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BRIEFING

NO SLIP UPS

JUNE 2017

- ADJUDICATORS CAN CORRECT TYPOGRAPHICAL AND CLERICAL ERRORS IN THEIR DECISIONS UNDER THE SLIP RULE.
- HOWEVER, ASKING AN ADJUDICATOR TO USE THE SLIP RULE CAN RESULT IN A WAIVER OF THE RIGHT TO CHALLENGE ENFORCEMENT OF THE DECISION.

A recent decision in the Technology and Construction Court[1] has highlighted the potential risks associated with inviting an adjudicator to use the so-called 'slip rule' to correct his decision.

What is the slip rule?

Before we address those risks, it is helpful to briefly recap what the slip rule is and how it has been applied.

"THE RAISON D'ÊTRE FOR ADJUDICATION, WITH ALL OF ITS PROS AND CONS, IS TO FACILITATE THE QUICK RESOLUTION OF CONSTRUCTION DISPUTES."

The raison d'être for adjudication, with all of its pros and cons, is to facilitate the quick resolution of construction disputes. Once an adjudicator makes a decision, it is final and binding on the parties unless and until challenged by way of court proceedings or arbitration. While enforcement of a decision can be challenged on the basis of a lack of jurisdiction or for a breach of natural justice, parties cannot challenge a decision on the basis that the adjudicator made the wrong decision. As Chadwick LJ emphasised in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd*[2]:

"[t]he task of the adjudicator is to find an interim solution which meets the needs of the case… [t]he need to have the 'right' answer has been subordinated to the need to have an answer quickly".

[1] *Dawnus Construction Holdings Ltd v Marsh Life Ltd* [2017] EWHC 1066 (TCC)
[2] [2005] EWCA Civ 1358

However, what if there is an obvious clerical or typographical error in the adjudicator's decision? Such slips are regular occurrences in adjudication decisions, owing (at least in part) to the short timeframe set out for the procedure. This brings us to the slip rule. Section 108(3A) of the Housing Grants, Construction and Regeneration Act 1996 provides that any construction contract must include a written provision permitting the adjudicator to correct his decision so as to remove a clerical or typographical error that arose by accident or omission. If such a provision is not included, paragraph 22A(1) of the Scheme for Construction Contracts 1998 (the "Scheme") will apply, allowing the adjudicator to correct a 'slip' in his decision, either on his own initiative or at the request of one of the parties.

"CASE LAW PROVIDES MANY EXAMPLES OF BOTH THE SITUATIONS IN WHICH THE SLIP RULE HAS BEEN APPLIED, AND THE TYPE OF ERRORS THAT THE SLIP RULE HAS BEEN USED TO ADDRESS."

The application of the slip rule

Case law provides many examples of both the situations in which the slip rule has been applied and the type of errors that the slip rule has been used to address. These include not only typographical and clerical errors, but also other slips such as awarding a sum to a claimant that failed to account for payments on account already made by the defendant. In *Bloor Construction (UK) Ltd v Bowmer & Kirkland (London) Ltd*[3], the adjudicator realised his error and revised his decision within the hour. The claimant later sought to enforce the original (more favourable decision) but the court held that it could not do so and allowed the adjudicator's corrections.

Similarly, in *YCMS Ltd v Grabiner*[4], the adjudicator made an "inexplicable arithmetical error". However, the adjudicator did not correct his error and instead made a recalculation using different figures. The court confirmed that a correction of the adjudicator's error "would have fallen within the ambit of the adjudication slip rule and its legitimate application". However, the adjudicator's decision ("and… clearly… second thoughts") to recalculate the amounts due ("the logic of which must be known only to the adjudicator") went beyond the scope of the slip rule and resulted in a further error. For that reason, the court held that the revised award was invalid.

YCMS makes it clear that, "in the ordinary course of events", the operation of the slip rule should not result in any prejudice to either party because the adjudicator "is simply putting right a mistake which it has made which it would not otherwise have made". As such, a distinction should be drawn between corrections necessary to give effect to the adjudicator's first thoughts or intentions, and changes to those intentions.

The speed with which the adjudicator corrects his mistake is also a factor. If a party wishes the adjudicator to use the slip rule and make a correction, it must notify the adjudicator as soon as possible and ensure that the request for a correction is clear. The adjudicator must then make any corrections to his decision within five days of the date on which the decision was delivered to the parties[5], and such a correction will form part of the decision[6].

The risks of the slip rule

So far so good. However, at the beginning of this briefing we mentioned that asking the adjudicator to make use of the slip rule is not without its risks. The major risk,

[3] [2000] EWHC 183 (TCC)
[4] [2009] EWHC 127 (TCC)
[5] Paragraph 22A(2) of the Scheme
[6] Paragraph 22A(4) of the Scheme

resurfacing in *Dawnus*, is the possibility that the party requesting the correction of an error through the slip rule could unwittingly also accept the validity of the adjudicator's decision and thereby waive its right to challenge the enforcement of the adjudicator's decision.

"THE COURT… HELD THAT '… IT CANNOT BE RIGHT THAT IT IS OPEN TO A PARTY TO AN ADJUDICATION SIMULTANEOUSLY TO APPROBATE AND TO REPROBATE A DECISION OF THE ADJUDICATOR…'"

This issue notably emerged in the earlier case of *Shimizu Europe Ltd v Automajor Ltd*[7], in which the Contractor, Shimizu, claimed payments in respect of alleged variations to the smoke ventilation works and the Employer, which did not accept that any variation had been made, agreed to make a without prejudice payment toward the value of the alleged variations. The adjudicator agreed that there had been no variations in respect of the smoke ventilation works but incorrectly awarded payments in respect of those works and made no allowance for the Employer's without prejudice payment. The Employer asked the adjudicator to correct his decision under the slip rule and the Contractor contended that, by doing so, the Employer had also accepted the award in principle. The court agreed with the Contractor and held that "… it cannot be right that it is open to a party to an adjudication simultaneously to approbate and to reprobate a decision of the adjudicator… either the whole of the relevant decision must be accepted or the whole of it must be contested… by inviting [the adjudicator] to correct the award under the slip rule [the Employer's solicitors] on behalf of [the Employer] accepted that the award was valid".

By way of contrast, this situation was (partially) avoided by the defendant in *Laker Vent Engineering Ltd v Jacobs E&C Ltd*[8] because the request for the adjudicator to correct his decision using the slip rule was accompanied by a general reservation of the defendant's rights to challenge the jurisdiction of the adjudicator. The court held that the reservation of rights wording was sufficient to preserve the defendant's rights to pursue a jurisdictional challenge. However, the court also held that the reservation of rights language did not preserve non-jurisdictional challenges and the defendant was therefore precluded from challenging the adjudicator's decisions on the grounds of a breach of natural justice "having sought to rely on the decisions for the purpose of the application to correct them under the slip rule".

In *Dawnus*, the defendant failed to pay the sums awarded by the adjudicator and instead emailed the adjudicator, inviting him to revise his decision under the slip rule on the basis that the adjudicator's alleged failure to consider defences to the claimant's loss and expense claims represented a breach of natural justice. The adjudicator rejected the points raised by the defendant and declined to revise his decision (save to correct the mathematical errors separately identified by the claimant). The claimant later applied for summary judgment for the enforcement of the adjudication decision and argued that "by inviting the adjudicator to correct errors in the decision under the slip rule… the defendant was accepting the validity of the decision and thereby electing to forego any opportunity that it might otherwise have had to challenge the decision, there having been no general reservation of rights".

The defendant accepted that it may have expressly or impliedly accepted that the adjudicator had jurisdiction, but argued that its email to the adjudicator should be treated as identifying natural justice failures and, "implicitly, that if the adjudicator

[7] [2002] EWHC 1571 (TCC)
[8] [2014] EWHC 1058 (TCC)

"WHERE A PARTY WISHES THE ADJUDICATOR TO USE THE SLIP RULE BUT DOES NOT ACCEPT THE VALIDITY OF THE DECISION… THAT PARTY MUST BE CAREFUL TO EXPRESSLY RESERVE ITS RIGHTS TO CHALLENGE THE ENFORCEMENT OF THE AWARD."

did not make the correction then the defendant would challenge the decision". The court rejected this argument and instead stressed that the defendant "could have, but did not, expressly reserve its right to pursue a claim of breach of the rules of natural justice when inviting the adjudicator to make corrections under the slip rule. In the absence of so doing… the defendant waived or elected to abandon its rights to challenge enforcement… since it had thereby elected to treat the decision as valid".

Conclusion

Accordingly, where a party wishes the adjudicator to use the slip rule but does not accept the validity of the decision (whether on jurisdictional grounds or otherwise), that party must be careful to expressly reserve its rights to challenge the enforcement of the award, if it subsequently wishes to do so. Otherwise, a party may find itself not only unhappy with errors in the adjudicator's decision, but also unable to challenge the enforcement of that decision in court. This situation should be avoidable by using a clear reservation of rights but, unfortunately, this is all too easily overlooked.

FOR MORE INFORMATION

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