



## LEGAL BRIEFING

### *ABB Ltd v BAM Nuttall Ltd* [2013] EWHC 1983 (TCC), Mr Justice Akenhead

#### *The Facts*

Under a sub-contract dated 8 November 2009 based on the NEC3 form ('the Sub-contract') ABB Ltd ('ABB') engaged Bam Nuttall Ltd ('Bam') to remove redundant equipment and design and install new cables for London Underground.

Clause 11.1A of the Sub-contract provided that no amendments could be made except where expressly recorded in writing by the parties. Clause 60 provided for compensation event payments and clause 62.6 provided that the sub-contractor's quotations for compensation event works would be deemed accepted if the contractor did not respond to the same within 5 weeks.

During February 2010 Bam found that the new cables could not be installed as expected and ABB instructed Bam to re-survey the cable route network.

During October 2010 Bam provided ABB with quotations for further survey work and for additional design. On 3 December 2010 the parties agreed on a price of £1.5m for the survey and design work but this agreement was not confirmed in writing.

During April 2012 Bam provided ABB with a quotation for additional design time from February 2011 to March 30 2012 in the sum of £977,088.88. Bam subsequently asserted that this quotation had been accepted owing to ABB's failure to substantively respond within the time scale prescribed by clause 62.6. On 7 September 2012 ABB paid Bam £3,636 for the additional design time.

During February 2013 Bam commenced adjudication. Bam submitted that the sum of £1.5m agreed on 3 December 2010 concerned survey and design work carried out up to 31 January 2011 only and that thereafter its April 2012 quotation had been accepted through the operation of clause 62.6. Bam therefore claimed £977,088.88 less £3,636. Bam also asked for a declaration that the 3 December 2010 agreement only covered works up to end of January 2011 and in the alternative, a declaration that the parties had not reached a binding agreement on 3 December 2010.

In response, ABB said that the 3 December agreement provided for Bam to be paid for work carried out after 31 January 2011, only if the work was required for reasons beyond Bam's control.

In a Decision dated 23 April 2013 the Adjudicator awarded Bam £973,432.18 plus VAT on the basis that Bam's April 2012 quotation was to be treated as accepted by ABB through the operation of clause 62. The Adjudicator also found that the agreement alleged to have been made on 3 December 2010 was contrary to clause 11.1A.

It was common ground that neither Bam nor ABB had raised any arguments in the adjudication based upon clause 11.1A and that the Adjudicator had neither in advance of his Decision given any indication of his intention to rely upon clause 11.1A nor sought the parties' submissions upon the same.

#### *The Issue*

ABB issued Part 8 proceedings challenging the Decision on the basis that the Adjudicator's reliance upon clause 11.1A amounted to a material breach of the rules of natural justice

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where neither party had referred to or addressed this clause in their submissions in the adjudication. Bam issued enforcement proceedings contending that the Adjudicator's finding that there was no agreement about the scope of the 3 December 2010 agreement was consistent with their alternative case. Bam also submitted that in the context of the other findings in the Decision and the overall result, the Adjudicator's reference to clause 11.1A was not material.

### *The Decision*

The Judge found that there had been a clear failure to comply with the rules of natural justice in circumstances that:

- (i) clause 11.1A had not been relied upon or referred to by the parties during the adjudication; and
- (ii) the Adjudicator had not raised clause 11.1A with the parties before he published his Decision.

Furthermore, the Judge concluded that the Adjudicator's breach of the rules of natural justice was a material breach where the Adjudicator's reliance on clause 11.1A was of considerable potential importance to the outcome of the dispute and could well have been decisive.

### *Commentary*

An Adjudicator's decision will not be enforced if there has been a breach of the rules of natural justice that is material to the overall result.

In this case it was clear that the Adjudicator had acted contrary to the rules of natural justice by unilaterally focusing on clause 11.1A without inviting the parties to make any submissions upon the effect of this clause. As to materiality, the Judge found it necessary to consider what would have happened if either party had been asked to comment upon clause 11.1A. The Judge's view was that it would have been possible for ABB to argue that clause 11.1A did not apply to the agreement reached on 3 December 2010 and that if this argument had succeeded, the sums claimed by Bam could have been substantially reduced. The Judge therefore concluded that the Adjudicator's breach of the rules of natural justice was, at the least, of considerable importance to the outcome of the dispute and as such, was material.

The Court must determine on the facts of each case whether or not a point determined by the Adjudicator without reference to the parties is decisive or peripheral to the overall result. It may be manifestly obvious that the Adjudicator had gone on a "frolic of his own" and committed a material breach of natural justice. Here the position was more opaque and Judge had to decide the materiality issue by considering the arguments that might have been raised by the parties, if asked to comment upon clause 11.1A. The Judge's conclusion that if properly ventilated, the impact of clause 11.1A could well have been decisive meant that the Adjudicator's breach of the rules of natural justice was material. As such, the Adjudicator's Decision could not be enforced.

Edward Lowery  
October 2013