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The construction & energy law specialists

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Welcome to the August edition of ***Insight***, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

This issue looks at what we have learnt about adjudication over the past twelve months

Insight

What have we learnt about adjudication over the past twelve months

We last looked at adjudication twelve months ago in our twenty-sixth issue of Insight, and there have been plenty of adjudication decisions since then but the majority have just restated established principles. There have, however, been some interesting decisions relating to (i) attempts to overturn an Adjudicator's decision on the merits; (ii) the date from which time starts to run for limitation purposes to contest an Adjudicator's decision under a Scheme adjudication; and (iii) the documents that might constitute contracts for construction operations under Part II of the Housing Grants, Construction and Regeneration Act 1996.

What can be learnt from these decisions in practice?

How easy is it to overturn an Adjudicator's decision on the merits?

Bouygues E&S Contracting UK Ltd v Vital Energy Utilities Ltd [2014] CSOH 115

It remains pretty difficult.

The decision

Vital subcontracted with Bouygues in relation to the design, supply and installation of the mechanical and electrical parts of a power plant. Vital terminated the subcontract alleging delay and poor workmanship. Vital was awarded £1.6 million by the Adjudicator and Bouygues challenged the award on three familiar grounds.

First, Bouygues argued that the Adjudicator had failed to exhaust the jurisdiction conferred upon him as he failed to entertain a relevant line of defence, namely, whether Bouygues' work was defective. Secondly, Bouygues claimed the decision was a nullity and the Adjudicator had gone off on a frolic of his own by accepting the view of an independent consulting engineer assessor which was based on a sample of 10% of Vital's invoices, copies of which had been provided to Bouygues and its expert. Thirdly, the Adjudicator stated in his decision that it was possible in his experience to rely on a sample to reach a conclusion, and Bouygues argued that the Adjudicator ought to have given the parties the opportunity to comment prior to doing so.

In relation to the first two arguments, the court held that there was no breach of the rules of natural justice as the Adjudicator had understood the dispute and did not consider evidence of which the parties were unaware. Ultimately, Bouygues' arguments went to whether the decision was correct, and this was not something for the court to determine. As for Bouygues' third argument, the court found there was nothing wrong with an adjudicator relying on his own experience; indeed it was common for adjudicators to do so. He had read Bouygues' views on the assessor's sampling methodology in the response to the draft determination and he was entitled to accept the assessor's view without further information.

Practice points

- It is very difficult to contest an adjudicator's decision on the merits. Even if you can identify an error in the Adjudicator's decision, it will probably not invalidate it. Provided the Adjudicator understands the question asked of him and answers it in a manner which is fair to both parties, he will not breach the rules of natural justice, even if he answers the right question incorrectly.
- Adjudicators commonly refer to their own professional experience without providing advance notice to the parties of their intention to do so. There will be no breach of the rules of natural justice unless (i) the Adjudicator adds to the evidence; (ii) there is an unauthorised inspection; or (iii) the Adjudicator uses undisclosed personal knowledge relating to the works.

When does time start to run for limitation purposes to contest an adjudicator's decision under a Scheme adjudication?

Aspect Contracts (Asbestos) Limited v Higgins Construction plc [2013] EWCA Civ 1514

Six years from the date of payment of the Adjudicator's award.

The decision

Aspect retained Higgins to carry out an asbestos survey under a contract that incorporated the Scheme. Additional asbestos-containing material was subsequently discovered and Aspect commenced adjudication proceedings against Higgins for Higgins' failure to discover the further material and critical

Insight

delay in June 2009. The Adjudicator decided in Higgins' favour in July 2009 and Aspect paid the awarded sum of £658,017 in August 2009.

Aspect then sought to challenge the Adjudicator's decision but there was a limitation issue, as more than 6 years had passed since Higgins' breach of contract or duty. In an attempt to circumvent the limitation issue, Aspect sought to imply a term into the contract providing that in the event that any dispute between the parties was referred to adjudication and money was paid over in compliance with the Adjudicator's decision, the paying party remained entitled to have the dispute finally determined by legal proceedings, and if the dispute was finally determined in its favour, to have the money repaid. This would provide Aspect with 6 years from the date it paid the Adjudicator's award and bring its claim within time. Higgins argued that no such implied term existed and Aspect's claim was time barred.

At first instance, the Judge held the implied term was unnecessary because it was open to an unsuccessful party in adjudication to seek a declaration that he was not liable within six years of the breach of contract or duty.

The Court of Appeal overruled the decision at first instance, holding that time for limitation purposes started to run from the date on which payment of the Award was made. The rationale was that there must be some mechanism whereby payments to adjudicators can be recovered if subsequent proceedings, arbitration or agreement decides payment should not have been made.

Practice points

- If you are the losing party, you do not agree with the decision of an adjudicator, and your contract incorporates the Scheme, you have 6 years from the date on which you made payment to challenge the award either in adjudication, arbitration, or by agreement with the other party.
- If you are the successful party, you now have to wait 6 years from the date you receive payment before you can be certain that no claim will be brought against you to try and recover the amount paid.

When is a document a construction contract?

Can a letter of intent constitute a construction contract for the purposes of the Act?

Glendalough Associated SA v Harris Calnan Construction Co Ltd [2013] EWHC 3142 (TCC)

Provided certain conditions are met, yes.

The decision

Glendalough invited tenders for a residential development in North London and Harris was instructed to proceed with the works under a letter of intent which confirmed the commencement date for the works, the contract period, and a final contractual completion date. No formal contract was ever entered into. The works fell into delay and Glendalough issued a withholding notice claiming liquidated damages of £250,000.

Harris subsequently commenced adjudication proceedings seeking a declaration that Glendalough was not entitled to deduct liquidated damages in circumstances where there was no formal contract with no effective liquidated damages clause. During the adjudication proceedings, Glendalough issued an application in the TCC seeking a declaration that the Adjudicator had no jurisdiction in the absence of an agreement in writing.

The Judge found that it was not open to Glendalough to object to jurisdiction under s.107(5) of the Act in the absence of a written agreement, because Glendalough had previously conceded that the Adjudicator had been properly appointed and further had not denied the existence of a written agreement. Further, the Judge made a provisional finding of fact that the letter of intent (either directly or by reference to other documents) identified the parties, the scope of work, the price or rates, and the timetable for the works. It therefore included sufficient information evidenced in writing for the purposes of s.107(2) of the Act.

Practice points

- If you have any doubts whatsoever in relation to the Adjudicator's jurisdiction, you must say so immediately. It will not usually be sufficient to rely on the general reservation of rights that adjudicating parties commonly include in the early stages of adjudication proceedings.
- If you wish your letter of intent to be a valid construction contract within the meaning of s.107(2) of the Act, there must be no doubt as to the contracting parties; the scope of work should be clearly defined; the parties must have agreed a satisfactory means of ascertaining the price, or have an agreed written record which identifies the rates that are to be applied to the work carried out; and there should be commencement and final completion dates for the work. These matters should either appear in the letter of intent itself, or be incorporated by reference to other documents.

Can a collateral warranty be a construction contract?

Parkwood Leisure Limited v Laing O'Rourke Wales & West Limited [2013] EWHC 2665

Everything depends on the precise wording of the warranty and the surrounding background facts, but yes, it is possible.

Insight

The decision

The facts of this decision are well known.

Parkwood wished to adjudicate its dispute with LOR, so it sought a declaration from the court that the warranty was a contract for construction operations under Part II of the Housing Grants, Construction and Regeneration Act 1996 ("the Act").

The Judge was satisfied that the warranty was a construction contract caught by the Act as it related in part to the execution and completion of works that were not yet complete, and there was a positive obligation upon LOR to carry out and complete the future work to the standard, quality and state of completeness called for by the contract.

Practice points if you do not wish your warranty to become subject to statutory adjudication

- Use the word "*warrants*" as opposed to "*undertakes*". The latter suggests the existence of a legal obligation that extends beyond that which would normally be seen in warranties.
- Make sure your warranty only provides that the works will comply with the underlying contract and does not contain an undertaking in relation to any future work.
- Consider timing. If it is practical to do so (and often it is not), do not provide your warranty until after practical completion as you will then only be warranting a state of affairs in respect of works that have already been carried out. Any warranty provided prior to practical completion may be treated as a contract to carry out works.

Conclusion

The decision in *Parkwood* was completely unexpected and took the construction industry by surprise because, as a matter of practice, collateral warranties had not been regarded as being construction contracts and there was no pre-existing authority which suggested this might be the case.

Glendalough raised the same issue but in relation to letters of intent (which had been considered previously by the court) and serves as a useful reminder of the issues that have to be considered when parties seek to adjudicate upon letters of intent.

As for *Bouygues*, there was nothing unexpected about the Judge's decision but it does serve to reinforce the robust approach the courts still take to adjudication enforcement in recognition of the fact that adjudication awards are interim-binding pending litigation, arbitration, or agreement between the parties.

Finally, the Court of Appeal also endorsed the interim-binding nature of adjudication decisions in *Aspect* but whether the Court of Appeal's decision will stand remains to be seen. Higgins has been granted permission to appeal to the Supreme Court and the Supreme Court may not agree that adjudication awards should remain open to challenge for 6 years from the date of payment as a great deal of commercial uncertainty would inevitably result.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston.
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