

To what extent can a court “interfere” with an ongoing adjudication by ruling on substantive issues that are the subject of the adjudication?

This was an issue considered in the case of *WW Gear Construction Limited v McGee Group Limited* [2012] EWHC 1509 (TCC).

McGee, a demolition contractor, commenced adjudication proceedings against WW Gear seeking payment of approximately £2.5m in respect of variations. The contract was in the form of the JCT Trade Contract. An issue in the dispute was whether the proviso in clause 4.6, which stated that the valuation of variations would not include for loss and expense for delay where this was recoverable elsewhere under the contract, meant that such loss and expense could not be recovered under clause 4.6 where it could have been recovered under clause 4.21 but for the claim being time barred.

Rather unusually WW Gear decided to apply to court whilst the adjudication proceedings were ongoing, to seek a declaration on this issue before the adjudicator reached his decision. There was then a debate as to whether the court could review such a substantive matter that was the subject of ongoing adjudication proceedings.

McGee argued that the court did not have jurisdiction to make this declaration, or, if it did, it should not do so, because it would be an unwarranted interference with the adjudication process. McGee relied on paragraph 9.4.1 of the Technology and Construction Court Guide, which provides that

“As noted above, the TCC will also hear any applications for declaratory relief arising out of the commencement of a disputed adjudication. Commonly, these will concern:

- a) Disputes over the jurisdiction of an adjudicator. It can sometimes be appropriate to seek a declaration as to jurisdiction at the outset of an adjudication, rather than both parties incurring considerable costs in the adjudication itself, only for the jurisdiction point to emerge again at the enforcement hearing.*

- b) Disputes over whether there is a written contract between the parties or, in appropriate cases, whether there is a construction contract within the meaning of the Act.*

c) Disputes over the permissible scope of the adjudication, and, in particular, whether the matters which the claimant seeks to raise in the adjudication are the subject of a pre-existing dispute between the parties.”

McGee highlighted that the guide did not envisage the court dealing with an application such as WW Gear’s. McGee also highlighted the decision in Dorchester Hotel Ltd v Vivid Interiors Ltd [2009] EWHC 70.

Edwards-Stuart J said that the court did have jurisdiction to consider and grant WW Gear’s application, because the court’s power to make declarations was very wide; but the question was whether it would be appropriate to do so. The factors Edwards-Stuart J thought should be considered in deciding this issue of appropriateness included the justice to the parties, whether it would serve a useful purpose, and any other special reasons.

After considering these facts Edwards-Stuart J decided that on balance it would not be appropriate to make the declaration sought by WW Gear. He said “*there are obvious practical difficulties in permitting such an application to be made during an ongoing adjudication*”. The points he highlighted were that with regard to the timetable for adjudication proceedings, it would distract the respondent from giving its full attention to the adjudication proceedings at a critical time; it would interfere with the adjudicator’s ability to conduct the adjudication properly; an adjudicator is likely to have very little time before reaching his decision to consider any declaration granted by the court (in this case the adjudicator would have had one day); and this may well lead to unfairness, misunderstandings or mistakes.

Edwards-Stuart J did not rule out it ever being appropriate for the court to make such a declaration on a substantive issue. He just said it would rarely be appropriate. One example he gave when it might be appropriate is where the parties agree that it would assist the adjudicator if the court made a declaration, and they agreed to extent the timetable for the adjudication proceedings to allow for this.

The nature of his judgment meant that Edwards-Stuart J made it clear that he would not have granted the declaration sought in any event (he thought that McGee could recover loss and expense for delay under clause 4.6 notwithstanding that it could have recovered this under 4.2.1 but for it being time barred); but he ordered that his judgement was not to be communicated to the adjudicator, so as to avoid his conclusion that it would not be appropriate for the court to rule on his matter being undermined.

Jonathan Gold
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Sheridan Gold LLP

Castle Court, 41 London Road, Reigate, Surrey RH2 9RJ | T 01737 735088 | F 01737 735001 | E info@sheridangold.co.uk | W www.sheridangold.co.uk
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