Sheridan Gold LLP
Solicitors

Recent Case Law Concerning Adjudication, Arbitration and Mediation

By Jonathan Gold

Adjudication

(1) 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. Twintec applied for an injunction to restrain Volkerfitzpatrick from pursuing the adjudication. One of its arguments was that 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 with Twintec, and granted the injunction. He found that only those provisions in the DOM/2 that related to the carrying out of works so as to achieve the two programmes and comply 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 that contained the reference to the RICS as the nominating body, which had not yet been agreed. The adjudicator should therefore have been appointed in accordance with the Scheme.

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 for an adjudicator to be nominated. Mr Justice Edwards-Stuart, citing the Court of Appeal's judgment in Pegram Shopfitters v Tally Weijl [2004] WLR 2082, said that unless the adjudicator was appointed in accordance with the correct contractual provisions, the adjudicator was not validly appointed; and Volkerfitzpatrick had sought to appoint an adjudicator in accordance with contractual provisions that did not actually exist.

This case was a further example of the apparent readiness of the Technology and Construction Court to grant injunctions to restrain adjudications from proceeding.

The judgment contains a useful summary of when a contract might arise out of a letter of intent, and what the terms and conditions of such a contract are likely to be.

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.

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

A dispute arose between the parties in respect of the final account and delays to the completion of the work, which Dovehouse Interiors 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 not 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.

Dovehouse Interiors issued its first notice of adjudication on 13 February 2014, in which it referred to applying to the RICS for an adjudicator to be nominated; and it then made such an application to the RICS. This was an error because the contract stated that the adjudicator should be nominated by the Chartered Institute of Arbitrators (CIArb), not the RICS. When this became apparent the adjudicator nominated by the RICS resigned, and Dovehouse Interiors then issued a second notice of adjudication on 24 February 2014, in which it correctly made reference to the CIArb.

The University of Brighton (UoB) commenced proceedings to obtain a declaration that the Final Certificate was conclusive, and an injunction to restrain the adjudication from proceeding, on the basis that the adjudication proceedings had been commenced after 13 February 2014.

UoB's first argument was that adjudication proceedings are not commenced until the referral is served. Mrs Justice Carr disagreed and concluded that adjudication proceedings are commenced when the notice of intention to refer a dispute to adjudication is issued.

UoB then argued that the adjudication proceedings were not commenced by the first notice of adjudication, but by the second notice, which superseded the first notice; and the second notice was issued after 13 February 2014. Mrs Justice Carr also disagreed with this, and found that the first notice was sufficient to prevent the Final Certificate becoming conclusive, for the following reasons:

- since there was no requirement in the notice to identify the nominating body, the first notice of adjudication was not invalid because it referred to the incorrect nominating body;

- it is immaterial whether or not the first adjudicator nominated by the RICS had jurisdiction, and/or the referral subsequently served was valid, because at issue was simply whether adjudication proceedings had been commenced, which they had been by the first notice;
- if Dovehouse Interiors had then abandoned the adjudication proceedings the first notice may have ceased to be of effect, but it did not do so; it was clearly eager to pursue its claim, issuing the second of adjudication the next working day after the first adjudicator resigned;
- paragraph 9(3) of the Scheme expressly provides that if an adjudicator resigns, as the first adjudicator did, the referring party serves a fresh notice, which is what happened; and an adjudicator could resign at any time through no fault of the referring party;
- it would be "odd" if to ensure that the Final Certificate was not conclusive a party had to issue both a claim form and a notice of adjudication to overcome any potential difficulties created by the notice of adjudication containing any errors; and
- 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 that the referring party can just start again; and it would be consistent with this to find that Dovehouse Interiors has not lost its right to challenge the Final Certificate by reissuing its notice of adjudication.

(3) 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 for RWE. 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.

Laker argued that in seeking to have the decisions corrected by way of the slip rule, Jacobs affirmed the adjudicator's decisions and was precluded from challenging the validity of the decisions. 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, albeit "*with some hesitation*", that this general reservation would be sufficient where a party either applies under the slip rule for a decision to be corrected or makes a payment, to preserve the party's right to challenge the jurisdiction of the adjudicator and the validity of the decision thereafter.

Jacobs was challenging the adjudicator's jurisdiction on the basis that the contract was not a contract for the carrying out of "construction operations", because it involved the assembly and installation of plant on a site where the primary activity is either power generation or the production of gas, and therefore fell within the exceptions in section 105(2)(c)(i) and (ii) of the Housing Grants, Construction and Regeneration Act 1996.

At issue was whether the site comprised just the area of land on which the power plant was situated, or it included the adjacent paper mill to which the power plant was providing electricity and steam.

The land on which the plant was situated had been leased by RWE from the owners of the paper mill; there were separate access and exit roads to the plant and the mill; and only approximately 30% of the electricity and steam generated by the plant was to be used by the paper mill.

However, Mr Justice Ramsey concluded that since the owners of the paper mill also owned the freehold of the land on which the power plant was situated, and the primary purpose of the plant, and the reason for its location, was to provide steam and electricity to the paper mill, the site included both the power plant and the paper mill. He therefore found that the exceptions in section 105(2)(c)(i) and (ii) did not apply.

Arbitration

(4) Morris Homes (West Midlands) Ltd v Antony and Jeffrey Keay [2013] EWHC 932

The case concerned the threshold for obtaining leave to appeal an arbitration award on a point of law. In particular section 69(3)(c) of the Arbitration Act 1996 (one of four conditions that need to be satisfied), which provides that:

> *"on the basis of the findings of fact in the award*
>
> - *the decision of the tribunal on the question is obviously wrong, or*
> - *the question is one of general public importance and the decision of the tribunal is at least open to serious doubt."*

It was held that

- the leave process was *"summary in nature"* (after the court has understood all of the relevant underlying material);
- it had to be *"clear-cut"* that the criteria was satisfied;
- it would not involve *"the drawing of fine lines"* with *"the court to require assistance in the form of submission or advocacy";* and
- subtle and complex arguments are therefore unlikely to succeed

This judgment highlights the difficulty in obtaining leave to appeal from an arbitrator's award in all but the most straightforward of cases

Mediation

(5) PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288

The defendant did not respond to the claimant's proposal to mediate. The defendant then made a Part 36 offer, which, nine months later, during which a further £500,000 of costs had been incurred, the claimant accepted, shortly before trial. The defendant would normally have recovered its costs for the period following the Part 36 offer being made.

In Halsey v Milton Keynes General NHS Trust [2004] 1WLR 3002 it was established that an unreasonable refusal to mediate could amount to unreasonable conduct, which could result in costs sanctions being levied. At issue in this case was the significance of the defendant's failure to respond to the claimant's proposals to mediate.

At first instance Mr Recorder Furst QC found that:

- the defendant's failure to respond to the proposal of mediation amounted to a refusal to mediate;
- this was, following Halsey, unreasonable; and
- therefore the defendant should not be able to recover any of its costs, despite its Part 36 offer having been accepted;
- but the defendant was not ordered to pay the claimant's costs.
-

The Court of Appeal largely agreed, and also endorsed what was said at chapter 11.56 of the Jackson ADR Handbook. Lord Justice Briggs said:

> *"the time has now come for this court firmly to endorse the advice given in Chapter 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds"*

Lord Justice Briggs indicated that he would not have been as harsh as Mr Recorder Furst QC in preventing the defendant recovering any of its costs, because the parties did incur a further £500,000 because of the claimant not accepting the defendant's part 36 offer when it was made; but he said this was ultimately a matter of discretion for Mr Recorder Furst QC.

He also said it would be draconian to make the defendant pay the claimant's costs, and this should be reserved for only the most serious and flagrant failure to engage in ADR

In summing up Lord Justice Briggs said:

> *"…this case sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, or the undertaking of some other form of ADR, or ADR at some other time in the litigation. To allow the present appeal would, as it seems to me, blunt that message. The court's task in encouraging the more proportionate conduct of civil litigation is so important*

in current economic circumstances that it is appropriate to emphasise that message by a sanction which, even if a little more vigorous than I would have preferred, nonetheless operates pour encourager les autres."

In light of this judgment:

- proposals to mediate should clearly be responded to, and promptly, in a way that engages with the process;
- if a party refuses to mediate it needs to have reasonable grounds for this and to explain these grounds at the time; and

the ADR Handbook is also clearly an influential publication that should be considered.

Jonathan Gold

jgold@sheridangold.co.uk