



LEGAL BRIEFING

Christopher Michael Linnett v Halliwells LLP

[2009] EWHC 319, TCC, The Hon. Mr Justice Ramsey

The Facts

The claimant adjudicator, was appointed in an adjudication between ISG Interior Exterior plc (“ISG”) and Halliwells LLP (“Halliwells”), arising out of a contract to carry out the fit-out works at Halliwells’ new offices in Manchester.

The adjudicator had been nominated by the RICS in relation to a contractual dispute between Halliwells and ISG. Unlike ISG, Halliwells did not respond to the adjudicator’s invitation to agree to his terms and conditions and did not return the adjudicator’s questionnaire. Instead, Halliwells challenged the adjudicator’s jurisdiction on the basis that the referral had been served out of time and asked him to withdraw from the adjudication and, alternatively, invited him to revise directions for the date of service of the response if the adjudicator was not prepared to withdraw.

The adjudicator did not accept Halliwells’ assertion that the referral was served out of time. In doing so, he decided against Halliwells’ jurisdictional argument and evidently decided to proceed to consider the merits.

The adjudicator subsequently sent an invoice to Halliwells, but they refused to pay. Halliwells argued that there was no contract between it and the adjudicator as the terms were not accepted and the adjudicator could not rely on Halliwells’ silence to establish that the terms were accepted and the contract was formed. The adjudicator claimed that Halliwells were liable for his fees and expenses because by its actions, it engaged the adjudicator’s services and was fully involved in the adjudication process throughout.

The Issue

This case raises a question of general importance concerning the ability of an adjudicator to recover his fees from the responding party to the adjudication when that party raises questions of jurisdiction.

The Decision

It was held that no contract was formed between Halliwells and the adjudicator on the adjudicator’s terms of engagement. Acceptance of the adjudicator’s terms could not be inferred from its silence. However, the Court went on to consider whether an adjudicator in this position has the right to take payment from Halliwells and whether the existence or absence of jurisdiction makes any difference.

Where one the party agrees the adjudicator’s terms but the other does not then, the adjudicator can enforce those terms against the party with whom he has a contract. There is nothing objectionable in an adjudicator being appointed unilaterally.

In general terms, if an adjudicator is appointed and neither party makes a contract with the adjudicator, the parties by participating in the adjudication and thereby requesting the adjudicator to act, enter into a contract with the adjudicator who acts in that capacity as a result of that request. There is therefore an implied term that the party would be liable to pay the reasonable fees and expenses of the adjudicator and would be jointly and severally liable with the other party to do so. The Judge could see no reason why the position

should not be similar where only one party makes the contract with the adjudicator but the other one does not.

Where a party wishes to raise a jurisdictional argument, it has one of two options. First, they can make an assertion of lack of jurisdiction and withdraw, taking no further part in the adjudication proceedings and leaving the adjudicator and the other party to proceed at their risk. In such circumstances in the absence of any agreement with the adjudicator, it would be difficult to make that party liable for the fees and expenses of the adjudicator. Secondly, it can make an assertion of lack of jurisdiction but continue to participate in the proceedings without prejudice to that contention. By participating in this way, whilst the party is not giving the adjudicator jurisdiction to make a binding decision, it is requesting the adjudicator to carry out work and make a decision.

If the adjudicator makes a decision which he did in fact have jurisdiction to make, then there is no reason why the mere fact of the erroneous jurisdictional challenge should change the position. If there is a valid jurisdictional challenge and if a party has not participated in the adjudication then, the party can have no liability for the fees and expenses of the adjudicator.

If, however, a party has participated in the adjudication process, albeit without prejudice to its contention that the adjudicator did not have jurisdiction, then in principle by participating and thereby requesting the adjudicator to adjudicate on the dispute, the party will generally be liable for the reasonable fees and expenses of the adjudicator.

It was held that Halliwells were liable to pay the reasonable fees and expenses of the adjudicator, even if he did not have jurisdiction.

Comment

It is important to note in this case that Halliwells asked the adjudicator to withdraw but in the alternative asked him to adjudicate the merits. Given the request and the fact that the adjudicator proceeded with the adjudication, this gave rise to a contract formed by conduct with an obligation by Halliwells to pay the adjudicator's reasonable fees and expenses.

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