

JOHN SISK & SON LTD V DURO FELGUERA UK LTD [2016] EWHC 81 (TCC)

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This was an application for enforcement of an adjudicator's decision by John Sisk & Son Ltd ("Sisk") that was resisted by Duro Felguera UK Ltd ("Duro") on the grounds that there had been a breach of natural justice or wrongful delegation of the adjudicator's decision-making function. The dispute arose out of a contract to carry out civils works at a Combined Cycle Power Plant worth some £36 million, of which the adjudicator had awarded Sisk £10 million.

Duro identified three matters in support of their position:

1. There was a real danger that the adjudicator had approached issues with a closed mind;
2. the adjudicator delegated certain parts of his decision-making role to a third party without notifying the parties of this or seeking their consent to that course; and
3. he purported to rectify or to amend the contract in circumstances where neither party had submitted that it should be rectified and without giving the parties any notice of his intention to take that approach.

(1) The Pre-Determination Point

The question for the court to determine was whether the fair-minded and informed observer, having considered all the facts, would conclude that there was a real possibility of predetermination. Edwards-Stuart J relied on the explanation of predetermination given by Beatson J in *R on*

the application of *Persimmon Homes Ltd v Vale of Glamorgan Council*[1] which provided:

"Predetermination is the surrender by a decision-maker of its judgment by having a closed mind and failing to apply it to the task. In a case of apparent bias, the decision-maker may have in fact applied its mind quite properly to the matter but a reasonable observer would consider that there was a real danger of bias on its part. Bias is concerned with appearances whereas predetermination is concerned with what has in fact happened."

Predetermination had traditionally been argued in cases where the procedure used to appoint an adjudicator was defective, the adjudicator's decision was subsequently quashed and so a second referral was made to appoint the same adjudicator to determine the same dispute again. In such cases, there was a real danger that the adjudicator would go into the second adjudication with a closed mind and so predetermination of the issues was likely to be found.

The facts of this case were very different. Duro's argument was made on the basis of an email sent by the adjudicator in which he communicated his intention to continue with the referral rather than resigning at that exact point in time. The adjudicator's email was sent after Duro had served a response to Sisk's referral notice and Sisk had served its reply to Duro's response, but before Duro had yet had the chance to respond to Sisk's reply. As Sisk's reply raised new matters about the adjudicator's jurisdiction and Duro had not yet had the chance to address the adjudicator on them before the adjudicator's email, Duro

sought to argue that from this point onwards the adjudicator had predetermined the jurisdiction dispute by deciding the answer in his email.

Edwards-Stuart J considered this submission to be entirely without merit:

"The adjudicator described the conclusions that he reached in his letter of 11 August 2015 as being a 'non-binding opinion'. The purpose of reaching those conclusions was for him to determine whether or not he had jurisdiction to continue the referral. He decided that he did. At no stage did he indicate that he would not entertain further submissions on the same points. Indeed, it seems that he did so, both at the meeting held on 1 September 2015 and in the submissions that he directed the parties to make thereafter."

(2) The Delegation to Mr Hutchinson

Duro sought to argue that part of the decision making process had been delegated to an accredited quantity surveyor, Mr Hutchinson, on the following basis:

"At some point after this Freeths examined the metadata for the Excel spreadsheets which were included as part of Appendices 1 and 2 to the Adjudicator's Decision. In each case Mr Hutchinson was shown as the creator of the document and as the person by whom it was last modified. On the basis of this information but, so far as I can tell, very little else, Duro contends that Mr Hutchinson must have been engaged by the Adjudicator as an expert or an assessor in relation to these documents. It therefore contends that the adjudicator wrongly (and without the consent of the parties) delegated part of his role as a decision-maker to Mr Hutchinson or... that his failure to notify the parties that he intended to do this was a breach of natural justice."

Edwards-Stuart J examined the evidence which included a number of spreadsheets and emails

which had been prepared out of the efforts of both the adjudicator and Mr Hutchinson. Duro had relied heavily on the fact that two different typefaces had been used within one email from the adjudicator, which they considered to be strong evidence that part of the decision making process had been delegated to Mr Hutchinson. The adjudicator explained the presence of both the Calibri and the Palatino Linotype fonts on the basis that the former was the default font for his emails and the latter was the default font for his documents. Part of the email had simply been copied and pasted from a document he had drafted himself, so this was no evidence of any delegation to Mr Hutchinson.

Edwards-Stuart J considered that there was "no basis whatever" for doubting the adjudicator's explanation. Indeed, the adjudicator's task would have been "almost insuperable" without the assistance of someone who could assemble and manipulate the data in a manner that made the figures manageable, and that the portion of the work completed by Mr Hutchinson amounted to no more than copying and pasting. Duro's submission on delegation was therefore without merit.

(3) The Contract Rectification

The parties were in dispute over the way in which the contract provided for the re-measurement of the works concerning the provision of concrete. The adjudicator's decision on the matter had used the verb "to correct" when determining which version of the contract he was to accept, and this formed the sole basis for Duro's contention that the adjudicator had rectified the contract without notice to either party of his intention to do so. In spite of this word choice, it was abundantly clear to Edwards-Stuart J that the adjudicator was merely adopting Sisk's view as the correct one and so there was no breach of natural justice. Duro's challenges to the adjudicator's decision therefore failed on each and every ground, and Sisk was granted summary judgment in the full amount.