

Legal Briefing

Having raised specific questions, had the adjudicator breached natural justice by coming to a conclusion that was different to the answers provided by the parties?

Victory House General Partner Ltd v RGB P&C Ltd [2018] EWHC 102 (TCC)

Before Miss Joanna Smith QC sitting as a Deputy
In the Technology and Construction Court
Judgement delivered 26 January 2018

The facts

During 2015 Victory House engaged RGB to construct a hotel in Leicester Square, London. The works were delayed and on 13 March 2017 the parties entered into a Memorandum of Understanding ('the MOU'). Recital D in the MOU noted that Victory House was "wary" of making further payments until the transformer, a key element of the outstanding work, was operational. The MOU provided for an immediate payment to RGB of £200k plus two further payments of £200k to be made when the transformer was operational – which occurred on 24 June – and upon Victory House's receipt of all of the T&C Certificates. The third payment was not made and in July 2017 RGB issued an application for payment under the contract claiming some £682,802.88 plus VAT. Victory House failed to serve a timely payment notice or any payless notice.

In August 2017 RGB commenced adjudication. Following the exchange of submissions the adjudicator circulated two questions concerning the effect of Recital D in the MOU. RGB replied that Recital D was merely background but they also noted that the MOU did not state that there would be no further payments under the contract. Victory House responded that Recital D identified their reluctance to make any further payments until there had been significant progress towards completion. The adjudicator did not reply to Victory House's invitation to indicate if there was anything else he wanted to receive comments upon.

In his 7 November 2017 decision the adjudicator rejected both RGB's primary case that the MOU was not legally binding and

Victory House's case that the MOU superseded the contract. He found that the true effect of the MOU was to suspend Victory House's obligation to make interim payments until the transformer was installed and operational. RGB's July 2017 application was therefore not precluded by the MOU and £682,802.88 plus VAT was payable in the absence of any valid payment notice or payless notice.

Victory House commenced Part 8 proceedings seeking a declaration that the decision was invalid for breach of natural justice. RGB issued an application for enforcement.

The issue

Did the adjudicator's approach give rise to a material breach of natural justice?

The decision

Victory House said that the adjudicator's conclusion that the MOU temporarily suspended the interim payment mechanism in the contract was not an argument that had been advanced by either party. Thus the adjudicator had "gone off on a frolic of his own" with an entirely new point that had not been hinted at in advance of the decision and which had not arisen out of the parties' answers to the adjudicator's questions.

The judge disagreed finding that the central issue in the adjudication was the proper interpretation of the MOU upon which both sides had made detailed submissions including in answer to the adjudicator's specific questions regarding the effect of Recital D. Thus the adjudicator's decision was made against the background of having posed specific questions about the purpose, scope and effect of Recital D and where both parties had had an opportunity to provide answers, there could be no breach of natural justice.

The judge said that Victory House should have appreciated that RGB's reply to the adjudicator's questions encompassed an alternative submission and taken the opportunity to respond. It was not enough for them to have only asked the adjudicator if more comment was required.

The judge added that alternatively, applying the reasoning in *Aecom v Staptina*, the adjudicator was entitled to make a finding on a point of importance on the basis of the material before him where that point and the relevant material had been fairly canvassed in the adjudication, whether or not the adjudicator's construction had been contended for by either party.

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Commentary

This judgment highlights two omissions by Victory House that were, with hindsight, decisive. Firstly, irrespective of their view of the MOU, it would have been prudent to serve a payment notice and payless notice, if only on a protective basis. Secondly, they could not rely upon having asked the adjudicator if more comment was required and should have made a further submission

The latter omission is more understandable but given the well known and drastic repercussions, it is difficult to excuse not serving a timely payment notice and payless notice in response to an application for payment, even if it is thought that the application is wholly misguided.

Ted Lowery
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