

Aecom Design Build Ltd v Staptina Engineering Services Ltd

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Executive Summary

It was held in *Aecom v Staptina*, that an adjudicator did not exceed her jurisdiction or breach the rules of natural justice by reaching an alternative declaration to the one sought in the Notice of Adjudication. The court therefore declined to make a declaration that would have severed parts of her decision.

The Facts

AECOM Design Build Ltd ("AECOM") brought Part 8 proceedings against Staptina Engineering Services Ltd ("Staptina") seeking a declaration that certain elements of a decision by an adjudicator dated 10 January 2017 ("the Decision") were unenforceable on the basis that the adjudicator had acted outside her jurisdiction and/or in breach of natural justice.

AECOM engaged Staptina to carry out mechanical installation works pursuant to an NEC Engineering and Construction Short Subcontract (the "Subcontract"). There were a number of disputes between the parties in relation to the validity of a Pay Less notice issued to Staptina and subsequent termination of Staptina's appointment, resulting in various deductions from Staptina's termination account.

The Decision was made in the third adjudication conducted between the parties by the same adjudicator. In brief, AECOM sought to pay less than the sums applied for by Staptina on the basis of deduction of the costs to rectify outstanding defects. Staptina sought certain declarations to the effect that AECOM was not entitled to make deductions for the cost of defects or for any other reason, "*or such declaration as the Adjudicator deems proper.*"

The Adjudicator decided that AECOM were in principle entitled to make deductions, but that those deductions must be confined to the sum it would have cost Staptina to remedy the relevant defect either before Completion or during the defect correction period. The relevant parts of the Decision stated at paragraphs 31-32

"All that is referred pursuant to the current Notice is the underlying principle, namely whether or not termination for convenience pursuant to Reason 5 leads to a right in principle for AECOM to make the two relevant deductions from Staptina's application.

However, I am empowered to decide how the sums to be deducted are to be assessed in the event that I find that deductions can be made, rather than simply stating that some form of deduction can be made in principle and no more."

AECOM argued in the Part 8 proceedings that the adjudicator, in reaching the second aspect of the decision, was acting outside of the scope of jurisdiction. AECOM submitted that all the adjudicator was entitled to do by way of answering the dispute was simply to answer the dispute referred to her as either "*yes - AECOM are entitled to make deductions for defects*" or "*no - AECOM are not entitled to make deductions for defects*". In any event, even if the adjudicator did have jurisdiction to deal with that aspect of the matter, AECOM argued that there was a breach of natural justice because it did not have a chance to make submissions as to how the deductions for defects ought to be quantified.

The Decision

Fraser J held that the adjudicator did not exceed her jurisdiction or breach the rules of natural justice. The court therefore declined to make a declaration that would have severed parts of her decision, for the reasons set out below:

Jurisdiction

Fraser J held that the scope of the jurisdiction of an adjudicator will not just be determined simply by the Notice of Adjudication, but also by the pleadings in the adjudication, pre-adjudication correspondence claims and assertions and the evidence submitted before the adjudicator.

Furthermore, it is open to an adjudicator to reach a decision which neither of the parties made submissions upon. This does not mean that an adjudicator is acting beyond jurisdiction, even if the decision reached is wrong in fact or in law. Put simply "*That would be answering the right question but in the wrong way. That is not the same as answering the wrong question.*"

In any event, as a matter of fact in this case, Fraser J held that the decision fell within the scope of the dispute referred to in the Notice of Adjudication.

Natural justice

Fraser J was not concerned that AECOM had made no submissions on the quantification of the deductions, and found that *"the adjudicator decided a point of importance on the basis of the material before her, and on a basis for which neither party had contended, and she was entitled to do so."*

The "catch all" element

AECOM argued that the "catch all" provision in the Notice of Adjudication, in which Stapina sought a certain declaration or *"such declaration as the Adjudicator deems proper"* was *"superfluous and in any event cannot alter the scope of the Notice of Adjudication."* However, Fraser J held that the inclusion of such "catch all" wording can allow an adjudicator to make an alternative declaration, as the adjudicator had done in this case.

However, Fraser J cautioned that such wording inviting alternative reliefs *"...is most unlikely to be determinative on its own, and should not be seen by parties as giving any adjudicator carte blanche to go outside the scope of the dispute referred to them in any particular case."*

Comment

The scope of the dispute referred to Adjudication is determined by all relevant material put before the adjudicator. On the basis of that material, an adjudicator is entitled to reach a decision for which neither party made submissions. That is based upon the principle that there is rarely only two possible answers to a question, particularly when it concerns matters of contractual construction.

The decision clarifies that whilst a "catch all" provision for alternative relief is unlikely to be determinative of itself. It appears not to give the adjudicator the ability to make decisions beyond the scope of the dispute referred to them, however it allows the adjudicator with the scope to reach an alternative declaration to the one sought.

It should also be noted that Fraser J included a stark word of caution to parties commencing fresh adjudications on the basis that Part 8 proceedings will succeed. Fraser J stated that *"It is simply not open to a party in a subsequent adjudication to advance a case which relies upon an earlier adjudication decision being treated as not binding upon the parties..."* and doing so clearly runs the risk of considerable wasted costs, duplication of effort and potentially proceedings for injunctive relief. Accordingly, parties ought to proceed on the basis of the adjudicator's decision being enforceable unless and until it is overturned in litigation or arbitration or by some other appropriate means.

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