



Maurice Rifat

Maurice Rifat comments on his recent success in the TCC in the case of *Dacy Building Services Ltd v IDM Properties LLP [2018] EWHC 178 (TCC)*.

Enforcement of Adjudication Awards in Relation to Oral Construction Contracts. How Hard Can It Be?

This was the third Act in the saga that is *Dacy Building Services v IDM Properties LLP*.

On 6th February 2018 the Judgment of Fraser J in the TCC was handed down in the which he upheld the adjudication award (Act 1) in favour of the Claimant in relation to payments due following payment applications under an oral construction contract, which was denied by the Defendant, and which the Claimant attempted to enforce by way of a summary Judgment application before Jefford J in *Dacy Building Services limited -v- IDM [2016] EWHC 3007 (TCC); [2016] All ER (D) 18 (Dec); [2017] BLR 114 (Act 2)*.

The summary judgment application was unsuccessful. Jefford J declined to grant summary judgment to enforce the adjudicator's decision, finding that the factual dispute regarding the parties' alleged oral contract was too complex for summary judgment. She held that the defendant had a real prospect of succeeding in its defence, which was more than "fanciful" in that the Defendant asserted that it was not clear who (if anyone) the Claimant had contracted with, despite the Claimant having deployed substantial resources to the project site. Notwithstanding this conclusion, Mrs Justice Jefford did note Coulson J's comments in *Penten Group Ltd v Spartafield Ltd [2016] EWHC 317 (TCC)* regarding the "latitude" that a Court should give adjudicators who have to grapple with oral contracts.

However, in finding that an oral construction contract had been made between the representatives of the parties at a 5-10-minute meeting at a bus terminus adjacent to the project site following a trial of this singular issue, Fraser J upheld the adjudicator's decision and gave Judgment for the Claimant of circa. £280,000 in unpaid applications and interest.

Of note in relation to adjudicator's powers and the problems they face Fraser J said the following;

"[3] ...adjudication enforcement...is to resolve disputes between the parties under construction contracts speedily. It must however be emphasised that it will only be in very rare cases that adjudication enforcement applications will result in trials relevant to that enforcement issue...if the jurisdictional point was simply a matter of law (for example of contractual or statutory construction) the court would deal with it summarily. The position was potentially different if the jurisdictional challenge was dependent on fact and evidence, where the issue that the Court would have to decide would be whether the Defendant had no, or a realistic prospect of establishing that there was no contract. The issue in such cases is often whether or not there was a concluded contract at all. The Courts will be reluctant to find that

there was no concluded contract if the subject matter of the putative contract has been performed....it will usually be possible for such issues to be decided summarily. A trial, with contested evidence given orally, will only in my judgment very rarely be justified.

...

“[85] Parliament having decided that oral construction contracts should fall within the statutory regime of adjudication, this is not the place to debate....the possibility of the practical difficulties that may arise as a result. However, this case is a good example of such difficulties that may occasionally arise where a contract is purely oral and one party to it flatly denies that such an agreement was made. In Penten Group Ltd -v- Spartafiled Ltd [2016] EWHC 317 (TCC) Coulson J (at paras. [27] & [28]) made certain comments to the effect that the Court should and would take a more generous view of the scope of the adjudicator’s jurisdiction where an oral contract was concerned...

“[86]Jefford J described those points as “well made” at [35] in her Judgment in this case on the enforcement proceedings and I agree...I wish to repeat (my) sentiments at [3] above. It will usually be possible for such issues to be resolved summarily. A trial, with contested evidence given orally, will only in my judgment very rarely be justified even on the question of whether there was a contract at all. It must be remembered that adjudication decisions simply deal with the position of the parties on an interim basis. The latitude to which Coulson J referred to in that case will not lead to any permanent injustice.”

Does this mean that the TCC will deal summarily with the vexed issue of whether there was an oral contract at all where one party flatly denies it? This may result in the TCC pushing for a

harder and more strident analysis when applying the test for summary judgment. A helpful tip for future adjudications arising from oral construction contracts which may be challenged, is to include in the Referral Notice a specific request for the adjudicator to decide as a discreet and separate issue whether an oral construction contract exists. If the challenging party agrees to the appointment on the basis of the Referral Notice, then arguably jurisdiction and thus enforcement cannot be challenged.

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