

Adjudication Update

There have been a number of recent Scottish cases. In *Quality Street Properties (Trading) Ltd v Elmwood (Glasgow) Ltd*, Quality Street sought an injunction to prevent the appointment of an adjudicator. Elmwood had sought to refer a dispute in relation to the ascertainment of its final account and payment of loss and expense. Quality Street sought the injunction on the basis that Elmwood was seeking to refer issues which were currently being litigated at Court, that the Final Account was agreed and that Quality Street were seeking to refer to adjudication more than one dispute.

Sheriff Principal Bowen QC held (thereby following *Hershel v Breen*) that adjudication could be commenced at any time and this was not inconsistent with the Court proceedings. However, he decided that, both parties having agreed that one can oust the jurisdiction of an adjudicator by reaching a compromise agreement, there was a triable issue as to whether there was such an agreement between the parties. The balance of convenience favoured allowing a full hearing on this issue first. If it were resolved in Quality Street's favour then the costs of the adjudication would have been avoided.

Having ruled in Quality Street's favour on the "agreement" point, the Sheriff held that he did not have to come to a decision on the "dispute" point. However, he did indicate, obiter, that he had some difficulty with the view expressed in *Fastrack* by HHJ Thornton QC that the dispute which may be referred to adjudication "is all or part of whatever is in dispute at the moment that the Referring Party first intimates adjudication reference". The Sheriff thought that the fact that an adjudicator only had 28 days to come to a decision, might suggest that Parliament did not have in mind for an adjudicator to consider a "conglomeration of claims".

In *The Construction Centre Group Ltd v Highland Council*, Lord MacFadyen had to consider a dispute arising in relation to the Small Isles and Inverie Ferry scheme. The defenders resisted payment of an adjudicator's decision in the sum of £250k.

By clause 66 of the contract, the parties had to give "effect forthwith to every decision of ... the Adjudicator on a dispute given under this clause" unless that decision was revised by agreement or the dispute had been referred to arbitration and an arbitral award had been made. The Highland Council argued that the effect of awarding summary judgment would be to give a final judgment in place of an interim decision. Lord MacFadyen disagreed, saying that not to allow enforcement would obstruct the purpose of section 108 of the HGCRA. One of the points of adjudication was to obtain payment on a provisional basis. CCGL were not asking the Court to endorse the soundness of the adjudicator's decision but were asking the Court to recognise that the parties had committed themselves contractually to implement that decision.

The Highland Council also argued that as they had a claim against CCGL for the payment of liquidated damages (quantified at a sum in excess of £250k), they were entitled to refuse to pay the sum awarded. A valid notice had been served in pursuant to section 111 of the HGCRA. CCGL argued that as the liquidated damages claim could have been advanced before the adjudicator, the Highland Council could not rely on it now to resist enforcement. Further, CCGL submitted that section 111 referred to notices in relation to payment certificates and not to notices in respect of adjudicator's decisions.

Lord MacFadyen held that as the Highland Council had chosen not to advance their retention argument before the adjudicator, they could not rely upon it now. That said, the right of retention was not lost and that right remained against any future sum, which might fall due to CCGL under the contract. However, there had been nothing to prevent the Highland Council from putting forward their claim for liquidated damages in the adjudication. It was now too late. Section 111 was not intended to permit the giving of a withholding notice in respect of an adjudicator's award.

Lord MacFadyen concluded that "it would...be destructive of the effectiveness of the institution of adjudication if a responding party could decline to put forward an available defence in the course of the adjudication, then give a section 111 notice seeking to withhold on that ground the sum awarded by the Adjudicator".

TG Coutts QC had to consider the *Petition of Edinburgh Royal Joint Venture*, who had resisted payment following an adjudicator's decision in favour of Broderick Structures Ltd. The adjudication rules were based on the 1998 ORSA Rules. One amendment stated that no party should make any application whatsoever to a competent court in relation to the conduct of the adjudication or the decision of the adjudicator until completion of the last phase of the works or termination of the sub-contract and until the prior written consent of both contractor and sub-contractor had been obtained. However, the adjudication rules also stated that every decision of the adjudicator was to be implemented without delay and the parties "*shall be entitled to summary enforcement*" of an Adjudicator's decision regardless of whether it was subject to any challenge or review.

ERJV claimed that the adjudication rules meant that all disputes were to be postponed (and this included enforcement of any adjudicator's decision) until after conclusion of the contract, such that they could all be raised at one time. Coutts QC considered that this position was unsound and selective in that it did not take account of all of adjudication rules and therefore could not be sustained. Broderick were not seeking to challenge the decision of the adjudicator, but merely to enforce their contractual rights. A distinction was made between an application to the Court after completion of the work, and an application for summary enforcement of an adjudicator's decision made during the work.

The Construction Umbrella Bodies' Adjudication Task Group has finally published its "*Guidance for Adjudicators*". Backers of the Guidance include the Department of Trade and Industry, the British Property Federation, the Construction Confederation, the Construction Industry Council, the National Specialist Contractors Council, and the Specialist Engineering Contractors Group. The Guidance remains in substantially the same form as the draft originally circulated last year. (See Dispatch 15)

The CIC has just issued a report on the first 40 months of adjudication. This follows on from a survey sent to the 666 separate adjudicators identified by the CIC as offering themselves for appointment as at 30 September 2001. The CIC concluded that, in the period from 1 May 1998 to 30 September 2001, the total number of adjudicator appointments made was 4845. Of these, some 3577 (or 74%) proceeded to a decision. The most frequent dispute adjudicated (some 73% of the total) involved allegations of non-payment. Mirroring this, the greatest numbers of references to adjudication were made by sub-contractors against contractors. Significantly, 67% of the decisions reached went in favour of the referring party.

Other Cases of Interest

In *ACT Construction Limited v E Clarke & Sons (Coaches) Ltd*, the CA had to consider the exact contractual relationship between the parties. Ward LJ held that although there was no formal contract, there was still an agreement to carry out work notwithstanding that the entire scope had not yet been agreed and that a price had not been agreed. There was an instruction to do work and acceptance of that instruction. Therefore there was a contract and the law will imply into that contract an obligation to pay a reasonable sum for that work ("i.e. a contractual quantum meruit").

Ward LJ also considered whether the payments, which have been made against the applications for payment, were settled or agreed. He found that they were the best estimate of the value of the work being done at the time. The paying party reserved the right and exercised the right to review the whole operation of the account at the conclusion of the work. Therefore, the figures did not purport to be final figures and on top of this it was recognised that the account was subject to debate.

HHJ Wilcox also had to consider the question of the effect of certification in *Johnson Control Systems Ltd v Techni-Track Europa Ltd*. Here, Johnson claimed that the sums certified during the course of the works were only certified on a commercial basis and thus were not certified sums. Johnson relied upon the fact that throughout the contract they paid the sums applied for and did not actually value the work. Thus the payments represented a commercial decision to pay what was asked for to ensure that the works progressed.

The Judge found that Johnson had had the opportunity to inspect the work and consider the timesheets provided in support of the valuations. They had the opportunity but chose not to avail themselves to check this work. There was no evidence that the work done was less than the value which had been certified. The Judge found that there was no reason to go behind the certificates.

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