

ADJUDICATION – A QUESTION OF TIMING ?

Adjudication was introduced into the construction industry primarily to prevent abuses by large employers or main contractors. These often withheld payments from smaller sub-contractors, causing the latter serious cash flow problems and placing sub-contractors under intense commercial pressure to settle for less than they were owed. The history and purpose of the introduction of Adjudication in the Housing Grants, Construction and Regeneration Act 1996 (“the 1996 Act”) is well summarised by Dyson J, as he then was, in the first major case on adjudication under the 1996 Act. At page 97 of *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93, Dyson J said:

“The intention of Parliament in the Act was plain. It was to introduce a speedy mechanism for settling disputes and construction contracts on a provisional basis, and requiring the decision of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement.... The timetable for adjudication is very tight... many would say unreasonably tight and likely to result in injustice. Parliament must have been taken to have been aware if this.....”

As adjudication has become more familiar in the commercial sphere of construction contracts so other industries have played with the introducing the use of adjudications. Thus, for example, the telecoms industry, where standard form contracts are often necessary under the regulatory framework, has considered the introduction of adjudications in the Standard Interconnect Agreement.

However what marks out the construction industry is the express statutory requirement that a party to a “construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with [the terms of the 1996 Act]”: see section 108 of the 1996 Act. If a construction contract¹ does not provide for adjudication complying with terms of the Act, then the adjudication provisions of the Scheme of Construction Contracts applies: section 108 (5). This Scheme is contained within Statutory Instrument 1998 No 649 (The Scheme for Construction Contracts (England and Wales) Regulations 1998).

Adjudications, despite the original intention for them to be “a sensible way of dealing expeditiously and relatively inexpensively with disputes” (per Lord Ackner at the Report Stage of the 1996 Act in the House of Lords), have spawned some elements of “trench warfare” behaviour. In particular claimants often see adjudications as a first bite of the cherry (which if it fails, still gives them the second bite of arbitration or litigation) and are sometimes used as a dummy run for the arbitration. Claimants often prepare a detailed case to submit to adjudication at their leisure, hoping to catch respondents ill prepared for responding within the tight timeframe which, once invoked, the adjudication process lays down. This approach appears to be aided by one of the specific terms of section 1996 Act. Section 108 (2) provides that “the contract shall (a) enable a party to give notice *at any time* of his intention to refer a dispute to adjudication...” (emphasis added).

¹ Construction Contracts can be deceptively wide ranging. For example HH Judge Thornton fairly recently held that the clean operations in the Foot and Mouth Crisis were within the ambit of construction contracts under the 1996 Act : see *Ruttle Plant Hire v DEFRA* [2004] EWHC 2152.

Over the years most construction contracts have attempted to set relatively strict time limits within which claims must be made (so as, for example, to reduce the risk of documents being lost and recollections fading). For example the 6th Edition of the ICE Conditions of Contract (pre the 1996 Act) originally provided that once the designated Contract engineer had given a decision on a dispute (or a certain period had elapsed without the engineer giving any decision) the dissatisfied contracting party had three months to refer the matter to arbitration. The consequences for a party failing to comply with such a timetable can be draconian: loss of the right to pursue the dispute further.

When adjudication was introduced a number of construction contracts attempted to keep the same type of strict tight table. Thus provisions for the parties to resort to adjudication were often tied to set time periods. Subsequently concern over what section 108 (2) (a) of the 1996 Act meant, led to most main stream contracts to adopt wording in line with that sub-section. However other contracts still do provide for adjudication to be commenced within set periods. Within the last 9 months, the present author has himself had to consider two Local Authority construction contracts which expressly provide for the dispute to be referred to adjudication within 1 Calendar month after the decision of an Engineer (or the failure to the engineer to gave a decision within the specified time period). The key issue is does a failure to commence the adjudication within that time period, prevent recourse to adjudication, particularly in light Section 108 (2) (a)?

This question has been touched upon in the recent Court of Appeal case of *Connex South Eastern v MJ Building Services Group plc* [2005] EWCA Civ 193; [2005] 2 All ER 870. The dispute centred on a contract involving the installation of CCTV cameras by MJ Building Services Group (“MJ”) for Connex SE trains (“SE”). The precise nature of that contract (and indeed a subsequent agreement) was in issue. Having determined that issue, it was accepted that the contract fell within the 1996 Act. This led to the further issue of whether MJ could refer the matter to adjudication nearly a year and half after MJ had purported to accept SE’s repudiatory breach of contract. The contract did not have any clause requiring that an adjudication to be commenced within a set time period (indeed it is not clear whether the contract had any provision for adjudication, thus causing the Scheme to apply). Accordingly the case was not absolutely on all fours with contracts setting down a prescribed period within which the adjudication must be launched.

However Connex still sought to argue that the phrase in section 108 (2) (a) *at any time* “cannot be read literally. For example a party cannot refer a dispute to adjudication after the expiry of the relevant limitation period” (paragraph 36 of the Judgement). Thus it was argued that “if as a result of the passage of time it is no longer possible to have a quick cheap and temporary adjudication, then it is an abuse of process to permit an adjudication to take place” (paragraph 37).

However Dyson LJ rejected this commenting (paragraph 38):-

“The phrase ‘at any time’ means exactly what it says. It would have been possible to restrict the time within which an adjudication could be commenced to, say, a period by reference to when the work was completed or the contract terminated. But this was not done”.

Moreover as he noted (paragraph 40) “neither the [1996] Act nor the Scheme gives an adjudicator the power to strike out or stay an adjudication for abuse of process. Indeed they contain no reference to ‘abuse of process’”. Dyson LJ had some doubts whether it was permissible to refer to *Hansard* but added (paragraph 38):. “It is clear from *Hansard* that the question of the time for referring a dispute to adjudication was carefully considered and it was decided not to provide any time limit for the reasons given by Lord Lucas. Those reasons were entirely rational”

The Court of Appeal therefore rejected *Connex*’s challenge that there must be some time limit on bringing an adjudication. However Dyson LJ did give the following obiter dictum (paragraph 39, emphasis added): “*There may be circumstances as a result of which a party loses the right to refer a dispute to adjudication: the right may have been waived or the subject of an estoppel. But subject to considerations of this kind there is nothing to prevent a party from referring a dispute to adjudication at any time*”. The trouble of course with such dicta is that, without specific facts, it is open to differing interpretations. It is quite easy to see why the Court would be reluctant to allow a party subsequently to commence an adjudication, when that party has previously represented to the other party that it would not be pursuing an adjudication, particularly if, say, acting on the representation, the other party has destroyed its records.

However estoppel by such a representation is but one example. If the parties have expressly agreed that they shall not commence an adjudication after a certain period, then it may be possible to argue that there is an estoppel by convention: i.e. that the parties contracted on the agreed assumption that no adjudication would be commenced after a set time period. What if this agreement is in the contract itself? At first sight there are problems with this. Section 108 (5) appears to rule out reliance on contract terms not complying with section 108 (2) (a). Indeed this appears to infringe the principle that Lord Simon considered in *Johnson v Moreton* [1980] AC 37 of not allowing parties to contract out of a regulatory regime if this would undermine the purpose of the Act. As he said at page 69 “Where it appears that the mischief which Parliament is seeking to remedy is that a situation exists in which the relations of parties cannot be properly be left to private contractual regulation, a party cannot contract out of such statutory regulation because to so permit would be to reinstate the mischief which the statute was designed to remedy and to render the statutory provision a dead letter”.

In summary *Connex South Eastern v MJ Building Services Group plc* does appear to provide strong grounds for saying that one can ignore contractual restraints on the time for commencing adjudications. However, until Dyson LJ’s dicta are more fully tested, one cannot completely rule out such contractual time limits on adjudication having an effect. Given the multitude of points already taken on the jurisdiction of adjudicators, my money is on further litigation on this point.

