

## **Arcadis UK Ltd v May and Baker Ltd (t/a Sanofi) [2013]**

Where there is a series of adjudication proceedings between the same parties, it is common for favourable decisions in previous adjudications to be put forward to subsequent adjudicators. In recent adjudication enforcement proceedings in the Technology and Construction Court, the extent to which an adjudicator may take into account or adopt the reasoning of the decision of a previous adjudicator was considered.

Arcadis was a contractor employed by May & Baker Ltd (trading as Sanofi) to carry out remediation works at a site in Dagenham. Arcadis was to carry out soil washing, chemical treatment and off-site disposal of material for redevelopment of the land for industrial purposes. The contract incorporated the NEC3 Engineering and Construction Contract and provided for various Compensation events. The Project Manager instructed Arcadis to carry out some work beyond the northern and southern boundaries of the site. Arcadis encountered contaminated ground and issued an Early Warning notice. The Project Manager subsequently purported to withdraw their instructions and a dispute over payment arose.

Arcadis commenced adjudication proceedings against Sanofi for payment in respect of the work beyond the northern boundary. The adjudicator decided in favour of Arcadis that the additional work was a Compensation Event and that Arcadis was entitled to payment and an extension of time. He then gave reasons why the Project Manager was not entitled to withdraw his acceptance of the Compensation Event or its effect on the Prices.

A few months later, Arcadis started an adjudication in respect of the work beyond the southern boundary. Sanofi objected to the proposed reappointment of the previous adjudicator, so a second adjudicator was appointed. Arcadis appended the decision of the first adjudicator to its referral and submitted: *“There has already been an adjudication in respect of the additional works at the north of the site on a similar factual basis...As the same principles apply to this Issue in this referral we consider that the Adjudicator is bound by that*

*previous decision (see Section 23(2) of the Scheme for Construction Contracts) and should therefore decide that the project manager is not entitled to withdraw a compensation event once it has been implemented. Should the Adjudicator not feel bound by the previous decision, which we consider would be incorrect, we request the Adjudicator to adopt the compelling arguments of [the first adjudicator] in this issue.”*

The second adjudicator decided that the works did constitute a Compensation Event and found that the effect of Compensation Event was an increase in the Prices. Sanofi did not honour the award and Arcadis issued enforcement proceedings.

Sanofi defended the proceedings on the basis that the second adjudicator, among other things, took an erroneously restrictive view of his own jurisdiction in deciding he was bound by the first adjudication and the decision was invalid on the grounds of apparent bias, as he was put in a position in which he had to have regard to the first decision.

The judge held that it was neither improper nor contrary to the rules of natural justice for the decision in the first adjudication to be put before the second adjudicator or for the second adjudicator to have regard to that decision. The first adjudicator's findings on the meaning of the contract were germane or at the very least, persuasive. By analogy, it was common in court proceedings for earlier decisions between the same parties to be put before the judge. In adjudication, this might even be required in some circumstances; for example, in questions of jurisdiction where the adjudicator may have no jurisdiction to decide disputes already resolved in an earlier adjudication.

Sanofi put forward a forceful argument that the second adjudicator had restricted his jurisdiction or acted in breach of natural justice, in finding he was bound by the earlier decision. However, the second adjudicator had not in fact decided he was bound by the first decision. He decided the issues on their own merits and not because he felt bound by the first decision. His agreement with the first adjudicator did not mean he restricted his jurisdiction or acted otherwise unfairly. On the question of bias, it will be rare for the jurisdiction or conduct of an adjudicator to be challenged in enforcement proceedings because they had looked at and considered any material put forward by either party. The second decision was therefore enforceable.

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