



LEGAL BRIEFING

Speymill Contracts Ltd v Eric Baskind

[2010] EWCA Civ 120, (CA), Lord Justice Waller, Lord Justice Jackson and Sir David Keene

Following a series of recent cases in the Technology & Construction Court ("TCC"), the Court of Appeal has now confirmed how parties should proceed when allegations of fraud are raised during the adjudication or enforcement process:

The Facts

In March 2005 Mr Eric Baskind engaged Speymill Contracts Ltd ("Speymill") as the main contractor to convert a former country house hotel into a residential home for his personal use. An agreement was reached in correspondence between the parties which incorporated the terms of the JCT 1998 Standard Building Contract, thereby including adjudication as a means of resolving any disputes.

The works were completed in June 2006. Fifteen interim payment certificates were issued during the course of the project totalling some £753,490; however, Mr Baskind only made payments amounting to £652,786. Speymill commenced adjudication seeking payment of all outstanding sums which were due, claiming that no withholding notices had been issued. Conversely, Mr Baskind alleged that he had served all of the appropriate withholding notices though was unable to produce copies as two of Speymill's employees had stolen his files. In addition, the electronic copies had unfortunately been destroyed when lightning struck his house and a power surge damaged his computer beyond repair. Speymill denied these allegations. The adjudicator ultimately awarded Speymill the outstanding monies.

Following Mr Baskind's failure to make any payments in respect of the adjudicator's decision, Speymill sought enforcement in the TCC. HHJ Platts declined to enforce the decision as he concluded that Mr Baskind did have an arguable defence with respect to the alleged theft.

Unsatisfied with the Judge's decision, Speymill appealed to the Court of Appeal.

The Issues

- (i) Did the parties agree that the adjudicator should not consider the issue of theft of the withholding notices?
- (ii) Did the adjudicator address the allegation of theft to the extent that it was necessary for him to do so?
- (iii) Should the adjudicator's decision not be enforced because it was tainted by the fraud of Speymill?

The Decision

Lord Justice Jackson first reviewed the recent cases where an allegation of fraud or theft was raised as a defence in adjudication. He agreed with the analysis set out by Mr Justice Akenhead in *SG South Ltd v Kings Head Cirencester LLP* that the basic propositions are:

"(a) Fraud or deceit can be raised as a defence in adjudications provided that it is a real defence to whatever the claims are...

(b) If fraud is to be raised in an effort to avoid enforcement..., it must be supported by clear and unambiguous evidence and argument.

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- (c) *A distinction has to be made between fraudulent behaviour ... which [was] or could have been raised as a defence in the adjudication and such behaviour... which neither [was] nor could reasonably have been raised but which emerge[d] afterwards. In the former case, if the behaviour... [is] in effect adjudicated upon, the decision without more is enforceable. In the latter case, it is possible that it can be raised but generally not in the former."*

Here, Lord Justice Jackson firstly held that the parties had not agreed that the adjudicator should not consider the theft issue. Mr Baskind argued in the adjudication that the theft allegation could not properly be resolved by the adjudicator, and therefore the adjudicator should make no award whatsoever. Speymill on the other hand argued that the theft allegation was a tactic which should not be allowed to derail the adjudication. Nonetheless, it was clear that no agreement had been reached that the theft issue should be carved out of the adjudication.

Secondly, Lord Justice Jackson held that the adjudicator did take into account the allegations of theft in a measured way. In the terms of his decision, the adjudicator found that Mr Baskind had not served any withholding notices as he was unable to produce either copies which were likely to be held by the professional team or copies of those withholding notices which were served after the alleged theft.

Finally, it was held that as the allegation of theft was raised directly in the adjudication and the adjudicator did take into account that allegation in his decision. This was not a case of fraud coming to light after the adjudicator's decision. Applying the principles set out in *SG South Ltd v Kings Head Cirencester LLP*, Lord Justice Jackson held that the allegation of theft formed no basis for refusing to enforce the adjudicator's decision.

Accordingly, Lord Justice Jackson concluded that the summary judgment should be entered for Speymill, thereby allowing the appeal. Sir David Keene and Lord Justice Waller agreed with this decision.

Comment

The Court of Appeal has now confirmed Mr Justice Akenhead's analysis in *SG South Ltd v Kings Head Cirencester LLP* regarding allegations of fraud in adjudication. Despite the seriousness of allegations of this nature, fraud does not sit in a special category. Where fraud is alleged in the course of the adjudication that allegation must be made good during the adjudication process itself. Provided that the adjudicator takes into account that allegation, his decision will be enforceable.

A party who is alleging fraud should be mindful that unless there is sufficient evidence to support that allegation, the chances of success are seriously minimised. In this appeal, Mr Baskind applied to adduce further evidence in support of his theft allegation. The Court of Appeal refused to allow further evidence to be submitted as the appropriate forum was the forthcoming full arbitration, where it was noted things may turn out differently.

Stacy Sinclair
May 2010
