



LEGAL BRIEFING

Pilon Ltd v Breyer Group Ltd [2010] EWHC 837 (TCC), Mr Justice Coulson

The Facts

Breyer engaged Pilon to work on a scheme split into two batches: batches 1-25 and batches 26-62. Disputes arose between the parties and Pilon left site. Early the following year, Pilon became the subject of a Company Voluntary Arrangement. Later that year, Pilon issued an interim application in respect of batches 26-62. It was not paid and Pilon commenced adjudication.

The adjudication notice limited the adjudication to the application in respect of batches 26-62. Breyer's principle defence was that it was entitled to set-off an over-payment on batches 1-25. It had not served withholding notices for this amount but argued it was not required to do so pursuant to the terms of the contract. The adjudicator decided that, as consideration of the alleged over-payment would be outside his jurisdiction, the adjudication was limited solely to batches 26-62.

The Issue

Was the adjudicator's decision enforceable even though he had not taken into consideration the alleged overpayment on batches 1-25?

The Decision

The adjudicator's decision on his jurisdiction was incorrect. He had failed to appreciate that what Pilon were seeking by their notice was not only an interim valuation of batches 26-62, but also an interim payment of any sum considered owing to them. This meant that set-offs could be considered. The adjudicator's error was not an inadvertent one but it was both deliberate and material, as the set-off represented approximately 71% of the sum awarded. Accordingly, this amounted to a breach of natural justice and the decision would not be enforced.

The Judge stated that an adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party's adjudication notice:

"It is not uncommon for adjudicators to decide the scope of their jurisdiction solely by reference to the words used in the notice of adjudication, without having regard to the necessary implications of those words ... Adjudicators should be aware that the notice of adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence to that claim. But, subject to questions of withholding notices and the like, a responding party is entitled to defend himself against a claim for money due by reference to any legitimate available defence (including set-off), and thus such defences will ordinarily be encompassed within the notice of adjudication."

Comment

The Judge gave a warning to parties seeking to overly restrict an adjudicator's jurisdiction, and to adjudicators who are tempted to interpret their jurisdiction in too restrictive a manner. If adjudicators fail to consider a material defence and/or cross-claim then the decision may well not be enforced. Of course, the same argument applies to referring parties. Whilst parties commencing adjudication want to make sure they are paid what they feel they are

owed, seeking to argue that the adjudicator's jurisdiction is narrower than it perhaps might be, (and not necessarily dealing with the issues raised in the defence) may only result in a short-term advantage. As in this case, such a strategy may backfire.

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