

Penten Group Ltd v. Spartafield Ltd [2016] EWHC 317 (TCC)

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Executive Summary

An adjudicator derives his/her jurisdiction from the notice of adjudication. Where a notice contends that the contract between the parties is on a certain basis and on certain terms, this will not preclude the adjudicator from deciding that the terms of the contract are in fact different to that alleged by the Referring Party.

Facts

The Defendant employer ("Spartafield") engaged the Claimant contractor ("Penten") to carry out building works at Plumbers Row, London.

The parties executed a letter of intent with an intention to sign a JCT ICD contract, however, no contract in that form was ever entered into. The works began in mid-2013 but in April 2015, Spartafield terminated Penten's employment.

In October 2015 Spartafield commenced an adjudication, seeking declarations, amongst other things, that a valid construction contract existed between the parties "and the terms of that Contract include the provisions of ICD2011" ("the October Notice").

In November 2015, the adjudicator decided that a valid construction contract did exist between the parties "but that the terms of that contract were not the JCT Contract but the letter of Intent" ("the Decision").

On 20 January 2016, Spartafield served a notice of adjudication seeking a declaration, amongst others, "that the Adjudicator was neither required nor had the necessary jurisdiction to decide on the terms of the contract between the parties if he did not accept that it was ICD 2011." ("the January Notice").

Before the decision of the adjudicator had been received, Penten commenced Part 8 proceedings claiming declarations that:

- (1) the Decision was enforceable; and
- (2) any further adjudicator appointed will not have jurisdiction to determine the matter because the matters had already been referred to the first adjudicator and in any event, the notice of adjudication purported to refer more than one dispute to adjudication.

Summary

Coulson J, relying on established case law, confirmed that the adjudicator derives his/her jurisdiction from the terms of the adjudication notice, and that any jurisdictional issues will be considered by reference to the nature, scope and extent of the dispute identified in that notice.

Coulson J then went on to conclude that the adjudicator did have the necessary jurisdiction to decide that the contract was on the basis of the letter of intent, for the following reasons:

1. The October Notice sought a declaration that there was a binding contract between the parties and it would be impossible to answer that question without deciding what the terms of the contract might be.
2. Whilst Spartafield did not refer to the letter of intent in its referral or claim, it could not "*artificially restrict the responding party's defence to its claim by saying that, because they made no reference to a particular point in the notice of adjudication, it therefore cannot arise for decision. It is not appropriate to construe a notice of adjudication in such a way as to deprive the responding party of a defence*".
3. On deciding that the ICD terms had not been incorporated into the contract, the adjudicator then had no sensible alternative but to find that the terms were as set out in the letter of intent.

In respect of granting the declarations Penten sought under (2) above, Coulson J:

1. Confirmed the well-known principle that it is not permissible to refer to adjudication a dispute which has already been decided, and concluded that it was not open for another adjudicator to decide that the contract incorporated terms

other than the letter of intent. However, Coulson J declined to grant the declaration sought on the basis that it may be too wide and there may well be other matters in the January Notice that are not all caught by the adjudicator's decision.

2. Confirmed the principle that only one dispute can be referred to adjudication but that "*a dispute about terms and a dispute about the claims under those terms are all part of a single dispute. Otherwise the whole basis of adjudication becomes unworkable*".

Comment

This decision confirms many well-known principles and reminds parties that it cannot preclude an adjudicator from jurisdiction by asserting the contractual basis between the parties; it is open to the adjudicator to decide otherwise. The Judgment is of further interest due to Coulson J's important observations on the difficulties faced by adjudicators in relation to contractual interpretation since the changes to the Housing Grants, Construction and Regeneration Act 1996 and the difficulties caused by what he termed "*serial adjudication*".

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