corrected. Given that, the Adjudicator should have revisited the PWDD and considered whether it contained any elements of overpayment.

The defence put forward by SGL in the Adjudication was that, regardless of whether or not the invoices were correctly vouched, no payment was due because of the earlier overpayments. The judge found that even if that did not fall within the scope of the dispute as defined in the Notice, it would still fall within the scope of the Adjudication. Here the judge made reference to Lord Macfadyen in *Construction Centre Group v Highland Council (2002)* where he said that whilst the scope of the Adjudication is defined by the Notice of Adjudication, it is also the case that any ground that may be founded upon by the responding party to justify his position also falls within the scope of the Adjudication. If the Notice raises the issue of whether a

particular sum is due, the Adjudicator must consider any relevant defence on which the respondent relies in arguing that the sum is not due.

In the RBG case, the judge considered that the question of the earlier overpayments fell within the Adjudicator's jurisdiction as set out in the Notice. However, even if it did not, on the basis of Lord Macfadyen's views in Construction Centre Group, the overpayments were clearly a relevant defence relied upon by SGL which should have been considered by the Adjudicator. It was found that the Adjudicator had failed to exhaust his jurisdiction as a result of misunderstanding his remit.

The judge also considered whether there had been a breach of natural justice. The decision was not made on the basis that there had been, but he did note that such a breach would have been substantial since it would have amounted denying SGL a fair opportunity to present its case.

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