

ICES SEMINAR

ADJUDICATION – LET’S PLAY BALL!

MOCK ADJUDICATION SCENARIO – CASES

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| 1 | Construction operations | <p>S.105(1) HGCRA provides a list of “<i>construction operations</i>” falling within the Act. S.105(2) HGCRA lists activities that are not “<i>construction operations</i>” and so an agreement to carry these out can not be a “construction contract” for the purposes of s.104 HGCRA.</p> <p>Power generation is one of the exceptions under s.105(2), however the assembly of scaffolding around a structural frame forming a contract for the assembly of a power generator was a construction contract as this in itself was a “<i>construction operation</i>” for the purposes of s.105(1). (<u>Palmers Ltd v ABB Power Construction Ltd (1999)</u>)</p> <p>This case also showed that sub-contractors further down the chain are not deprived of their rights under HGCRA merely because the main contract is excluded under s.105(2).</p> <p>In deciding whether the sub-contract is a “<i>construction operation</i>” or not when the main contract comes under s.105(2) the question is whether the construction operation of the sub-contractor furthers the activities which are excluded under the main contract. (<u>ABB Power Construction Ltd v Norwest Holst Engineering Ltd (2001)</u>)</p> <p>The power generation exclusion does not apply even if works are carried out on a generator if the primary activity of the site on which the generator is on is not within the exclusions in s.105(2). (<u>ABB Zantingh Ltd v Zedel Building Services Ltd (2001)</u>)</p> <p>Services supplied under a sub-contract for use on plant or machinery excluded under s.105(2) will only be excluded if they are used to enable the plant to be operated. If they are not for operational purposes they may not necessarily be excluded. (<u>Comsite Projects Ltd v Andritz AG (2003)</u>)</p> |
| 2 | Agreements in writing | <p>S.107 HGCRA requires agreements to be in writing. This does not necessarily require a formal contract but all terms of the agreement must be evidenced in writing. Material terms must be sufficiently recorded in writing. (<u>RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd (2002)</u>)</p> <p>Further support was found in <u>Trustees of the Stratfield Saye Estate v AHL Construction Ltd (2004)</u> where express terms of a contract had to be in writing. The judge found that the contract and scope of works were sufficiently evidence in writing by way of letters, drawings and minutes of a meeting.</p> <p>The record of the meeting between the parties with accompanying</p> |

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| | | <p>emails may be considered to be sufficiently evidenced in writing to be a “<i>construction contract</i>” for the purposes of HGCRA.</p> <p>This point may fall away if the proposed amendments to the HGCRA are given effect.</p> |
| 3 | Existence of a dispute | <p>Under s.108 HGCRA a dispute must exist before it can be referred to adjudication. A dispute includes any difference.</p> <p>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. (<u>Fastrack Contractors Ltd v Morrison Construction Ltd (2000)</u>)</p> <p>For a dispute to exist, a point must have emerged in the process of discussion or negotiation that needs to be decided. (<u>Sindall Ltd v Solland (2001)</u>)</p> <p>Summary of the law in this area was given in <u>Amec Civil Engineering Ltd v Secretary of State for Transport (2004)</u>:</p> <ul style="list-style-type: none"> • The word dispute should be given its ordinary meaning; there is no special or unusual meaning conferred upon it by lawyers. • The mere notification of a claim does not automatically and immediately give rise to a dispute; a dispute does not arise unless and until it emerges that the claim is not admitted by the receiving party. • The length of time a respondent may remain silent before a dispute can be inferred is heavily dependent upon the facts of the case; if the gist of the claim is both well known and obviously controversial, a very short period of silence may be adequate. • If the claim as presented by the client is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither by silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication. <p><u>Cantillon Ltd v Urvasco Ltd (2008)</u> applied the Amec decision. It is the essential claim that is being made and the fact that it has been challenged that has to be looked at.</p> <p>The scenario sees Salford Scaffolding Limited presenting Gorton Generator’s Limited with the subject matter of the claim and having opportunity to consider it and then not admitting it. This would be considered a dispute for the purposes of HGCRA.</p> |
| 4 | Appointment of | <p>Contracts will often contain provisions relating to the appointment of the adjudicator. The courts generally take a common sense approach</p> |

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| | <p>adjudicator</p> | <p>to the appointment provisions but if it finds that an appointment is not valid under the contract then the adjudicator has no jurisdiction.</p> <p>In the event that a contract does not contain provisions as to the appointment of an adjudicator, para 2 of the Scheme applies.</p> <p>Following the giving of a notice of adjudication, the referring party is to request the person specified in the contract to act as adjudicator (para 2 (1)(a)).</p> <p>If there is no named adjudicator or the named adjudicator has indicated he is unwilling / unable to act and the contract provides for an “Adjudicator Nominating Body”, the referring party is to request that the “Adjudicator Nominating Body” named in the contract selects a person to act (para 2 (1)(b)).</p> <p>If neither of these circumstances applies, the referring party is to request an “Adjudicator Nominating Body” selects a person to act (para 2 (1)(c)).</p> <p>This part of the scenario was based on facts analogous to <u>Makers UK Limited v Camden London Borough Council (2008)</u>. It was submitted in this case that contacting the proposed adjudicator presented an appearance of bias and so the adjudicator’s decision was unenforceable.</p> <p>The court held that there was no apparent bias as the matters raised did not give rise to any suspicion.</p> <p>The court provided some guidance in this case:</p> <ul style="list-style-type: none"> • Parties should limit their unilateral contacts with adjudicators before, during and after and adjudication; the same goes for adjudicators having unilateral contact with individual parties. It can be misconstrued by the losing party even if entirely innocent. • If any such contact had to be made it was better done in writing so that there would be a full record of communication. • Nominating institutions might sensibly consider their rules as to nominations and as to whether they do or do not welcome or accept suggestions from one or more parties as to the attributes or even identities of the person to be nominated by the institutions. If it is to be permitted in any given circumstance, the institution might wish to consider whether notice of the suggestions must be given to the other party. |
| <p>5</p> | <p>Reaching and delivery of decisions</p> | <p>Under s.108(2)(c) HGCRA a contract shall require the adjudicator to reach a decision within 28 days of referral or such other longer period as is agreed by the parties after the dispute has been referred.</p> <p>Para 219 of the Scheme provides that the adjudicator shall reach his</p> |

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| | | <p>decision not later than 28 days after the date of the referral notice.</p> <p>Case law demonstrates that the Courts will give some leeway to the time for communication – but this is only provided that the decision itself is completed within the 28 days or the agreed extended period.</p> <p>In <u>AC Yule & Son v Speedwell Roofing & Cladding (2007)</u>, the adjudicator sought an extension of time as a result of Speedwell's request for further time.</p> <p>Yule agreed to the adjudicator's request but Speedwell did not. The adjudicator's provided his decision within the extended period, however, Speedwell stated the decision was invalid as it had not expressly agreed to his request for an extension.</p> <p>The Court held that if there was a clear obligation on both parties to respond, promptly and plainly to the adjudicator. If, in breach of that obligation one party failed to respond they was a strong case for saying that party had accepted by silence.</p> |
| 6 | Natural justice | <p>Enforcement of an adjudicator's decision will be refused where there has been a breach of the principals of natural justice.</p> <p>In <u>Carillion Construction Ltd v Davenport Royal Dockyard Ltd (2006)</u> the Court of Appeal emphasised that it would only be in the plainest cases that a challenge could be mounted on the basis of breach of the rules of natural justice.</p> <p>It is not possible to identify all the circumstances that might give rise to such a breach, it is inevitably a question of fact and degree in each case. Breaches have been found by the courts in the following situations:</p> <ul style="list-style-type: none"> • A failure by the adjudicator to consult with one party upon submissions made by the other; • Where the adjudicator uses an analysis different to that advanced by the parties without informing the parties of his proposed methodology and seeking their observations on its suitability; • Where an adjudicator has acted in related disputes arising out of the same project but between different parties; • Where substantial quantum information was provided for the first time during the adjudication which the opposing party did not have time to address; • Where a party did not have a proper opportunity to consider the material served by the opposing party by reason if its lateness and quantity; and • Where the adjudicator fails to make available to one party |

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| | | <p>information he obtained from the other party or various third parties (as in the scenario). (<u>Woods Hardwick Ltd v Chiltern Air-Conditioning Ltd (2001)</u>)</p> |
| 7 | Reaching and delivery of decisions | <p>Unlike in the Arbitration Act 1996, there is nothing the HGCRA or the Scheme that allows the adjudicator to delay communication of his decision until his fees are paid; the adjudicator does not have a statutory right to exercise a lien.</p> <p>In <u>Cubitt Building & Interiors Ltd v Fleetglade Ltd (2006)</u> the judge considered that the essence of adjudication was speed and that compliance by the parties and the adjudicator with the relevant timetable was a key ingredient of the adjudication process.</p> <p>In <u>Mott MacDonald Ltd v London & Regional Properties Ltd (2007)</u> the court held that the adjudicator was not entitled to impose a lien on his decision and refuse to deliver it pending payment of his fees. The lien prevented the adjudicator from complying with his obligation to deliver his decision as soon as possible after it had been reached, as required by para 19(3) of the Scheme.</p> <p>The judge did not find a reason that justified the delay in delivering the decision and held that, as the decision was not delivered “promptly by the most rapid available means of delivery”, the decision was invalid.</p> <p>In our scenario, the adjudicator has exercised a lien and has provided no other justification for his failure to deliver the decision as soon as possible after it has been reached. It was delivered out of time and so the decision is invalid.</p> |
| 8 | Insolvency | <p>The court may refuse to enforce an adjudicator’s decision where there is actual or potential insolvency of the party who is due to receive payment. This is due to the fact that an adjudicator’s award is temporary and in the event that, after a substantive trial, the original receiving party is ordered to repay the money, he may not be in a position to repay. This leads to an unfair situation on the part of the party who is ultimately awarded any money.</p> <p>If the receiving party is in liquidation the courts have not enforced the adjudicator’s award as it would lead to injustice between the parties. (<u>Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd (2001)</u>)</p> <p>The situation is more difficult if the receiving party is not in liquidation but is in financial difficulties. It could be deemed to be unfair to pay over the money due now only to find that when the dispute is finally determined, the receiving party, if ordered to, may no longer be able to pay it back.</p> <p>Judges have been known to order payments into court. (<u>Ashley House plc v Galliers Southern Ltd (2002)</u>)</p> <p>The position was summarised in <u>Wimbledon Construction Company 2000 Ltd v Vago (2005)</u>. The judge held that a court must balance (1)</p> |

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| | | <p>the intention of the legislation that adjudication should be enforced summarily, (2) the right of the successful party not to be prejudiced by being kept out of its money; and (3) in cases where there is a serious risk that the party will not be able to recover the money, that the defendant is not being seriously prejudiced in a way not contemplated by the Act.</p> <p>The relevant factors to consider are:</p> <ul style="list-style-type: none"> • Adjudication is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute. • Adjudicators' decisions are intended to be enforced summarily and the successful party in the adjudication should not generally be kept out of its money. • An application to stay the execution of summary judgment may be considered. • If the claimant is in insolvent liquidation or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted. • If the evidence of the receiving party's financial position suggests that it is probable that it would be unable to repay the judgment sum a stay of execution may be justified unless the receiving party's financial position is the same or similar to its financial position at the time the relevant contract was made or the receiving party's financial position is due, either wholly, or in significant part, to the paying party's failure to pay those sums which were awarded by the adjudicator. <p>In our scenario, Gorton Generator Limited's financial position has become worse as a result of Salford Scaffolding Limited not paying the sums awarded by the adjudicator. Consequently, any application by Salford Scaffolding Limited for a stay of execution of the summary judgment may be dismissed. Therefore the adjudicator's award would be enforced and Salford Scaffolding Limited would be ordered to pay the amounts due.</p> |
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