

Case Law Recap

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Darya Belsner v CAM Legal Services Limited [2022] EWCA Civ 1387

Case and background information

- The court determined whether the Solicitors Act 1974 s.74(3) and CPR r.46.9(2) applied to claims brought through the RTA portal where no County Court proceedings had actually been issued.
- The appellant solicitors had acted for the respondent client in her damages claim arising from a road traffic accident.
- The claim was made under the Pre-action protocol for low value personal injury claims in road traffic accidents. It was settled at stage 2, after the provision of medical reports, with the defendant's insurer paying damages of £1,917 plus fixed costs of £500 plus disbursements plus VAT.
- The solicitors retained the fixed costs and paid the client the damages less a success fee.
- The client had signed a retainer under which she agreed to personally pay any shortfall in the solicitors' costs recovered from the negligent defendant. The solicitors had estimated their base costs (not including disbursements or VAT) at £2,500, on the assumption that most such claims settled within the portal after production of medical evidence and financial losses.
- The client had argued that she was not informed that the fixed costs that would be recovered were going to be five times less than she would have to pay.
- Under s.74(3), "the amount which may be allowed on the assessment of any costs ... in respect of any item relating to proceedings in the county court shall not, except insofar as rules of court may otherwise provide, exceed the amount which could have been allowed ... as between party and party in the proceedings".
- The solicitors contended that r.46.9(2) applied, which stated that s.74(3) did not apply where the solicitor and client had entered into a written agreement which expressly permitted payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings.
- The High Court found that the solicitors could not rely on r.46.9(2) because the client had not given her informed consent to the agreement.
- The main issue was whether the judge erred in assuming that s.74(3) and r.46.9(2) applied to cases brought through the RTA portal where no County Court proceedings were actually issued.

Held

Appeal allowed.

- Did s.74(3) and r.46.9(2) apply to claims brought through the RTA portal without County Court proceedings being issued?
- Section 74 was entitled "Special provisions as to contentious business done in county courts". The distinction between contentious and non-contentious business was fundamental to the costs regime established by the 1974 Act.
- The comments in *Bott & Co Solicitors Ltd v Ryanair DAC [2022] UKSC 8, [2022] 2 W.L.R. 634, [2022] 3 WLUK 198* accorded with the decision in *Simpkin Marshall, Re [1959] Ch. 229, [1958] 10 WLUK 88* that business was only to be regarded as contentious if proceedings had in fact begun.

- The caveat in s.87 stating that the definition only applied "except where the context otherwise requires" did not change matters; there was no context in s.74(3) that required it to be applied to costs that were not "in respect of any item relating to proceedings in the county court".
- It was notable that employment tribunal cases were regarded as non-contentious business. Further, nothing in s.61 allowed a contentious business agreement to cover cases where no proceedings were issued in any court. In those circumstances, it was not possible to hold that s.74(3) applied to claims brought through the RTA portal without County Court proceedings actually having been issued, *Bott & Co* considered, *Simpkin Marshall* applied
- Rule 46.9(2) could not enlarge the meaning of s.74(3). An updating construction of s.74(3) could not make a section that applied specifically and only to contentious business apply to claims being brought within an online pre-action portal.
- That was made even clearer by the expressed objective of the Protocol being "to ensure that ... the defendant pays damages and costs using the process set out in the Protocol without the need for the claimant to start proceedings"
- The court commented that its conclusions did not mean that the distinction between contentious and non-contentious costs was a meaningful or logical one now that the pre-action online portals formed a significant part of the litigation environment.
- The 1974 Act was in urgent need of legislative attention. Moreover, its conclusions did not mean that it was logical for s.74(3) and r.46.9(2) to apply to cases where proceedings were issued in the County Court and not to cases pursued through pre-action portals

Northumbrian Water Ltd v Doosan Enpure Ltd and another [2022] EWHC 2881 (TCC) **(14th November 2022)**

Adjudicator's decision enforced, appeal for a stay in arbitration under s.9 Arbitration Act 1996 rejected.

Background to the dispute

- NWL is a statutory undertaker engaged in the supply of potable and raw water and the collection, treatment and disposal of sewage in England. It serves 2.7 million people in the Northeast of England
- The JV, comprising Doosan Enpure Limited and Tilbury Douglas Construction Limited (formerly known as Interserve Construction Limited), was formed for the purpose of performing a contract with NWL.
- On 23 March 2016 NWL entered into a contract with the JV based on the NEC3 Engineering and Construction Contract Option C for the design and construction of the 'Phase 2 Horsley Water Treatment Works'.
- The works are described in the contract data as the design, supply, construction, installation, testing, commissioning and putting into operation an upgrade to Horsley Water Treatment Works.
- Clause Z37.2 of the Contract provides that each of the JV parties are jointly and severally liable to NWL for the performance of the Contractor's obligations under the Contract and for all obligations and liabilities of the Contractor arising under or in connection with the Contract.

The parties involved had expressly agreed to adjudicate all disputes under Option W2 of the NEC3 Engineering and Construction Contract, Option C. Some of the works were excluded works from the statutory adjudication by section 105(2) Construction Act 1996. The tribunal was arbitration.

Due to cost overruns and delays, a dispute arose, resulting in the claimant (NWL) giving notice to terminate the defendant's (Doosan) obligation to complete the works. The termination relied on Doosan's failure to comply with the contractual obligations. The dispute was then referred to adjudication where both parties were seeking declarations and claiming sums due. NWL's termination was deemed valid, awarding NWL the £22.5 million that went unpaid. Enforcement proceedings than began. Doosan then served a notice of dissatisfaction as required under Option W2. It is also issued an application to stay the enforcement proceedings for arbitration under section 9 Arbitration Act 1996.

The section 9 application failed; the judge noted that the defendant participated in the adjudication without raising a jurisdictional challenge. In the defendant's notice of dissatisfaction, they did not challenge jurisdiction or raise a breach of natural justice, they simply accepted some parts of the adjudicator's decision and challenged other parts. By doing this, the defendant had partly accepted the validity of the adjudicator's decision, therefore, losing any right to challenge it. This meant that the adjudicator's decision was enforced, becoming final and binding as a matter of contractual obligation under clause W2.3(11).

Manor Co-Living Ltd v RY Construction Ltd [2022] EWHC 2715 (TCC) **(31st October 2022)**

Background of the dispute

- In October 2020, Manor Co-Living Limited (MCL) appointed RY Construction Limited (RYC) to carry out extension and conversion works at a property. The contract was based on the JCT Standard Building Contract 2016 with bespoke amendments.
- Disputes arose on the project. In November 2021, the Contract Administrator (CA) issued a notice on RYC by email, specifying defaults and warning of MCL's intention to terminate if the defaults were not remedied within 14 days.
- Under cover of an email sent in December, the CA issued a letter to RYC, terminating the contract
- RYC responded, asserting that MCL was in repudiatory breach of contract on the grounds that:
- the Termination Notice was invalid. It should have been given by MCL (not the CA), and delivered by hand or by recorded, signed for or special delivery
- MCL/the CA had, in early December, arranged for locks to be changed on the site, preventing RYC from carrying out the work
- MCL denied that it was in repudiatory breach.
- RYC referred the dispute to adjudication, seeking a decision on whether MCL had correctly served the Termination Notice and complied with the notice requirements in clause 8.4 in the contract
- In its Notice of Adjudication and Referral, RYC stated that the question of whether MCL had substantial grounds to terminate the contract was not part of the matters referred.
- MCL raised this issue in its response, stating that it had been entitled to terminate the contract based on common law, claiming the Termination Notice acted as a valid acceptance of RYC's alleged repudiation of the contract.
- The adjudicator found in favour of RYC. Deciding that the prevention of RYC accessing the site, MCL was in repudiatory breach of contract.
- He stated that MCL's conduct was clearly intended to make further performance by RYC impossible.

- The adjudicator decided that in regard to MCL's defence he had no jurisdiction to consider whether MCL had substantive grounds to terminate and that the notice of termination was not a valid acceptance of a repudiatory breach of contract.

MCL then issued part 8 proceedings.

Held

- The court considered the judgment in *Global Switch Estates v Sudlows*, which set out a series of principles derived from case law, regarding what constitutes the scope of an adjudication, and when an adjudicator's failure to consider an issue within that scope might amount to a breach of the rules of natural justice.

- The court considered that it had been necessary for the adjudicator to consider whether MCL had successfully terminated the contract at common law, to properly determine the dispute.

- The court disagreed with RYC when it argued that, at the correct level of abstraction, all the adjudicator had needed to do was answer the question, 'Did MCL successfully terminate the contract at common law?'.

- In the court's view, the common law termination issue consisted of two elements that had to be considered:
  (i) whether RYC was in repudiatory breach
  (ii) whether MCL had validly communicated acceptance of the repudiatory breach. The court stated that it was 'plainly permissible' for the adjudicator to start his analysis with the second issue.

- It said that, if the adjudicator *had* found that MCL had communicated acceptance of a repudiatory breach, then in those circumstances, he should have proceeded to consider the first issue—a failure to do so would have breached the rules of natural justice. However, in the court's view, this problem simply did not arise.

- Following its review of the parties' adjudication submissions and the adjudicator's decision, the court concluded that:
  - MCL had not actually argued in the adjudication that its conduct, in preventing RYC from accessing the site, communicated acceptance of repudiatory breach. In the court's view, there could not have been 'a breach of natural justice for the Adjudicator to fail to deal with a case which was not advanced'

  - the adjudicator had dealt 'head on' with the question of whether the Termination Notice was a valid acceptance of a repudiatory breach and rejected it. Having found that MCL had not communicated acceptance of repudiation by its Termination Notice, the adjudicator had therefore determined that MCL's repudiation case failed on its merits and so there had been no need for him to consider whether RYC was actually in repudiatory breach

- Even though the adjudicator had been wrong to conclude the question of RYC's repudiatory conduct was beyond his jurisdiction, this ultimately had no bearing on the substance of his decision. Accordingly, there had been no breach of the rules of natural justice.

Appeal denied

D McLaughlin & Sons Ltd v East Ayrshire Council [2022] CSIH 42

Background of the dispute

- D McLaughlin and Sons Ltd (DMS) was engaged by East Ayrshire Council (EAC) to construct an extension to a school in East Ayrshire. The contract included the terms of the Standard Building Contract with Quantities for use in Scotland, 2011 edition (the Contract).
- The Contract provided for the issue of 'Interim Certificates' and a 'Final Certificate' after completion of the works. The Final Certificate specified the final Contract Sum and any balance payable, taking into account previous payments. Clause 1.9.1 of the contract provided that, in any dispute resolution proceedings, the Final Certificate would have effect as 'conclusive evidence' in respect of several matters including the need for additions to or omissions from the Contract Sum. However, if the Final Certificate was challenged in proceedings within 60 days of issue, it is only conclusive in respect of matters which are not subject to challenge.
- On 10 August 2017, DMS issued an interim payment notice, which taking into account sums previously paid meant that circa £950K was due to be paid. EAC did not issue a pay less notice, so this became the sum due. By July 2019, EAC had made some payments towards the sum due, but had not paid the full amount. On 17 July 2019 EAC issued a final certificate, which brought out a balance due to DMS of circa £1,400, which it paid.
- Within the required contractual time EAC challenged the Final Certificate by raising court proceedings. However, notwithstanding the court proceedings, in March 2020, EAC raised an adjudication in relation to the August 2017 interim certificate, seeking the balance between sums paid and the sum due (in the absence of a pay less notice). EAC defended the adjudication arguing that: (i) the payment notice was invalid, as there had been a miscalculation in the due date; and (ii) in any event the Final Certificate was now conclusive evidence of sums due to DMS. The adjudicator decided that as this was effectively a 'smash and grab' adjudication, the true value of the work (and thus the Final Certificate) were not at issue and that the sole scope of the adjudication was the impact of the absence of a pay less notice. Accordingly, he awarded the full amount claimed to EAC. No challenge to his jurisdiction was taken and EAC did not dispute the decision within 28 days as it needed to do in order to preserve the right to challenge it in final proceedings.
- DMS raised proceedings to enforce the award, separate from the existing proceedings relating to the Final Account. DMS counterclaimed, seeing declarations that (i) the Final Certificate was conclusive in the adjudication, because the adjudication had not been raised within 60 days of the Final Certificate; and (ii) the Interim Payment Notice was invalid.
- In two separate decisions, Lord Clark decided that: (a) the decision should be enforced as none of the limited grounds for resisting enforcement were met. In particular, the limited circumstances where a court could look at the underlying final merits (per *Hutton Construction v Wilson Properties London* [2018] 1All ER (Comm)) 524 were not met; and (b) the counterclaim could not proceed, because even although he reasoned that the Final Certificate was conclusive in the adjudication because the dispute about it had been raised in earlier, separate proceedings (applying *Marc Gilbard's 2009 Settlement Trustees v OD Developments and Projects* [2015] EWHC 70 (TCC)), the adjudicator's decision had not been challenged within 28 days.
- EAC appealed.

Held

- Each of the three appeal court judges took a different approach.
- The Lord President (Scotland's most senior judge) took the view that the Final Certificate did not supersede Interim Certificates other than in respect of the Contract Sum as valued at the

end of the contract. The Final Certificate only provides an entitlement to payment of the balance of sums due. The adjudication was not a challenge to the Final Certificate and so the arguments about whether it was binding or not did not apply and *Marc Gilbard's Trustees* did not apply. Even if it was conclusive, the decision of the adjudicator had not been challenged in time.

- Lord Woolman, in a very short opinion, considered that the adjudication was in effect a challenge to the Final Certificate and that therefore *Marc Gilbard's Trustees* did apply and that the adjudicator ought to have made a nil award. However, despite sympathising with EAC's position, he refused the appeal because the adjudicator's decision had not been challenged within 28 days.
- Lord Malcolm would have allowed the appeal. In a lengthy dissent, influenced by the proposition that adjudication was intended to assist contractor cash flow, he concluded that the Final Certificate was binding and that the adjudicator ought not to have decided in favour of DMS. In relation to the time limit on challenging adjudicator's decisions (which had not been complied with) his opinion was that it made little sense for these provisions to apply to adjudications raised long after the Final Certificate.