

SAME ISSUES, DIFFERENT PROCEEDINGS

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Legal Briefings

Parties involved in construction and engineering projects sometimes find themselves fighting the same issue on different fronts. In the recent English case of *Beumer Group UK Limited v Vinci Construction UK Limited* (13 September 2016) a subcontractor argued that it had not finished late in one adjudication against the main contractor, but in another adjudication in respect of the same project argued that one of its sub-subcontractors had in fact, finished late. The lessons learnt from this case are relevant to any project participant in the middle of a chain of construction and engineering contracts.

Vinci was the main contractor. Beumer was the subcontractor and their sub-subcontractor was Logan. There were disputes between Vinci and Beumer and Beumer and Logan in relation to delay to the works. Both disputes were referred to separate adjudications at the same time but the adjudicator was the same person.

In the Vinci adjudication ("First Adjudication") Beumer contended that it had not finished the works late. However, in the Logan adjudication ("Second Adjudication"), Beumer contended that Logan had finished late.

In the First Adjudication the adjudicator found that Beumer had not finished late albeit that Beumer had been arguing in the Second Adjudication that its sub-subcontractor was late. A contradictory position from that in the First Adjudication.

Vinci contended that the decision in the First Adjudication should not be enforced as there was a breach of the rules of natural justice because it had not had the opportunity to be heard in relation to the issues raised in the Second Adjudication. In particular, that the arguments which Beumer had put forward in the First Adjudication and in the Second Adjudication were factually inconsistent. Vinci also argued that the adjudicator was biased against it.

The English High Court accepted Vinci's argument that the decision in the First Adjudication should not be enforced. It referred to the inconsistent arguments raised by Beumer in the two adjudications. The court decided that the adjudicator, having been aware of the matters raised in the Second Adjudication, should have disclosed his involvement so that Vinci might comment on the contentions advanced by Beumer in the Second Adjudication.

As he had not done so, an appearance of bias was raised, as would be the case if the adjudicator had held a unilateral telephone conversation with one party. The court also referred to arbitrators being governed broadly by the same principles likely to affect their impartiality.

Whilst there were joinder provisions in the subcontract, these only applied if all parties consented, which was not the case here.

The court commented that putting forward inconsistent arguments in different sets of adjudication proceedings was not to be encouraged. In court and arbitration proceedings, the signing of statements of truth on submissions and witness statements would normally discourage such behaviour.

Although an unusual case in that the same adjudicator was appointed to both cases, the case highlights the dilemma a project participant "in the middle" may have when seeking to put forward inconsistent contentions in different proceedings. Further, whilst this case concerns domestic adjudication in England it is conceivable that similar issues could arise internationally with dispute adjudication boards (DABs), such as those contemplated under the FIDIC forms of contract.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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