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BRIEFING

PAY NOW, ARBITRATE LATER?

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- ENGLISH HIGH COURT HOLDS THAT ONLY MATTERS THAT GO DIRECTLY TO ENFORCEABILITY OF ADJUDICATOR'S DECISION WILL FALL WITHIN ARBITRATION AGREEMENT EXCEPTION IN ARTICLE 8 OF JCT CONTRACT
- PRE-EMPTIVE CLAIMS ARE LIKELY TO FAIL UNLESS THERE ARE GENUINE ISSUES OF ENFORCEABILITY

An important recent decision of the English Technology and Construction Court (TCC) has given parties clarity on the question of when a dispute concerning the enforcement of an adjudicator's decision falls within the scope of the arbitration agreement exception at Article 8 of the JCT contract.

"THE DECISION … IS, IN EFFECT, A CONFIRMATION OF THE OFT-CITED "PAY NOW, ARGUE LATER" PRINCIPLE OF ADJUDICATION."

In *Maelor Foods Limited v Rawlings Consulting (UK) Limited* [1] it was held that only matters that go directly to the enforceability of an adjudicator's decision will fall within the Article 8 exception. This means that a pre-emptive claim that seeks to prevent enforcement is likely to fail unless genuine issues of enforceability have been raised (namely that the adjudicator did not have jurisdiction in the first place or acted contrary to the rules of natural justice).

Whilst the decision, which is, in effect, a confirmation of the oft-cited "pay now, argue later" principle of adjudication, is not unexpected, it deals with an issue on which there was no previous authority and also provides useful practical pointers to bear in mind for anyone contemplating (or faced with) a similar application.

The claim

The claimant, Maelor Foods Limited, engaged the defendant, Rawlings Consulting (UK) Limited, to carry out works at its meat processing plant in Wrexham pursuant to a 2011 JCT standard build contract with approximate quantities. In April 2018, Rawlings sent an interim payment notice (IPN) to Maelor. Maelor disputed the sum in the IPN and referred the matter to adjudication. The adjudicator found in favour of

[1] [2018] EWHC 1878 (QB)

Rawlings but five days later Maelor issued a claim in the TCC, arguing that the adjudicator had not had jurisdiction to hear the dispute and that his decision was wrong in law.

Maelor argued that:

a) the adjudicator did not have authority to adjudicate because the dispute arose under a number of different contracts, some which did not contain adjudication clauses;
b) the IPN under which the defendant claimed payment was invalid in law;
c) the adjudicator's decision was wrong in law; and
d) as a consequence of the above, no sums were due to the defendant.

However, Rawlings then applied to stay the proceedings under section 9 of the Arbitration Act 1996, contending that it was the subject matter of an arbitration agreement in Article 8 of the contract.

"THE CRUX OF THE MATTER … WAS … WHETHER THE DISPUTE BETWEEN THE PARTIES IN MAELOR'S CLAIM WAS GOVERNED BY THE ARBITRATION AGREEMENT IN ARTICLE 8 OF THE JCT CONTRACT OR WHETHER THAT ARBITRATION AGREEMENT WAS INOPERATIVE FOR THE PURPOSES OF THE DISPUTE."

Articles 7 and 8 of the JCT standard build contract (2011 edition) provide that (1) the parties may refer any dispute to adjudication, (2) subject to that option, the parties shall refer any dispute to arbitration but (3) the requirement to refer any dispute to arbitration does not apply to "any disputes or differences in connection with the enforcement of any decision of an Adjudicator".

Meanwhile, section 9 of the Arbitration Act provides:

9(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter…

9(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.

The combined effect of sections 9(1) and (4) is that a stay will be granted unless the arbitration agreement is found to be "null and void, inoperative or incapable of being performed".

The crux of the matter before the TCC was therefore whether the dispute between the parties in Maelor's claim was governed by the arbitration agreement in Article 8 of the JCT contract or whether that arbitration agreement was inoperative for the purposes of the dispute. If the Article 8 arbitration agreement was not engaged because the dispute was connected to the enforcement of the adjudicator's decision then Rawlings would not get their stay. However, if Rawlings was successful then any dispute as to the adjudicator's award would have to be resolved through arbitration, and in the meantime Maelor would have to pay ("pay now, argue later").

The TCC judgment

HHJ Eyre QC dealt first with Maelor's arguments at (b), (c) and (d) above (i.e. that the IPN was invalid, the adjudicator's decision was wrong at law and therefore there were no sums due to Rawlings). He decided that the declarations Maelor sought as

to the invalidity of the IPN and the incorrectness in law of the adjudicator's decision were clearly not matters pertaining to enforceability. As HHJ Eyre QC noted "some meaning has to be given to the words 'the enforcement of'. Some effect has to be given to those words".

Maelor's more nuanced contention was that the claim was a pre-emptive strike to defeat an application for enforcement. In this context the claim could be viewed as giving rise to a dispute or difference in connection with the enforcement of the decision. Although perhaps somewhat circular in its reasoning, this argument gained some traction with the judge, and was supported by a portion of Edwards-Stuart J's judgment in *Geoffrey Osborne v Atkins Rail*[2].

"ULTIMATELY … HHJ EYRE QC FOUND THAT A PRE-EMPTIVE STRIKE AIMED AT NULLIFYING AN ADJUDICATOR'S DECISION, WHILE IF SUCCESSFUL WOULD RENDER ANY ENFORCEMENT OF NO VALUE, WAS NOT CONNECTED TO THE ENFORCEABILITY OF THE DECISION ITSELF."

Ultimately however, HHJ Eyre QC found that a pre-emptive strike aimed at nullifying an adjudicator's decision, while if successful would render any enforcement of no value, was not connected to the enforceability of the decision itself:

"…the argument by analogy to *Osborne* … cannot prevail against the wording of the arbitration clause here and the emphasis in that clause on disputes in connection with the enforcement of a decision. The fact that a challenge by way of a … claim, or indeed otherwise, to the correctness of an adjudicator's decision might be a pre-emptive strike if made and determined in time, and might at the end of the day render nugatory the relief awarded by way of enforcement of an adjudicator's decision, does not mean that it is a dispute or difference in connection with enforcement".

Maelor's other argument (that the amounts claimed under the IPN arose under different exchanges between the parties and from different contracts, some of which did not contain an arbitration clause) was then dealt with quickly.

Clearly, if the dispute properly arises under a contract that does not contain an arbitration clause then section 9 of the Arbitration Act 1996 does not apply. However, HHJ Eyre QC preferred Rawlings' analysis that the dispute in this case concerned only one contract – the JCT contract. The adjudicator had concluded that he was entitled to make an award under the JCT contract in relation to a dispute concerning sums in the IPN schedule. Maelor argued that such a finding was not open to the adjudicator, but did so by reference to the terms of the JCT contract itself. It is worth noting also that Maelor's claim defined the JCT contract as the "contract" in question. The judge therefore had no difficulty in finding that this was a dispute arising under the JCT contract rather than any other collateral agreement(s).

The result was that Rawlings' application was successful and Maelor's claim to prevent enforcement had to be stayed.

Conclusions

The scope for a party seeking recourse under the Article 8 exception to arbitration for issues arising in connection with an adjudicator's decision has been confirmed by this judgment to be restricted to narrow issues of enforceability. Any party seeking recourse under the exception by way of a pre-emptive strike style application would be wise to consider whether there are clear grounds to argue a breach of natural

[2] [2009] EWHC 2425 (TCC)

justice or lack of jurisdiction. If not, the message is again clear: "pay now, argue later", or under a standard form JCT contract "pay now, arbitrate later".

"ANY PARTY WISHING TO ENGAGE THE ARTICLE 8 ARBITRATION EXCEPTION UNDER THE JCT CONTRACT AS A MEANS TO AVOID A STAY SHOULD BE CAREFUL TO FRAME ITS ARGUMENTS (AND THE SPECIFIC RELIEF SOUGHT) IN ITS APPLICATION ACCORDINGLY."

Another message that comes out of this case is that any party wishing to engage the Article 8 arbitration exception under the JCT contract as a means to avoid a stay should be careful to frame its arguments (and the specific relief sought) in its application accordingly. Whilst that may seem an obvious point, HHJ Eyre QC's decision does make clear that "the wording of the … claim is, in my judgment, highly significant", contrasting the clear wording of the Article 8 exception requiring there to be a dispute as to the enforcement of an adjudicator's decision with the phrasing of Maelor's application which had made expressly clear it was seeking "the court's determination of issues of law" and that "the objections to the adjudicator's jurisdiction will be relied upon in defence of **any enforcement proceedings**" (our emphasis added).

FOR MORE INFORMATION

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