Fenwick Elliott
Solicitors, Adjudicators and Mediators

DISPATCH

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" Constructive Law for the Construction Industry "

Adjudication Update

In ***Carillion Construction Limited v Devonport Royal Dockyard Ltd***, HHJ Bowsher QC had to consider an application for the enforcement of an adjudication decision where the sum involved was some £7,451,320 plus VAT. Devonport alleged that the Adjudicator did not have jurisdiction because the relevant contract was not (evidenced) in writing and that no dispute had arisen prior to the service of the notice of adjudication.

The key to the first argument was whether the project was cost reimbursable. As this was a material term, following the CA decision in ***RJT Consulting v DM Engineering*** (see issue 21), that term must have been evidenced in writing for the dispute to be referable to adjudication.

Here, there was a construction agreement in writing, but what was in issue was an alleged oral agreement that radically changed the written agreement (if indeed that written agreement had been made). The change was far greater than a typical variation made pursuant to the terms or by the construction contract. It was common the adjudicator did not have jurisdiction.

HHJ Bowsher QC also considered the question of whether or not there was a dispute. Devonport said that the claim was advanced by a letter dated 5 July 2002. There then followed an exchange of correspondence in which Devonport sought clarification and further information. The notice was served on 6 August 2002 without providing the clarification, information or time requested by Devonport. Carillion said that the dispute went back to May 2002.

HHJ Bowsher QC turned to the decisions made in arbitration as to whether or not there was a dispute. He noted that Devonport did not ignore the claim. They asked for further information.

HHJ Bowsher QC said a broad approach is required. The fact that an application was made and was not paid is not necessarily enough to make a dispute. Devonport were denying that payment was due, or were denying that payment was due until some verification was provided. Devonport were not denying the claim outright. Devonport was not ignoring the claim. They were asking for clarification. Devonport did not have time to respond to the limited clarification that was given prior to the adjudication commencing. HHJ Bowsher QC held that "*The conduct of the adjudication indicates that, if given a reasonable opportunity to respond, there would have been a dispute, but that is not the point.*" The Judge accepted that the case here was not clear cut but found in favour of Devonport.

Lord Johnston gave Judgment in the Scottish Court of Appeal in an appeal brought by Ballast Plc in relation to the Burrell company (see Issue 13).

The original complaint was that the Adjudicator's decision did not determine the dispute as originally referred and identified in the Notice. As a consequence the decision was a nullity. Lord Johnston affirmed the original decision of Lord Reed and in doing so stressed the importance for adjudicators of answering the question actually put in the Notice of Adjudication. He noted that:-

" As regards jurisdiction…it is our opinion that the Adjudicator, while restricted to issues focussed in the dispute, has nevertheless both the power and duty to determine whether or not a claim that it put forward in respect of valuation of work done is validly asserted under the contract. He must answer that question either in the affirmative or the negative. He cannot decline to address it, which is what the Adjudicator in fact did in this case. [The power of the Adjudicator] is based on the notice of the dispute which identified the question which the Adjudicator had to address. Thereafter, it was his duty in addressing that question to consider the validity of each and all of the claims put forward, which in turn would require him to consider the basis upon which they were being asserted. If not contractually based, they must inevitably fail - either in whole or in part."

Adjudication continued

Again in Scotland, in ***A v B***, Lord Young had to consider an application by *A* to enforce an adjudicator's decision, awarding them loss and expense totalling £639,151.82.

B argued that the contract prohibited *A* from raising any action to enforce the award until either termination of the present sub-contract or actual completion of the last phase of the main contract. Appendix 8 of the sub-contract stated that no party shall, save in the case of bad faith, make any application whatsoever to a court in relation to the conduct of the adjudication and the decision of the adjudicator until completion of the contract or termination of the sub-contract. This clause was almost certainly there to try and frustrate any potential adjudication.

Unlike in England & Wales, in Scotland, two types of Court proceedings may arise out of an adjudication. The first is the judicial review of the decision (i.e. challenges to the jurisdiction of the adjudicator) and the second relates to an action to enforce an adjudicator's award. *A* argued that this clause was not concerned with enforcement, but with challenges to the decision by way of judicial review. The Judge agreed, noting that, an adjudicator's decision when pronounced is legally binding on the parties. Since an obligation arising out of a decision is binding, it must be capable of enforcement. The clause in the contract related only to judicial review of a decision - not to proceedings to enforce that decision.

The Judge also noted that the requirement of Rule 28a of the (then) ORSA Rules, which was incorporated into the contract and which required every decision of an adjudicator to be implemented without delay reinforced his decision that the amendment imposed by the contract prohibited the immediate enforcement.

Alternatively, *B* relied on the fact that the adjudicator had awarded an extension of time of only 46 weeks, when 112 weeks was sought. Consequently, *B* maintained that *A* was in delay for a period of 66 weeks, which would attract LAD's at a rate of 75K per week. In relation to *B's* second argument, Lord Young noted that *B* did not, during the adjudication, assert that they were entitled to LAD's if the Adjudicator failed to award *A* the full extension of time sought. *B* merely contested the VAT claim, admittedly with some success. However, making a claim for LAD's is different to challenging a claim for an extension of time. Different questions arise, for example, is the sum claimed as LAD's penalty? Therefore this argument failed.

Health & Safety

Kevin Myers, the chief executive of the Construction arm of the HSE has published his second report for the year ending November 2002. A full copy can be found at www.hse.gov.uk/spd/pdf/report2.pdf. The report is encouraging and there has been a substantial reduction in the number of fatal injuries suffered.

However unsurprisingly the HSE stresses that there is more to be done. For example the report comment son the *"disappointing"* outcome of the blitzes (or surprise site inspections) carried out over the year. Of the 1,113 sites visits, work was stopped on 460 (or 41%). There is little doubt that the HSE will continue to rigorously take steps to enforce the health and safety legislation and to try and ensure that the targets set by the Construction Safety Summit held on 27 February 2001 are achieved.

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