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ADJUDICATION

Contractual Problems Nos 12.1 to 12.25 arise out of adjudication under Part II of the Housing Grants, Construction and Regeneration Act 1996 referred to as the 'Construction Act'.

12.1 Will an adjudicator's award be enforced by the courts using a summary procedure?

12.1.1 Prior to an enforcement case coming before the courts, it was considered by some eminent authorities that the courts would not, and in fact could not, enforce an adjudicator's award by a summary procedure. The reasons were based upon a number of cases, including *Halki Shipping Corporation* v. *Sopex Oils Ltd* (1997).

12.1.2 The first court case concerning the enforcement of an adjudicator's decision was *Macob Civil Engineering Ltd* v. *Morrison Construction* (1999). In this case the parties entered into a contract under which the claimant Macob was to carry out groundworks. A payment dispute arose which was referred to Mr E. Mouzer, an adjudicator. His decision was that the subcontract provided a payment mechanism which did not comply with the Act, consequently the Scheme for Construction Contracts applied. Mr Mouzer concluded that the defendant had served a notice indicating an intention to set off from payments due out of time and therefore immediate payment should be made to Macob. The adjudicator's decision was in the form of a pre-emptory order under which either party could apply to the court for enforcement.

The defendant applied to the court for a stay to arbitration on the grounds that the decision was wrong on its merits and also that there had been a breach of the rules of natural justice. The judge rejected the defendant's arguments, holding that to refuse enforcement would substantially undermine the effectiveness of adjudication. He considered that the provision of the Act should be construed positively. The decision of the adjudicator was therefore held to be binding.

12.1.3 In *Outwing Construction Ltd* v. *H. Randall* (1999), a dispute under DOM/1 was referred to Mr Talbot, an adjudicator appointed by the Chartered Institute of Building. He considered that, as the terms of the subcontract did not comply with the Act, the Scheme for Construction Contracts applied.

It was the decision of Mr Talbot that the defendant should pay the claimant, plus his fees and expenses. He ordered his decision to be made pre-emptorily. The claimant issued an invoice for the amount included in the adjudicator's decision. In the absence of payment, solicitors acting for the claimant provided a deadline for payment threatening to apply for summary judgment in the event of non-payment. After the date had passed, the defendant responded to the effect that it intended to seek a court stay to arbitration. A writ was issued by the claimant for payment plus interest and costs. The defendant made payment but refused to pay the claimant's costs. The court found in favour of the claimant. It was the view of the judge that the intention of Parliament is clear: disputes may be referred to adjudication and the decision of the adjudicator has to be complied with.

12.1.4 It was not long before the Scottish court became involved with regard to adjudication. In the case of *Rentokil Allsa Environmental Ltd* v. *Eastend Civil Engineering Ltd* (1999), the adjudicator found in favour of the pursuer. A cheque for the full amount was provided by the defendant, who simultaneously lodged an arrestment freezing the payment they were obliged to make to the pursuer. This is a mechanism in Scotland which does not apply in England whereby, to put pressure on a reluctant payer, the payee seeks to arrest or freeze payments due to the payer by third parties, in this case freezing payment from itself to the pursuer. The court found in favour of the pursuer, refusing to allow the use of the arrestment mechanism to circumvent and negate the effect of the adjudicator's decision.

SUMMARY

It has been made clear by the courts that in passing the Construction Act the intention of Parliament is clear in that a decision of an adjudicator appointed under the Act can be enforced by summary procedure.

12.2 Will the court enforce part only of an adjudicator's award?

12.2.1 An adjudicator's decision may comprise a number of parts. If the court holds that part of the award is tainted and unenforceable, will the valid parts be enforced? This was the problem faced by the court in the case of *R. Durtnell and Sons* v. *Kaduna Ltd* (2003). Kaduna and Durtnell entered into a JCT 80 standard form of contract for work to be undertaken at Kaduna's property in Hampshire. The parties were in dispute concerning the sum which Durtnell was due to be paid under the terms of the contract and their entitlement to an extension of time.

12.2.2 The adjudicator made a declaration concerning Durtnell's entitlement to an extension of time and an award of £1.2m in respect of the payment claim. For some strange reason Kaduna paid half of the £1.2m and then contested the adjudicator's decision on the basis that, under the terms of the contract, the architect had 12 weeks to deal with applications for extensions of time and the period had not expired. Durtnell applied to the court to have the balance of the adjudicator's decision paid.

12.2.3 The court agreed with Kaduna that the adjudicator should not have included an entitlement to an extension of time in his decision as the 12-week period available to the architect for granting extensions of time had not elapsed. However, the court ordered Kaduna to pay to Durtnell the balance of the £1.2m.

SUMMARY

In the case of *R. Durtnell and Sons* v. *Kaduna Ltd* (2003), the adjudicator in his decision awarded £1.2m and a declaration concerning an extension of time. Unfortunately the adjudicator acted outside his jurisdiction concerning the extension of time. Nonetheless, the court ordered the payment to be made.

12.3 When can it be said that a dispute has arisen giving rise to an entitlement for the matter to be referred to adjudication?

12.3.1 Section 108 (1) of the Construction Act states that:

> 'A party to a construction contract has the right to refer a dispute arising under the contract for adjudication...'

12.3.2 If there is no obvious dispute there is nothing to be referred to adjudication. This may seem obvious but nonetheless, in the case of *Sindall Ltd* v. *Sollard* (2001), a matter was referred to an adjudicator before a dispute was alleged to have taken place. Sindall was the main contractor for the refurbishment of Lombard House in Mayfair. The employer was Sollard and the contract administrator Michael Edwards. Work was delayed and the contractor requested an extension of time. A period of 12 weeks was awarded which did not meet with Sindall's minimum requirements and the matter was referred to adjudication. The adjudicator decided that an extension of 28 weeks was appropriate. Further delays occurred and the employer threatened to determine Sindall's employment. Sindall drew attention to delays due to the issue of 123 instructions by the contract administrator and requested a further extension of time. They sent a box of files to the contract administrator and gave him seven days for a response. Michael Edwards asked for more time to consider the submission but the request was ignored and Sindall commenced adjudication. The court considered that, in view of the short period of time given to Michael Edwards to reach a decision, there could be no dispute which was referable to adjudication. The judge said:

> 'It must be clear that a point has emerged from the process of discussion, or the negotiations have ended, and that there is something which needs to be decided'.

12.3.3 Whether or not a dispute has in fact occurred will often depend upon the facts of the case. Remarks of judges in the following cases are very relevant:

(1) *Fastrack Contractors* v. *Morrison Construction* (2000) in which Judge Thornton QC stated:

> 'A dispute can only arise once the subject matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion.'

(2) *Edmund Nuttall* v. *R.G. Carter* (2002) where Judge Seymour QC said:

> 'For there to be a dispute there must have been an opportunity for the protagonists each to consider the position adopted by the other and to formulate arguments of a reasoned kind.'

12.3.4 Other cases brought before the courts where the question of whether a dispute had arisen include:

Cowlin Construction Ltd v. *CFW Architects* (2002)
Costain Ltd v. *Westcol Steel Ltd* (2003)
Beck Peppiatt Ltd v. *Norwest Holst* (2003)
Orange EBS Ltd v. *ABB* (2003)

SUMMARY

For a dispute to have arisen which may be referred to adjudication it must be clear that the process of discussion or negotiation has ended and that there is something which needs to be decided.

12.4 To comply with the Construction Act and be subject to adjudication, the contract must be in writing or evidenced in writing. Would reference in meeting minutes to the nature of the work and the submission of fee accounts in relation to work undertaken by an engineer be regarded as a contract evidenced in writing?

12.4.1 Section 104 (2) of the Construction Act covers services provided by an engineer undertaking design work. The matter which had to be decided by the adjudicator in the case of *RJT Consulting Engineers Ltd* v. *DM Engineering (Northern Ireland) Ltd* (2002) was whether the contract complied with the requirement to be in writing or evidenced in writing.

The contract between RJT Consulting Engineers and DM Engineering was essentially oral. Both the parties to the dispute were involved with the refurbishment of the Holiday Inn in Liverpool. RJT's representative verbally agreed with a representative from DM to undertake some design work for a fee of £12 000. DM was the mechanical and electrical contractor and RJT the consulting engineer. A dispute arose whereby DM levied a claim for negligence in the sum of £858 000 against RJT. The matter was referred to adjudication by DM. RJT applied to the court for a declaration that the agreement was not in writing and therefore not covered by the Construction Act. DM argued that, whilst the contract was not in writing, it was evidenced in writing. RJT's case was that to be evidenced in writing the evidence must

recite the terms of the agreement. Judge Mackay disagreed. He noted that the material concerning the contract was extensive. RJT had submitted fee accounts which identified the nature of the work, the names of the parties and the place of work. There were minutes of a meeting which again referred to parties and the nature of the work undertaken. The judge concluded that the evidence in support of the agreement would not be required to identify its terms and that due to the extensive number of documents the agreement came within the ambit of the Construction Act.

12.4.2 On appeal the Court of Appeal took a different view, as expressed by Lord Justice Ward when he made the following observations:

> 'On the point of construction of section 107, what has to be evidenced in writing is literally the agreement, which means all of it, not part of it. A record of the agreement also suggests a complete agreement, not a partial one.'

12.4.3 The Court of Appeal, in coming to this decision, seemed to be taking the view that there is no difference in meaning between a contract in writing and one evidenced in writing. This being the case, it was pointless a distinction being made in the wording of the Act.

12.4.4 The decision of the Court of Appeal was followed in *Debeck Ductwork Installations Ltd* v. *T. and E. Engineering Ltd* (2002) and *Tally Weigl (UK) Ltd* v. *Pegram Shopfitters Ltd* (2003).

SUMMARY

To comply with the Construction Act all of the agreement must be in writing. There seems to be no provision for a contract which is part in writing and part oral. It would be interesting to speculate what the attitude of the Court of Appeal would have been in the case of *RJT Consulting Engineers Ltd* v. *DM Engineering (Northern Ireland) Ltd* (2002) had those parts of the contract which were in dispute been in writing, with the remainder over which there was no dispute subject to an oral agreement.

12.5 Can a dispute concerning verbal amendments to a construction contract be referred to adjudication?

12.5.1 Section 107 of the Construction Act requires a contract to be in writing or evidenced in writing for it to be referable to adjudication. Where the contract itself is in writing does this provision apply to amendments to the contract?

12.5.2 A dispute concerning this matter arose in the case of *Carillion Construction* v. *Devonport Royal Dockyard* (2003). Carillion was contracted to undertake refurbishment at Devonport Royal Dockyard. The contract was in writing, under which Carillion was to be reimbursed its costs and a fee. A gain share/pain share arrangement applied whereby any underspend compared with the target was shared by the parties and in like manner any overspend was shared. The target cost was, over the period of contract, increased from £56m to £100m. Carillion argued that an oral agreement had been reached to

abandon the gain share/pain share with payment being made on a fully cost-reimbursable basis. An application for payment to accord with achieving milestone 33 was made by Carillion based upon its costs and a fee. The employer refused to make the payment and the dispute was referred to adjudication.

12.5.3 The adjudicator decided that a binding agreement had been entered into to amend the contract and that the employer was due to pay to Carillion the sum of £7 451 320 plus VAT. It was argued by the employer that there was no binding oral agreement and if one existed, as it had not been evidenced in writing, it fell outside the adjudicator's jurisdiction.

It was held by the court that the Construction Act does not provide for adjudication in respect of an oral variation to a written construction contract.

SUMMARY

The Construction Act does not provide for adjudication in respect of an oral variation to a written construction contract.

12.6 Where a mediator is appointed in relation to a dispute in connection with a construction contract and the dispute is not resolved but referred to adjudication, is the mediator barred from being appointed as adjudicator?

12.6.1 In the case of *Glencot Development & Design Co Ltd* v. *Ben Barratt & Son (Contractors) Ltd* (2001), the court was asked to decide whether there was evidence of bias on the part of the adjudicator which would prevent the enforcement of his decision. The claimant, Glencot, was a subcontractor to the defendant, Barratt, for the provision of 1200 mild steel wind posts which were provided as part of a brickwork subcontract. It was agreed by the parties that the value of the work was £390 000 plus VAT. The dispute, however, concerned whether Barratt was entitled to a 3% discount. Mr Peter Talbot was appointed as the adjudicator. In the first instance, at the request of the parties, he acted as a mediator. The mediation did not resolve the dispute and Mr Talbot reverted to his role of adjudicator. He wrote to both parties offering to withdraw from the adjudication if either party felt that his ability to make an impartial decision had been affected by his presence during the settlement negotiations. Barratt was of the opinion that Mr Talbot should withdraw. Mr Talbot took legal advice and decided to continue with the adjudication. The decision of Mr Talbot was that the final account should be £431 616 plus VAT, giving a balance due of £160 016 plus VAT, having taken into account amounts already paid.

12.6.2 The court had to consider whether to enforce the decision. It was argued that the decision should not be enforced due to bias on the part of the adjudicator. Bias can come in one of two forms. Actual bias is where it can be demonstrated that a judge, arbitrator or adjudicator is actually prejudiced in favour of or against one of the parties. Apparent bias may occur where