

Adjudication Update

The RICS Dispute Resolution Service has announced that the fee for the appointment of an adjudicator (and arbitrator or independent expert) by the RICS President will increase to £300 (inclusive of VAT) with effect from 1 August 2002.

In the case of *JT Mackley & Co Ltd v Gosport Marina Ltd*, HHJ Seymour QC had to consider an attempt to refer a dispute under an ICE contract to arbitration. Previously there had been two adjudications under the contract which had been favourable to Mackley. Gosport, the Employer, sought to arbitrate the disputes.

However, clause 66(6) of the ICE Conditions states that a decision of the engineer was a condition precedent to the entitlement of a party to a contract to refer a dispute to arbitration. Here there had been no reference of the dispute to the engineer, who had had no part in the adjudication.

HHJ Seymour held that the requirement for a decision of the engineer under clause 66(6) applied even where a party was seeking to challenge the decision of an adjudicator. References to arbitration had to be made in accordance with the relevant arbitration clause.

The Judge held that the form of words of section 108 of the HGCRA:-

“makes it plain...that arbitration is only available as a means of challenging the decision of an adjudicator if the relevant contract so provides or an ad hoc arbitration agreement is made. Where it is sought to rely on an arbitration clause in the relevant contract, it seems to me to be obvious that the ability to do so, and the terms upon which such may be done, fall to be determined under the relevant arbitration clause.”

Therefore although the matters had been the subject of an earlier adjudication, under the terms of this contract, a reference to the engineer had to be made before any reference to arbitration could be contemplated.

In *Diamond v PJW Enterprises Ltd*, Lady Paton, in Scotland, had to consider an adjudication concerning a professional negligence claim. PJW employed Diamond as contract administrators on a refurbishment contract in Glasgow. During the course of the works a dispute arose which resulted in the termination of Diamond's appointment. PJW employed others in Diamond's place, brought a claim for professional negligence against Diamond and then referred that claim to adjudication.

The adjudicator found against Diamond who resisted paying, claiming that the adjudicator did not have the power to award damages and that an appointment as a contract administrator was not a construction contract as defined by the HGCRA. Lady Paton held that Diamond's contract administration services qualified as surveying work thereby falling within the HGCRA. By agreeing to carry out contract administration services, Diamond had entered into an agreement to do surveying work.

It is interesting that although Lady Paton expressed doubts about the merits of the decision, she concluded that she could not interfere with that decision. Lady Paton recognised the potential difficulties caused by the short time limits imposed by adjudication but stated:

“There is nothing in the 1996 Act...in precedent or principle, to suggest that an adjudicator seeking to resolve a dispute...is not entitled to reach conclusions about the manner in which a professional person has carried out his or her duties in the course of the construction contract - and that includes conclusions as to whether there might have been any professional negligence. ...While therefore, it may on one view seem startling that a professional person acting as an adjudicator should be invited to rule within 28 days on the important and often difficult and delicate question as to whether a fellow professional has failed in his or her duty to such extent that there has been professional negligence, yet it seems that a proper construction of the statutory language...permits this very result - although importantly, a “provisional interim” result.”

Thus Lady Paton has provided judicial confirmation that there is nothing to stop a claim of professional negligence being made in an adjudication.

Adjudication continued

In *Earls Terrace Properties Ltd v Waterloo Investments Ltd*, HHJ Seymour QC had to consider Earls Terrace's claim for a declaration that the adjudication commenced by Waterloo should be restrained on the basis that the agreement, as amended by a subsequent variation agreement, was not a construction contract within the definition of the HGCRA.

By an agreement dated 4 December 1996 Waterloo had agreed to act as a developer for Earls Terrace. The agreement was later amended by a deed of variation dated 20 July 1998. The 1996 agreement came within the definition of a construction contract. However, it also pre-dated the operative date of the HGCRA, 1 May 1998. The deed of variation was entered into after 1 May 1998, the effective date of the HGCRA. However, that deed of variation merely amended the fee due to the defendant, and deleted one sub-clause in the main agreement. Thus the variation agreement was not a contract for construction operations.

The key question here was whether the making of a deed of variation on 20 July 1998, which was not in itself a construction contract, but which varied the terms of the main agreement dated 4 December 1996, would have the effect of bringing the entirety of the agreements within the HGCRA, notwithstanding that the earlier agreement was not a contract to which the HGCRA applied because that agreement pre-dated the operative date of the HGCRA.

HHJ Seymour QC held that whilst it was possible that a variation to a construction contract made before 1 May 1998 could amount to a construction contract (and therefore come within the HGCRA) here, since the deed of variation merely modified the fee provisions, it was not sufficient to bring the earlier agreement within the scope of the HGCRA. Thus the adjudication which had been commenced was void and of no effect since the adjudicator had no jurisdiction to act.

Mediation

CEDR's latest Commercial Mediation Statistics (for 2001/02) show that, of the 338 commercial mediations held over the past year, 77 per cent of cases settled during the mediation or shortly after as a result of the progress generated during that mediation. Of these, construction related disputes made up the largest category at 12% with cases ranging in value from £8,000 to over £60million. The settlement rate for these was only 54%. CEDR suggest that this was a reflection on the "increasing complexity" of construction cases.

Costs

In *Phoenix Finance Ltd v Federation International de L'Automobile and others*, a case where the Claimant's claim for interlocutory relief was dismissed, the Defendants were awarded their costs on an indemnity basis since the Claimant had failed to send a letter before action or give any other warning that proceedings were being contemplated.

Even though this was a case to which no pre action protocol applied, nevertheless Morritt VC held that the whole rationale of the current procedural rules was that the failure to send some form of letter before action was unreasonable in itself for an award of indemnity costs to be made and it was not therefore necessary for the Defendants to show that the conduct of the Claimant had in fact served to increase their costs.

Expert Evidence

The case of *Layland v Fairview Homes Plc and another* involves a challenge to the conclusion of a Court appointed single joint expert.

Part of the Claimants' claim involved a claim in respect of the diminution in value of their property. The Court appointed joint expert had concluded that there was in fact no diminution. On the basis of that report, the Defendants successfully applied pursuant to CPR Part 24 for summary dismissal of the claim. In response, the Claimants sought to adduce further expert valuation reports which showed that, contrary to the view of the joint expert, there had been a diminution in the value of the property.

On appeal, the Court was satisfied that there was material that the Claimants might use in cross-examination of the single joint expert which might persuade either the expert or the Court that the expert was wrong. Although the Claimants' case was weak, it could not reasonably be said to stand no realistic chance of success (the test required by CPR 24) and therefore their case was reinstated.

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