



LEGAL BRIEFING

Highlands and Islands Airports Ltd v Shetland Island Council [2012] ScotCS CSOH 12

In this Scottish case the court considered whether an adjudicator consulting senior counsel for confirmation of a legal point, albeit informally and as a “freebie”, constituted a breach of natural justice.

The Facts

Shetland Island Council (the “Consultant”) entered into a contract with Highlands and Islands Airports Limited (the “Employer”) for the design, consultancy, project management and construction supervision for the construction of an extension to runways at Sumburgh Airport on the southern tip of Shetland. The runway extension was built and thereafter a dispute arose between the parties as to whether or not the Consultant had caused the Employer losses due to a defective runway arising out of a breach of contract.

The dispute was referred to adjudication. On 24 June 2011 the adjudicator issued his decision. In his decision the adjudicator determined that the Consultant should pay the Employer in excess of £2 million for the Consultant’s breaches of contract and the resultant requirement for remedial measures and additional costs.

After the decision was issued the Consultant’s solicitors found out by chance that, before reaching his decision, the adjudicator had taken advice from senior counsel as to the proper construction of Clause 41.3 of the NEC Professional Services Contract, which formed part of the contract between the parties. The adjudicator maintained, when questioned, that he:

“did not seek or was given a formal oral opinion by counsel but was merely seeking confirmation of a view I held on a particular matter. The telephone call to counsel was based on my understanding, formed in my own mind, of the meaning of Clause 41.3 of the NEC Professional Services Contract. I would repeat that I already had my own view before telephoning counsel. This view was confirmed by counsel and nothing extra or additional was discussed during my short telephone conversation.”

Counsel never charged for the advice which was a “freebie”.

The adjudicator had not told either of the parties that he had taken advice from counsel on this matter, what the terms of the advice were and had not given either of the parties a chance to address him on the proper construction of Clause 41.3.

The Consultant gave notice of its intention to refer the matter to arbitration and also sought to have the decision set aside on the grounds that there had been a breach of natural justice.

The Issues

The main issue of interest is whether the adjudicator had breached the rules of natural justice.

The Decision

In the Judge’s view it was clear that the adjudicator had a concern about the proper interpretation of Clause 41.3. Whilst he accepted the adjudicator’s evidence that he had already formed his own view on the meaning of the provision before he phoned senior

counsel, he noted that he was sufficiently concerned to seek confirmation of the view held. In the Judge's opinion this constituted advice and it did not matter that it did not take long to impart and that no fee was to be paid for it.

Further the advice was sought on a matter which was central to the exercise that the adjudicator had to carry out as it was the foundation for any award in favour of the Employer for future remedial works costs. Despite this the adjudicator had given no indication to the parties that the issue was one that concerned him and he had not told them he was seeking legal advice or confirmation of his views on the point. If he had done so then either or both parties might have taken the opportunity of making submissions as to the meaning of Clause 41.3 and the way in which it should be applied.

The Judge noted that a breach of the rules of natural justice which is peripheral or irrelevant, and not of potential importance, will not be regarded by the Court as tainting the decision of an adjudicator with the result of rendering his decision unenforceable or invalid. Whether the issue is of such importance, or is peripheral or irrelevant, involves a question of degree which must be assessed by the Court. In the present case the Judge considered the question was of considerable potential importance as it was central to the quantification of the largest part of the award made by the adjudicator.

Whilst the Judge did not consider that the adjudicator had been deliberately unfair nevertheless "*an opportunity was afforded for injustice to be done*". Accordingly his decision was not enforced.

Comment

This case forms a timely reminder to adjudicators as to what steps they may take to confirm a view, or form a view, on legal points raised during an adjudication. In particular, informal consultations with friends and colleagues regarding points that are central to an adjudication should be avoided. If in doubt the parties should be informed that advice is going to be sought, or has been sought, and their opinions on the content of that advice should be canvassed.

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