



LEGAL BRIEFING

Amey Wye Valley Ltd v The County of Herefordshire District Council

[2016] EWHC 2368 (TCC) Mr Justice Fraser

The Facts

During September 2003 Herefordshire District Council (*'Hereford'*) entered into a 10 year service delivery agreement (*'the SDA'*) with Herefordshire Jarvis Services Ltd, subsequently renamed Amey Wye Valley Ltd, (*'Amey'*) for the provision of repair and maintenance works to the roads in Herefordshire.

During July 2005 the parties signed a joint statement with the aim of resolving disputes over the application of the price adjustment mechanism in the SDA. Nevertheless, disputes continued and during 2013 Amey commenced adjudication. On 9 May 2013 (*'the First Decision'*) the adjudicator decided that the joint statement was binding and made a number of declarations as to how it was to be interpreted. He also noted that he had not been given jurisdiction to determine any financial entitlements.

The parties were unable to agree how the First Decision should be applied so in January 2015 Amey commenced a second adjudication seeking a determination of the sums due under the price adjustment mechanism. In a decision dated 26 February 2015 (*'the Second Decision'*) the adjudicator set out his calculations and ordered Amey to refund to Hereford an over-payment of £9.5m. The adjudicator's calculations included an arithmetical error in favour of Hereford worth some £2.45m according to Amey and £1.99m according to Hereford.

During 2016 Amey issued a Part 8 application contending that the adjudicator had acted without jurisdiction because the Second Decision was inconsistent with the First Decision insofar as the adjudicator's calculations were contrary to the SDA, the joint statement and the first adjudicator's declarations as to how these documents ought to be interpreted. Alternatively, Amey asked that the Second Decision be severed to dispose of the arithmetical error.

Amey's Part 8 application and Hereford's enforcement proceedings were heard together.

The issue

Should enforcement of the Second Decision be refused on the grounds advanced by Amey or if enforceable, should the Second Decision be severed to exclude the effect of the arithmetical error?

The Decision

The Judge considered that Amey's main argument amounted to a misconceived submission that for his decision to be enforceable, the second adjudicator would, uniquely, not be permitted to make any errors of fact or law, including calculation errors. The Judge cited the well-established rule that an adjudicator's decision, made within jurisdiction, will be enforced regardless of errors of fact of law. Thus the manner in which the second adjudicator had carried out his calculations was not immediately determinative of whether or not he had jurisdiction to do so.

The Judge found that the second adjudicator had not attempted to decide again the issues of interpretation set out in the First Decision but rather had applied the first adjudicator's

declarations to determine the financial consequences. Therefore the second adjudicator had decided something that had not been previously decided and his jurisdiction to do so was not undermined if in so doing he made mistakes in his calculations or in his application of the first adjudicator's declarations.

On Amey's alternative case, the Judge considered that where the Second Decision determined a single dispute it was not in the categories of decision for which severance was available, as per *Cantillon v Urvasco*. The Judge also noted that in claiming severance, Amey was seeking to correct an error in an otherwise enforceable decision and it was trite law, going back to *Bouygues v Dahl-Jensen*, that the Court should not contemplate adjustment of the arithmetic to correct the outcome.

Commentary

This judgement reminds us of some of the basic rules that should in reality discourage inventive approaches to opposing enforcement:

- (i) the test remains whether what the adjudicator decided was within his/her jurisdiction to decide;
- (ii) it is not the function of the Court to embark upon a detailed analysis of how an adjudicator has made calculations or findings of fact leading to his/her ultimate decision. Any such analysis will not go to jurisdiction *per se*. (Thus, as the Judge remarked, the extensive calculations submitted by Hereford and Amey were unhelpful); and
- (iii) upon enforcement, summary judgment will still be granted to the "winner" who is the winner only by virtue of the adjudicator's incorrect calculation.

The Judge referred sympathetically to the arithmetical error in the Second Decision and observed that adjudicators are not expected to be perfect, particularly when confronted with extraordinarily detailed calculations that in this case, included mistakes by both parties.

Finally, the Judge avoided offering any definitive views upon the principles that should apply when it comes to interpreting adjudicators' decisions but he warned against scrutinising errors of fact by reference to the perceived intention of the adjudicator.

Ted Lowery
October 2016
