

Murray & Roberts LTD v Alstom S & E Africa (PTY) LTD Case Number 2104/2018

The Applicant (M&R) sought an order from the court enforcing the decision of an adjudicator. The adjudication was not an arbitration and took place in terms of a subcontract concluded between M&R and the Respondent (Alstom) that provided for the reference of disputes to an adjudicator. M&R referred a dispute to adjudication and the Adjudicator gave a decision. M&R sought an undertaking that Alstom would comply with the decision. Alstom demurred.

M&R approached the court to enforce the decision. Alstom resisted enforcement on the basis that the decision was impossible of performance.

The court was required to determine whether impossibility of performance, advanced as the basis upon which the court should not order specific performance, was of application to the enforcement of the Adjudicator's decision. Under the subcontract, the Adjudicator's decision was final and binding and required Alstom promptly to give effect to the decision.

The court held that there were distinctive features of the adjudication that did not permit of the application of its general equitable discretion to refuse specific performance in appropriate cases in quite the way that would occur in a standard case. In the standard case, the court enjoys the remedial power to decide whether the specific performance of contractual obligations should be refused. In this case, the Adjudicator was given the competence to decide what remedy should be imposed and did so. The court was being asked to refuse to enforce that remedy.

The court held that ,in such a case, while the court continued to enjoy the power to determine whether to grant a remedy of enforcement, its exercise of this power will be different to the exercise of its discretion when the court is deciding upon the remedy *de novo*.

Where, as in this case, an adjudicator has decided upon the remedy, by reason of a competence the parties to the contract have given him, the following will be relevant. First, did the adjudicator decide the dispute now raised before the court ? If not, could the party contending for impossibility have raised the issue before the adjudicator, and if so, did the party do so, and if not, why not ? Second, why should the party contending for impossibility escape its obligations to be bound by the outcome of the adjudication, to treat it as final and give effect to it ? Third, what are the consequences of permitting a party to escape the enforcement of the decision ? In the standard case, a refusal of specific performance simply requires the wronged party to seek damages or some other appropriate remedy. But in the case where the enforcement of the decision of an adjudicator is in issue, it is the adjudicator that has determined the merits of the case and decided upon a remedy. Here the decision of the court is binary: enforce the decision or leave the applicant without the benefit of the decision. The equities of such an outcome require careful consideration. Fourth, what are the systemic risks if agreed procedures for dispute resolution that are intended to be quick and avoid disruption to large construction projects nevertheless give rise to lengthy litigation before the courts. Fifth, is there a risk that the impossibility relied upon will indeed , if an order is made, require what

cannot be done and expose the defaulting party to the risk of contempt proceedings ? This is by no means a closed list.

The court then turned to a consideration of these matters. It held that there was no warrant to exercise its discretion to refuse the enforcement of the Adjudicator's decision. Among other reasons, the court found that upon a proper interpretation of the Adjudicator's decision, the decision was not impossible of performance.