Sheridan Gold LLP
Solicitors

Adjudication: Effect of Defence on Jurisdiction

By Peter Sheridan

Introduction

It is generally well-known that an adjudicator derives his jurisdiction from the notice of adjudication. It is the dispute described in the notice of adjudication that the adjudicator has jurisdiction to determine. The scope of the adjudicator's jurisdiction cannot subsequently be widened by the referring party's subsequent referral document or otherwise. These points generally apply unless the parties agree something else.

These well-known principles have been known to lead the referring party into difficulty. One area of potential danger is seeking to define the scope of the adjudication narrowly so as to attempt to limit the other party's response. Adjudicators have also been led into the error of taking too restrictive a view of their own jurisdiction, by reference to the terms of the adjudication notice and the relief sought in it. The effect where the responding party's defence or an important part of it is not considered in the adjudication is often a jurisdictional error that also amounts to a breach of the rules of natural justice. It is important for adjudicators to bear in mind that the adjudication notice will rarely, if ever, mention a defence but will put the referring party's case only; but the terms of the adjudication notice cannot be used to restrict the other party's ability to defend itself.

Any defence must normally be considered. Akenhead J stated in *Cantillon v Urvasco* (2009) that "whatever dispute is referred to the adjudicator, it includes and allows for any ground open to the responding party which would amount in law or in fact to a defence of the claim with which it is dealing", citing the *KNS* case (2001) as authority.

Cases where an adjudicator has taken an erroneously restrictive view of his jurisdiction, usually on the basis of the terms of the notice of adjudication, including the relief sought, with the result that he decides not to consider an important element of the dispute that has been referred to him were reviewed in *Pilon v Breyer Group* (2010) by Coulson J, who made the following points.

- The adjudicator must attempt to answer the question referred to him; the question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable.

- If the adjudicator fails to address the question referred to him because he has taken an erroneously restricted view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice.

- However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable.

- Any such failure must also be material; in other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication.

The position in *Pilon v Breyer Group* was that Pilon has undertaken work for Breyer, divided into batches 1-25 and 26-62. Pilon made interim application for payment in respect of batches 26-62, which was not paid, referred the dispute to adjudication and recovered over £200,000. In the adjudication, Breyer claimed to be entitled to set off over £147,000 because of earlier overpayment to Pilon in respect of batches 1-25. The adjudicator did not consider that defence, as he considered the dispute in then notice of adjudication to be limited to batches 26-62.

Coulson J found that the adjudicator deliberately placed an erroneous restriction on his own jurisdiction, which amounted to a breach of natural justice. He noted that in the notice of adjudication Pilon was seeking not only an interim valuation of batches 26-62, but also an interim payment of any sums due to them. While the interim valuation required the adjudicator to have regard to batches 26-62 only, the claim for payment meant that the adjudicator was obliged to consider whether Breyer were right to say that a much smaller net payment was due.

When a defence is raised in adjudication, but was not raised previously and did not feature in the crystallisation of the dispute, that does not put the dispute outside the jurisdiction of the adjudicator; he must still consider it: see *e.g. PC Harrington v Tyroddy* (2011).