Can the court restrain a party who refers and abandons serial adjudications to obtain a tactical benefit? Can the costs of the other party be recovered? Mrs Justice O’Farrell DBE has recently clarified these issues in Jacobs v Skanska.

The case involved an adjudication process whose timetable had been modified by agreement. Skanska was claiming damages against Jacobs for an allegedly defective design that had caused it loss.

Skanska referred the dispute to an adjudicator, but later withdrew. This, according to Skanska, was because their counsel had become unavailable and they could no longer meet the timetable set out in the agreement. Jacobs had incurred substantial costs in preparing for the adjudication.

Skanska then referred substantially the same dispute to a different adjudicator. Jacobs commenced part 8 proceedings seeking to restrain Skanska’s ability to take any further steps in relation to the second adjudication and a declaration that Jacobs are entitled to be paid their wasted costs in relation to the first adjudication.

Skanska argued that there was no concept of abuse of process in adjudication, and that it is open to a party to seek any tactical advantage it can, including opening and closing serial adjudications in respect of a claim.

Generally, Mrs Justice O’Farrell DBE held that there is nothing to stop a party from withdrawing from an adjudication and starting a new one and that the principle of abuse of process does not apply to adjudication. The claim persists even after the withdrawal and new referral, as the dispute has not been decided by the previous adjudicator (paras 27 to 34).

However, O’Farrell J rejected the submission that serial opening and closing of adjudications is always open to the parties, as this could force the other party to incur unrecoverable costs and thus amount to unreasonable and oppressive behaviour (para 33). In such circumstances, the court has a power to restrain the second adjudication by injunction (para 35).

Skanska’s withdrawal was unreasonable, but not oppressive. Jacobs will be able to rely on most of its prepared work in the second adjudication, as the issue is substantially the same (para 36). O’Farrell J made the declaration that Jacobs is entitled to its wasted or additional costs as damages, as Skanska had breached their contract detailing the timetable of adjudication. This did not mean all costs are recoverable, as some of them would still have been incurred in preparing for the second adjudication.

The case highlights the rough and ready approach to adjudication, defending its ‘inherent unfairness’ with the advantage of ‘speed and efficiency in obtaining a decision’ (para 26). The general position that a party is not entitled to wasted costs in preparing for an adjudication in the absence of agreement was common ground, so the precise effects as to costs of Skanska’s unreasonable conduct in withdrawing from the first adjudication tantalisingly elude us.

Mrs Justice O’Farrell does suggest that where the conduct is genuinely oppressive (or the inconvenience or costs caused ‘severe or exceptional’), the court might have the power to ‘interfere by way of injunctive relief’ (para 36). Whether a declaration as to costs could be granted where such behaviour occurs is unclear.

Say that dominant contractor knowingly referred and abandoned a series of adjudications against a small subcontractor, alleging entitlement to pay less than the final contract sum. The subcontractor’s solvency could depend on receiving the final sum, and it would incur continued costs in preparing for a never-ending series of adjudications to prove its case. The contractor could practically force the subcontractor to accept less than its full entitlement, because the continued delay and costs incurred would be damaging to its business.

This would obviously be both unreasonable and oppressive, and once it becomes obvious the court has the power to stop future adjudications. But can the contractor recover its costs?

Contact Us

This case review was written by our Construction Team.

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