ADJUDICATION ENFORCEMENT: BE CAREFUL WHAT YOU AGREE IN POST-ADJUDICATION NEGOTIATIONS

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A new case about the construction of a leisure project has raised important issues about whether an adjudicator's decision can be settled by a "subject to contract" agreement. In *Aqua Leisure International Limited v Benchmark Leisure Limited*[1], the first case on this novel point, the English High Court rejected arguments that an adjudicator's decision was no longer binding due to post adjudication discussions. On a separate issue concerning costs awarded by the adjudicator under the Late Payment of Commercial Debts (Interest) Act 1998, the Court found that Benchmark's failure to raise a jurisdiction challenge on a point of law that was only established some time after the adjudication had concluded did not amount to a waiver of that issue.

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BACKGROUND AND ISSUES

The dispute concerned the development of a waterpark in Scarborough. Following completion of the project, Benchmark (the site developer) failed to pay sums due to Aqua (the contractor). Aqua referred the dispute to adjudication and obtained an award in its favour. As well as the balance of sums claimed, the adjudicator ordered Benchmark to pay £12,600 in respect of legal costs pursuant to s5A of the Late Payment of Commercial Debts (Interest) Act 1998 (the 1998 Act).

Following the adjudicator's decision, Aqua and Benchmark entered into negotiations to settle their dealings. Terms were recorded in a draft agreement, expressed to be "without prejudice and subject to contract", but no formal settlement agreement was signed by the parties. Nevertheless, Benchmark proceeded to make initial payment instalments and Aqua completed the snagging works, in accordance with what had been agreed during negotiations.

It subsequently became clear that Benchmark would not make the final payment instalment and Aqua commenced proceedings to enforce the adjudication award.

Benchmark resisted enforcement, contending:

1. The parties had entered into an agreement, which meant that the adjudication decision was no longer binding; and

2. The part of the decision awarding costs under the 1998 Act was not enforceable.

THE DECISION

Binding agreement

Under s108(3) of the Housing Grants, Construction and Regeneration Act 1996, an adjudication is binding until finally determined by legal proceedings, by arbitration (where allowed for in the underlying contract) or by agreement. The question was therefore whether the parties had entered into a binding agreement finally determining the dispute which meant there was no entitlement to adjudicate the dispute.

Aqua argued that the settlement agreement was expressly made on the basis that it would not become binding until it was set out in writing. In contrast, Benchmark's position was that the "subject to contract" condition was "shallowly rooted" and that it was at least arguable that the parties had entered into a new contract by their actions.

The Court stated that the caselaw on "subject to contract" was well-established and held that none of the points advanced by Benchmark suggested that a new contract had been formed. The Court referred to *RTS v Molkerei*[2], which states that waiving reliance on a previous "subject to contract" condition depends on the circumstances of each case, but that "the court will not lightly so hold" that said condition has been superseded.

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The Court concluded that Aqua's dispute with Benchmark was a "paradigm example" of why it will not lightly hold that agreements expressed as "subject to contract" have been superseded. The parties had: (i) set their own rules of engagement; (ii) agreed that there would be no binding contract until the terms were set out in a written (and signed) agreement; and (iii) clearly envisaged that the agreement reached would not be enforceable until the requisite formalities had been observed.

Costs

Both parties were agreed that, in light of *Enviroflow v Redhill*[3] (decided a month after the adjudication decision was issued), the adjudicator did not have jurisdiction to award costs pursuant to the 1998 Act.

Accordingly, Benchmark argued that as the adjudicator was wrong in their application of the law – the costs under the 1998 Act were not payable. Aqua, meanwhile, contended that Benchmark had fully engaged with the costs issue during the adjudication. As Aqua had not made any reservation of rights on this point (or indeed any general reservations for that matter), Benchmark argued that Aqua had waived its right to any jurisdictional challenge.

The general rule on adjudication enforcements is that the court may not deal with an issue which the adjudicator has already decided[4]. While there is an exception to this rule where the issue is a "short and self-contained point" and can be dealt with without oral evidence and by short oral submissions[5], the present case was not one to which the exception applied. Instead the point concerned a question of "jurisdiction in the most fundamental sense" and the Court observed that the adjudicator had "no jurisdiction to make the award [of the costs under the 1998 Act] at all because the statute under which he purported to act had no application".

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Regarding Aqua's argument that Benchmark had failed to reserve its rights and as such had waived its objection on jurisdiction, the Court found that it would be unreal not to take account that common practice at the time of the adjudication was that the adjudicator had jurisdiction to award costs under the 1998 Act. As such, it would be wrong to hold that Benchmark had waived any right to this fundamental point of jurisdiction. Such a precedent would lead to parties expressing general reservations of rights for developing law, which would be "undesirable".

Accordingly, the Court severed the part of the decision awarding costs under the 1998 Act, but otherwise proceeded to enforce it summarily.

COMMENT

This case highlights the risks of "subject to contract" negotiations following an adjudication award. Although the court will not lightly hold that a "subject to contract" condition has been waived, where the facts indicate a new agreement was reached the court may find there are reasonable prospects to refuse the summary judgment enforcement application. This outcome would of course not preclude the claimant from applying for summary judgment on the basis of a breach of the new agreement, although this would certainly result in additional costs and delay.

Where a project is ongoing, it may be preferable for parties to try to reach an agreement and the "subject to contract" wording allows the parties to agree key terms of the agreement without fleshing out all the details. To avoid any possible arguments that a binding agreement has been reached, always: (i) make clear in correspondence that any agreement will not be enforceable until the parties have signed a written agreement; and (ii) be persistent when chasing the other side to sign any draft agreement. The court will find evidence of such behaviour to be persuasive that no binding agreement was reached between the parties.

The analysis of the Court regarding the waiver is also worth noting for any party who falls victim to an adjudicator's decision (or parts thereof) which raises fundamental questions of jurisdiction. In such a situation, should enforcement proceedings be initiated by way of summary judgment, the court may well sever the portion of the decision which raises the fundamental point of jurisdiction.

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[1] [2020] EWHC 3511 (TCC)

[2] [2010] 1 WLR 753

[3] [2017] EWHC 2159 (TCC)

[4] *Bouygues v Dahl Jensen* [2000] BLR 522

[5] *Caledonian v Mar* [2015] EWHC 1855 (TCC)

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