Case Analysis: Dawnus Construction Holdings Ltd v Marsh Life Ltd (2017)

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Comment

This case is a reminder to always reserve a party’s position when challenging the validity of an adjudicator’s decision. Failure to do so might result in losing any right to challenge enforcement.

This case is also a reminder that the TCC will not review pleadings/defences submitted in an adjudication in detail when considering a natural justice challenge, but will instead look more to the question asked of the adjudicator, the general claims made and defences provided, and the decision given.

Background

The Contractor, Dawnus Construction Holdings Ltd, was engaged by the Developer, Marsh Life Ltd, to design and build a hotel complex under a JCT 2011 Design & Build Contract. The project suffered from various delays and the contract was later terminated in disputed circumstances. The matter was referred to adjudication. The Contractor sought loss and expense on the grounds that the works had been affected by delays which were a relevant matter in accordance with the contract. The adjudicator directed the Developer to pay the Contractor £1m. The Developer alleged that the adjudicator had breached the natural justice rule, by failing to deal with its defences regarding the loss and expense claims, and invited him to correct the errors resulting from the breach using the slip rule. The adjudicator declined the invitation and the Developer failed to pay the £1 million. The Contractor applied to enforce the adjudicator’s decision.

Argument

Contractor - by inviting the adjudicator to correct his decision under the slip rule, the Developer had accepted the validity of the decision and had therefore elected to abandon its right to challenge enforcement.

Developer - it might have elected to abandon its right to challenge the adjudicator’s decision on the grounds of jurisdiction, but it had retained its right to challenge on the grounds of a breach of natural justice.

TCC Decision
The developer failed to expressly reserve its position when inviting the adjudicator to correct errors in its decision using the slip rule due to alleged breaches of natural justice. The failure to expressly reserve its position regarding jurisdictional enforceability when making an application under the slip rule meant that the developer had effectively waived its right to challenge enforcement.

The doctrine of election prevented a party from "approbating and reprobating" an adjudicator's decision simultaneously. The whole of the decision had to be accepted or contested and a party could not state that a decision was valid for one purpose and not for another. *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] C.L.C. 739 applied and *Shimizu Europe Ltd v Automajor Ltd* [2002] B.L.R. 113 considered.