Alex Hickey KC successful in Northumbrian Water Ltd v Doosan Enpure & Anor [2022] EWHC 2881 (TTC)

Alexander Hickey KC appeared for the successful claimant in Northumbrian Water Ltd v Doosan Enpure & Anor [2022] EWHC 2881 (TCC) (14 November 2022), the second case this year to consider whether an arbitration clause in a construction contract required the parties to refer any issues as to enforceability of an adjudication award.

The claimant ("**NWL**") contracted with a joint venture comprised of the defendants ("**the JV**") for the design and construction of waste water treatment works in the North East of England. The parties fell into dispute about responsibility for delay as well as alleged defects in the JV's work. NWL terminated the contract in May 2021, on the primary basis that the JV had substantially failed to perform its obligations.

The parties disagreed about the validity of NWL's termination, and there was a large difference between them as to certain sums due following termination : the JV said it was entitled to a net payment of nearly £33m as well as substantial extensions of time. NWL said that in fact, the JV was indebted to NWL to the tune of £50m. With a difference between them of nearly £80m, covering complex delay and technical issues, the stage was set for a mighty battle.

Section 105(2) of the Housing Grants, Construction and Regeneration Act 1996 excludes much work related to water treatment from the scope of the statutory adjudication regime. The parties had however agreed a tiered dispute resolution provision under NEC terms, with adjudication followed by arbitration. NWL referred an adjudication seeking determination of the net sums due under the termination account.

After what must have been a heavy adjudication, with time for the Decision extended by agreement to around 10 weeks after the Referral was issued, NWL prevailed. The JV obtained a partial extension of time, but that was not enough to extinguish its delay losses and other liabilities to NWL. The Adjudicator ordered the JV to pay NWL £22,458,540.04 plus interest.

The JV did not comply with that part of the adjudicator's decision and issued a notice of dissatisfaction in respect of various substantive findings made, stating an intention to refer those matters to arbitration for final determination. The JV did not raise any jurisdictional issues in respect of the adjudicator's decision. NWL issued proceedings in the TCC to enforce the decision in the usual way. The JV responded by making an application under section 9 of the Arbitration Act 1996 to stay those proceedings. The JV said that NWL's claim was a dispute "*arising under or in connection with*" the contract and therefore caught by the arbitration clause.

The Court decided that the contractual tiered dispute resolution made clear that a decision was final and binding unless a notice of dissatisfaction was given. Since the notice of dissatisfaction did not raise any jurisdictional issues about enforcement, there was no dispute about enforcement capable of being taken to arbitration. In any event, as the Court noted, the practical effect of what the JV was saying would be to insert an intermediate step in the enforcement of an adjudication decision: the party trying to enforce would first have to commence and win an arbitration confirming that it had a right to enforce the decision, and then it would have to go to court to enforce the arbitration award under section 6 of the Arbitration Act 1996. That might seem uncommercial and contrary to the policy of the HGRCA 1996, but since this was a contractual rather than statutory adjudication the court ultimately had to be guided by the words of the contract.

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The court placed significant weight on the fact that the parties had agreed that an adjudication decision would be "*binding*" on an interim basis. If an adjudicator's decision could not be enforced except by way of the lengthy process outline above, it would be deprived of any efficacy in the meantime and therefore not "*binding*" in any real sense. Giving effect to that presumed intention meant reading the arbitration clause as excluding disputes concerning the enforcement of adjudicator's decisions.

The court also noted a conceptual problem in the JV's argument. It was trite law that an adjudicator's decision was either (1) valid and enforceable or (2) a nullity, because the adjudicator had acted outside their jurisdiction. Adopting the reasoning of Dyson J in Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] 1 BLR 93 Mrs Justice O'Farrell noted that if a party were to argue that an adjudicator's decision was unenforceable, it would necessarily be arguing that the decision was a nullity, and therefore had no status under the underlying contract whatsoever. If that were the case, then it could not be something "*arising under or in connection with*" the contract, and would not be caught by any arbitration clause.

A party faced with an adverse adjudication decision in a contract with a tiered dispute resolution clause will therefore usually be faced with a choice: to accept that the decision is binding and (if so advised) continue to fight the *merits* of the dispute by moving on to an arbitration on the merits; or to argue in court that the decision was a nullity and therefore could not be enforced.

This case follows on from the TCC's judgment earlier this year in Metropolitan Borough Council of Sefton v Allenbuild Ltd [2022] EWHC 1443 (TCC) in which HHJ Hodge KC dealt with similar issues and reached similar conclusions, albeit in relation to a statutory adjudication such that the public policy argument and adherence to the "pay now, argue later" had greater significance in the court's reasoning.

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