Construction Law Update

Recent Decisions in Mediation and Adjudication

April 2015

Sheridan Gold LLP

Mediation

(1) Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd [2014] EWHC 3148 (TCC)

BAE was successful in arguing that it was entitled to terminate a software licence agreement with Northrup. When the court came to deal with the issue of costs, Northrop argued that it should only have to pay 50% of BAE's costs, because of BAE unreasonably refusing to mediate.

BAE argued that (i) it was an "all or nothing" dispute concerning contract interpretation, (ii) BAE thought (rightly) that it had a strong case, and it was unwilling to make a significant payment that would have been necessary to settle Northrup's claim, and (iii) it did make a settlement offer, that Northrup did not better.

Mediation

(1) Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd (cont.)

Mr Justice Ramsey concluded that:

- Northrup's claim was for £3m, the parties costs amounted to £500k, and it was estimated that the cost of mediating would have been £40k, which was not disproportionately high
- BAE's reasonable view that it had a strong case provided some limited justification for not mediating
- However, other factors, notably the effectiveness of a skilled mediator and the mediation process, outweighed this and it was unreasonable for BAE not to mediate.

Mediation

(1) Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd (cont.)

Although Mr Justice Ramsey thought BAE's settlement offer was irrelevant to the issue of whether or not it was reasonable for BAE to mediate; he did take it into account when considering costs generally.

Since Northrup had not bettered BAE's offer, Mr Justice Ramsey thought it unreasonable of Northrup not to have accepted BAE's offer; and this effectively cancelled out BAE's unreasonable conduct in not mediating.

As a result, BAE did recover all of its costs.

Adjudication

(2) Twintec Ltd v Volkerfitzpatrick Ltd [2014] EWHC 10 (TCC)

The parties entered into a simple contract based on a letter of intent issued by Volkerfitzpatrick, in which it instructed Twintec to *"proceed immediately with all works necessary to enable [Twintec] to achieve the Design Programme and Construction Programme in accordance with the documents listed below."*

These documents included the DOM/2 standard form of sub-contract.

Volkerfitzpatrick referred a dispute to adjudication, and, on the basis that the DOM/2 in its entirety had been incorporated into the contract, asked the RICS to nominate an adjudicator, which the RICS did.

Adjudication

(2) Twintec Ltd v Volkerfitzpatrick Ltd (cont.)

Twintec applied for an injunction to restrain Volkerfitzpatrick from pursuing the adjudication, arguing the adjudicator had been wrongly appointed, and therefore did not have jurisdiction, because the adjudication provisions in the DOM/2 had not been incorporated into the contract.

Mr Justice Edwards-Stuart agreed. He found that only those provisions in the DOM/2 that related to the carrying out of works in accordance with the other documents referred to in the letter of intent, were incorporated into the contract. This did not include the DOM/2 adjudication provisions, and certainly not the Appendix containing the reference to the RICS as the ANB.

Adjudication

(2) Twintec Ltd v Volkerfitzpatrick Ltd (cont.)

Mr Justice Edwards-Stuart concluded that the Adjudicator should have been appointed in accordance with the Scheme, not the DOM/2 provisions.

Volkerfitzpatrick argued, with some justification, that this would have made no practical difference because it would have still applied to the RICS under the Scheme. Mr Justice Edwards-Stuart, citing Pegram Shopfitters v Tally Weijl [2004] WLR 2082, said unless the Adjudicator was appointed in accordance with the correct contractual provisions, the Adjudicator was not validly appointed.

Adjudication

(2) Twintec Ltd v Volkerfitzpatrick Ltd (cont.)

This case is a further example of the readiness of the TCC to grant injunctions to restrain adjudications from proceeding (see also Harding v Paice [2014] EWHC 3824 (TCC)).

A further interesting aspect of the case was Twintec's additional argument that an injunction should be granted because of the effect of the adjudication on the concurrent court proceedings between the parties; and that because of these proceedings, the adjudication was unreasonable and/or oppressive. Mr Justice Edwards-Stuart did not agree with Twintec on this, but made some helpful comments in respect of such arguments.

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Adjudication

(3) University of Brighton v Dovehouse Interiors Ltd [2014] EWHC 940 (TCC)

A dispute arose in respect of the final account and delays to the works, which Dovehouse referred to adjudication.

The contract, which was in the form of the JCT Intermediate Building Contract, contained a term to the effect that the Final Certificate issued by the Contract Administrator in December 2013 would be conclusive in respect of such matters, save insofar as these are the subject of adjudication, arbitration or other proceedings commenced no later than 28 days after the Final Certificate. This period was then extended by agreement to 66 days, such that it expired on 13 February 2014.

Adjudication

(3) University of Brighton v Dovehouse Interiors Ltd (cont.)

Dovehouse issued a notice of adjudication on 13 February 2014, the last possible date; and applied to the RICS for an Adjudicator to be nominated.

This was an error because the contract stated that the Adjudicator should be nominated by the CIArb. When this became apparent the Adjudicator nominated by the RICS resigned, and Dovehouse then issued a second notice of Adjudication on 24 February 2014.

The (UoB) sought a declaration that the Final Certificate was conclusive because the adjudication proceedings had been commenced after 13 February 2014.

Adjudication

(3) University of Brighton v Dovehouse Interiors Ltd (cont.)

UoB argued that (i) adjudication proceedings are not commenced until the referral is served, or (ii) the proceedings were commenced by the second notice of adjudication, not the first notice.

Mrs Justice Carr rejected both arguments. She said that adjudication proceedings are commenced when the notice of adjudication is issued; and that service of the first notice was sufficient to prevent the Final Certificate from becoming conclusive, for the following reasons:

- the notice did not have to refer to the correct ANB, and it was therefore not invalid

Adjudication

(3) University of Brighton v Dovehouse Interiors Ltd (cont.)

- it is immaterial whether or not the first Adjudicator nominated by the RICS had jurisdiction, because at issue was simply whether adjudication proceedings had been commenced
- if Dovehouse had then abandoned the proceedings, the first notice may have ceased to be of effect, but it did not this: it issued the second notice of adjudication the next working day after the first Adjudicator resigned
- paragraph 9(3) of the Scheme expressly provides that if an adjudicator resigns, the referring party should serve a fresh notice, which is what happened; and an Adjudicator could resign at any time through no fault of the referring party

Adjudication

(3) University of Brighton v Dovehouse Interiors Ltd (cont.)

- it would be “odd” if to ensure that the Final Certificate was not conclusive, a party had to issue a claim form and a notice of adjudication to overcome any potential difficulties created by the notice of adjudication containing any errors

- in Lanes Group plc v Galliford Try Infrastructure Ltd [2012] BLR 121 the Court of Appeal concluded that where adjudication is not pursued for whatever reason, the right to adjudication is not lost forever and the referring party can just start again; and it would be consistent with this to find that Dovehouse has not lost its right to challenge the Final Certificate by reissuing its notice of adjudication

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Adjudication

(4) The Trustees of The Marc Gilbarb 2009 Settlement Trust v OD Developments and Project Limited [2015] EWHC 70 (TCC)

This more recent case also concerned the issue of the Final Certificate issued under a JCT Form of Contract becoming conclusive.

Clause 1.9.1.3 of the contract provided that *"if any adjudication, arbitration or other proceedings are commenced by either Party within 28 days after the Final Certificate has been issued, the Final Certificate shall have effect as conclusive evidence as provided in clause 1.9.1, save only in respect of the matters to which those proceedings relate".*

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Adjudication

(4) The Trustees of The Marc Gilbarb 2009 Settlement Trust v OD Developments and Project Limited [2015] EWHC 70 (TCC)

OD initially commenced court proceedings within time; it did not progress these proceedings very assiduously; and then sought to refer the same claims to adjudication, well after the 28 days following the issuing of the Final Certificate had passed.

Mr Justice Coulson concluded that as a matter of interpretation, clause 1.9.3 provides that the contractor has to challenge the Final Certificate in one set of proceedings, and this is *"the only vehicle"* for doing so. Therefore OD was not able to open up the Final Certificate also by way of adjudication proceedings.

Adjudication

(5) Laker Vent Engineering Ltd v Jacobs E&C Ltd [2014] EWHC 1058 (TCC)

Laker was appointed by Jacobs to install pipe-work at a biomass combined heat and power plant that Jacobs was designing and constructing. Various disputes arose between the parties that Laker referred to adjudication. Laker was successful and sought to enforce the three decisions that it obtained in its favour.

Jacobs argued that the decisions were invalid because the contract was not for the carrying out of “construction operations”, as it involved the assembly and installation of plant on a site where the primary activity is either power generation or the production of gas (section 105(2)(c) of HGCR Act)

Adjudication

(5) Laker Vent Engineering Ltd v Jacobs E&C Ltd (cont.)

Laker argued, firstly, that Jacobs affirmed the Adjudicator's decisions by seeking to have the decisions corrected by way of the slip rule.

However, in its email to the Adjudicator asking for the decisions to be corrected Jacobs did state *"we fully reserve our client's position in relation to your jurisdiction and for the avoidance of doubt, this email is written without prejudice to that general reservation of our client's position in relation to your jurisdiction."*

Mr Justice Ramsey said this general reservation would be sufficient to preserve the party's right to challenge the jurisdiction of the Adjudicator and the validity of the decision.

Adjudication

(5) Laker Vent Engineering Ltd v Jacobs E&C Ltd (cont.)

Laker then argued that the “site” included the adjacent paper mill, to which the power plant provided steam and electricity; and the primary activity on the site was not power generation.

Mr Justice Ramsey agreed on the basis that (i) the owners of the paper mill owned the freehold of the land where the power plant was situated, and (ii) the primary purpose of the plant was to service the paper mill.

Although he overlooked that (a) the land where the plant was situated had been leased by RWE, (b) there were separate access roads to the plant and the mill; and (c) only 30% of the power generated by the plant was to be used by the paper mill.

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Adjudication

(6) Eurocom Limited v Siemens Plc [2014] EWHC 3710 (TCC)

Eurocom was a sub-contractor to Siemens installing communications systems at London Underground stations.

A dispute arose that Eurocom referred to adjudication in August 2012, Matthew Molloy was appointed as the Adjudicator, and he decided that Eurocom actually owed Siemens £35k.

In November 2013 Eurocom commenced a second adjudication.

In completing the RICS form for the nomination of an adjudicator, in response to the query *"are there any Adjudicators who would have a conflict of interest in this case",* Eurocom stated *"we would advise that the following should not be appointed"* and it went on to list various people, including Mathew Molloy.

Adjudication

(6) Eurocom Limited v Siemens Plc (cont.)

The RICS nominated Tony Bingham, who went on to decide that Eurocom was owed £1.6m. Eurocom commenced proceedings to enforce this decision, and Siemens argued that the decision was invalid, in part because of the appointment process.

Mr Justice Ramsey agreed, concluding that:

- Eurocom made a false statement suggesting that Matthew Molloy, and others, had a conflict of interest
- there was strong evidence that Eurocom made this false statement deliberately or recklessly, and
- the effect of this fraudulent misrepresentation was that the application to the RICS was invalid, and therefore Mr Bingham did not have jurisdiction.

Adjudication

(6) Eurocom Limited v Siemens Plc (cont.)

Mr Justice Ramsey found, in the alternative, that Eurocom's actions amounted to a breach of an implied term not to act dishonestly; this went to the heart of the appointment process; and this also meant that Mr Bingham did not have jurisdiction.

However, in response to an alternative argument by Siemens, Mr Justice Ramsey did not think that the RICS' failure to provide a copy of the form completed by Eurocom to Siemens, as the RICS' guidance notes says it will do, was sufficient to invalidate the appointment process.

Adjudication

(6) Eurocom Limited v Siemens Plc (cont.)

A further alternative argument raised by Siemens was that the second decision dealt with issues that had already been decided in the first adjudication.

Eurocom argued that the first adjudication concerned payments due under the sub-contract, and the second adjudication concerned damages for breach of contract following Siemens wrongfully terminating the sub-contract.

Mr Justice Ramsey found that many of the claims in the two adjudications had the same subject matter; Mr Bingham therefore decided issues that had already been decided in the first adjudication; and he did not have jurisdiction to do this.

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Adjudication

(7) Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC)

GTB was appointed by Estura to carry out works at Salcombe Harbour Hotel. GTB submitted an interim application for payment, which was effectively its draft final account; Estura did not respond to this; GTB commenced adjudication proceedings claiming that the sum it had applied for was therefore payable in full; and the Adjudicator agreed, deciding that £4m was payable by Estura.

GTB commenced proceedings to enforce the decision, and Estura raised various arguments as to why in the “exceptional circumstances” summary judgment should not be granted.

Adjudication

(7) Galliford Try Building Ltd v Estura Ltd (cont.)

Estura referred to Hillview Industrial Developments (UK) Ltd v Botes Building Ltd [2006] in which Mr Justice Coulson said *"the jurisdiction in adjudication enforcement cases to grant a stay under the CPR must be limited to cases where there is a risk of manifest injustice".*

Estura essentially argued that it was unable to pay, and this was in part caused by GTB. Mr Justice Edwards-Stuart accepted, on limited evidence, that Estura could not pay; but did not accept that this was because of GTB.

Nevertheless, and rather surprisingly, Mr Justice Edwards-Stuart stayed enforcement in respect of £2.5m, with Estura only having to pay £1.5m.

Adjudication

(7) Galliford Try Building Ltd v Estura Ltd (cont.)

Mr Justice Edwards-Stuart did say that the facts of the case were exceptional, and the course of action he adopted would only be appropriate in rare cases.

These circumstances were that it would take Estura at least 6 – 9 months to overcome the decision, by way of commencing adjudication proceedings in respect of the final account; and that would be reliant on GTB completing the works, which it had no incentive to do.

To what extent was this judgment influenced by the debate surrounding Mr Justice Edwards-Stuart's judgment in ISG v Seevic (and that the judgment is being appealed)?

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