



LEGAL BRIEFING

Thermal Energy Construction Ltd v AE & E Lentjes UK Ltd

[2009] EWHC 408, TCC, HHJ Stephen Davies

The Facts

This was an application by Thermal Energy Construction Limited (“Thermal Energy”) to enforce against AE & E Lentjes UK Limited (“Lentjes”), a decision of an adjudicator, in which he decided that Lentjes should pay Thermal Energy the sum of £904,567.00, plus VAT. Thermal Energy issued proceedings to enforce the decision and applied for summary judgment.

The application was opposed by Lentjes because the adjudicator failed to give reasons in respect of an issue which was a necessary element of his decision on the underlying dispute and as a consequence it was argued that Lentjes suffered substantial prejudice such that the decision should not be enforced by the court.

The sub-contract included a provision for adjudication in accordance with the TeCSA Adjudication Rules 2002. The notice of adjudication identified the dispute as being Lentjes’ failure to properly value and certify payment for certain elements of the mechanical erections services work being carried out. It requested the adjudicator to provide reasons for his decision.

In the response, Lentjes had a defence by way of counter-claim operating by way of set-off in relation to its liability to its client for liquidated damages under the main contract. In its reply, Thermal Energy took issue with the response by asserting that the adjudicator had no jurisdiction to consider the defence and secondly that in any event the claim was barred by the overriding conditions of the contract.

The adjudicator’s decision made no express reference to the set-off and counter-claim advanced by Lentjes in its response and he did not make any reference to the jurisdictional challenge which Thermal Energy had made in relation to Lentjes’ set-off and counter-claim.

The Issues

There were three issues before the court:

- (i) Did the adjudicator give any or any intelligible reasons in relation to the set-off and counter-claim advanced by Lentjes?
- (ii) Did Lentjes suffer substantial prejudice as a result of the failure to provide reasons?; and finally
- (iii) Did Lentjes fail to follow the procedure envisaged by the TeCSA Rules which permits the parties to ask the adjudicator to correct the errors in his decision?

The Decision

If an adjudicator is requested to give reasons, a brief statement of those reasons will suffice. The reasons should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues. It will only be in extreme circumstances that the court will decline to enforce an otherwise valid adjudicator’s decision because of the

inadequacy of the reasons given. It would need to be shown that the reasons were absent or unintelligible and that as a result, he had suffered substantial prejudice.

However, there is clearly a significant difference between a decision to the effect that the adjudicator did not have jurisdiction to decide the set-off and counter-claim, which in principle would be subject to consideration by the courts in the event of an adjudication enforcement application, and a decision within his jurisdiction that having considered the defence, it was rejected on the merits.

In this case, it was held that there was simply no express reference at all to this point being one of the issues which the adjudicator recognised he had to decide, nor was it the subject of any express reference as being an issue which he in fact decided. The adjudicator had therefore not dealt with this issue at all and did not give any reasons which would indicate that he dealt with the issue. This was one of those rare cases where the adjudicator failed to comply with his obligations.

His Honour Judge Stephen Davies held that Lentjes did suffer substantial injustice. For example, a substantial injustice could arise if Lentjes were to launch a further adjudication to seek to recover the losses.

The removal of clerical mistakes or errors arising from an accidental slip or omission as envisaged under the TeCSA Rules could not encompass what happened in this case, where the adjudicator had for whatever reason simply not dealt at all explicitly with a substantial element of the defence raised by Lentjes.

The adjudicator failed to deal with the issues raised by Lentjes and as a result there was a substantial prejudice to Lentjes and the decision could not be enforced.

Comment

An adjudicator is obliged to give reasons so as to make it clear that he has decided all the essential issues which he must decide as being issues properly put before him by the parties, so that the parties can understand, in the context of the adjudication procedure, what it is that the adjudicator has decided and why. The court recognises the summary nature of the adjudication process and accepted that it is not every error or omission by an adjudicator which should lead to a decision not being enforced. One has to go further to show substantial prejudice before one can resist the enforcement of a decision.

Birgit Blacklaws
June 2009
