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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.

In this issue we discuss what we have learnt about adjudication in the last six months.

Insight

Five practice points we have learnt about adjudication in the last six months

This twenty-sixth issue of *Insight* looks at five key adjudication decisions that have been handed down by the courts over the past six months that have considered, amongst other issues, (i) running multiple disputes, (ii) resisting enforcement, (iii) resisting payment and (iv) having more than one bite of the cherry.

What can we learn from them in practice?

Running multiple disputes

Can you serve numerous Notices of Adjudication at the same time for determination by the same adjudicator? Willmott Dixon Housing Ltd (formerly Inspace Partnerships Ltd) v Newlon Housing Trust [2013] EWHC 798 (TCC)

In a non-Scheme adjudication, yes.

The decision

In this case, Newlon maintained that referring two adjudications simultaneously was contrary to section 108 of the HGCRA (and also the CIC Rules which applied here), which only allows adjudicators to determine one dispute at any one time.

Newlon's argument was rejected by Mr Justice Ramsey who held that there is nothing under the HGCRA that precludes a party from serving more than one Notice of Adjudication, each relating to a different dispute, and then referring each adjudication to the same adjudicator. This is because section 108(2)(a) of the HGCRA provides parties with the right to adjudicate "*at any time*".

Practice point

This is only a first instance decision and it is not therefore binding authority, but it seems to suggest that non-Scheme adjudications can be referred to adjudication simultaneously, provided there is nothing preventing the presentation of more than one dispute in any other adjudication rules that might govern the dispute.

Resisting enforcement

Can you resist enforcement on the basis that the adjudicator considered a contract clause the parties did not refer to? ABB Ltd v BAM Nuttall Ltd [2013] EWHC 1983 (TCC)

Yes.

The decision

In *ABB*, it was common ground that the adjudicator had referred to a particular clause of the contract in his decision, which had not been raised by the parties, and which he did not refer to the parties prior to issuing his decision.

The parties (and ultimately the courts) must have confidence in the fairness of the adjudicator's decision-making process. It is perfectly legitimate for an adjudicator to raise new points with the parties and invite comment, argument or even evidence, but only when he has done so may he rely on that point in reaching his decision. If the issue is an important one and the adjudicator does not refer it to the parties prior to issuing his decision, then the rules of natural justice risk being breached. In *ABB,* the claimant successfully argued that the adjudicator's decision should not be enforced as the issue was an important one and there was therefore a material breach of the rules of natural justice.

Practice point

If you receive a decision from an adjudicator that makes reference to a material, actual or potentially important part of the decision that was not mentioned by the parties, and was not referred to the parties by the adjudicator prior to the decision being issued, then you should consider resisting enforcement on the basis that the rules of natural justice have been breached.

Resisting payment

Can you set off or withhold against an adjudicator's decision? Thameside Construction Company Ltd v Stevens and another [2013] EWHC 2071 (TCC)

It all depends on the wording of the adjudicator's decision.

The decision

In *Thameside*, the adjudicator directed that payment should be made within 14 days and made it clear that there should be no set-off other than sums that had already been set off through his calculations. The matter only reached the courts because the adjudicator formed the view that issues as to liquidated damages (amongst other things) should be "*left over*" to another day, which caused confusion and prompted the set-off and withholding arguments that arose.

The judge, Mr Justice Akenhead, provided some broad guidelines as to the circumstances under which a right to set off or withhold can be exercised. He confirmed that the starting point is to consider what the adjudicator decided, and that means looking at the adjudication pleadings, and primarily the

Insight

decision itself, to ascertain the essential components of, or basis of, the decision.

As a general rule, decisions should be honoured and no set-off or withholding will be permitted unless (i) there is a contractual right to set-off which does not offend against the statutory requirement for immediate enforcement of the adjudicator's decision (which would be rare), (ii) the adjudicator decrees that a balance is due as opposed to a balance being payable, or (iii) the adjudicator's decision expressly permits a right of set-off or withholding.

Practice point

If you are considering withholding or setting off sums from an adjudicator's decision in practice, you should pay heed to the guidelines set out by Mr Justice Akenhead in *Thameside* and bear in mind that more often than not it will be an uphill task.

Having more than one bite of the cherry

Can a decision in one adjudication be placed before an adjudicator in a subsequent adjudication? Arcadis UK Ltd v May and Baker Ltd (t/a Sanofi) [2013] EWHC 87 (TCC)

In certain circumstances, yes.

In the *Arcadis* case, Mr Justice Akenhead did not hesitate in finding that it was neither improper nor contrary to the rules of natural justice for a decision in one adjudication to be placed before a second adjudicator for consideration in a subsequent adjudication, or for the second adjudicator to have regard to any previous decision which he found to be germane and persuasive. This was on the basis that the courts look at previous decisions all the time.

The decision

On the facts here, Arcadis had succeeded in an earlier adjudication in relation to very similar issues of fact and law that also pertained to the second adjudication, and so Arcadis understandably sought to persuade the second adjudicator to adopt the findings of the first adjudicator on the basis that the same principles applied.

This seems relatively straightforward, but a note of caution if you are considering adopting Arcadis' approach in practice. The important point to note is that the second adjudicator confirmed he had decided the issues on their own merits, and not because he felt bound by the decision of the first adjudicator in relation to the factual and legal issues that the first adjudicator considered to be pertinent. It would not therefore automatically follow that any earlier decision would necessarily bind any subsequent adjudicators; indeed, there is nothing requiring adjudicators to follow earlier decisions.

It is up to individual adjudicators to decide the extent to which earlier decisions might be relevant or helpful, and any second adjudicator would effectively have to wholeheartedly agree with the approach taken by the earlier adjudicator if he were to adopt his decision.

Practice point

The crux of the matter is that the closer any earlier decision on the facts and issues, the easier it will be for any subsequent adjudicator to adopt the earlier adjudicator's decision. You should only rely on an earlier decision if the facts and issues are aligned. It is also worth noting that if an issue has already been adjudicated upon, it cannot be adjudicated upon a second time. You should therefore establish and define the scope of the adjudication, and the nature and extent of the adjudicator's decision, before making any final decision as to whether to rely on an earlier decision.

Can you litigate following an adjudication? Aspect Contracts (Asbestos) Ltd v Higgins Construction plc [2013] EWHC 1322 (TCC)

Yes, provided you issue proceedings within the six-year limitation period.

The decision

The adjudication in *Aspect* was a Scheme adjudication. Aspect pleaded an implied term that where money was paid over following a Scheme adjudication, the paying party acquired a right to have the dispute finally determined by legal proceedings, because the limitation period began afresh from the date on which payment was made.

Mr Justice Akenhead, however, did not agree with Aspect. He considered it was not reasonable, equitable or necessary to imply the terms that Aspect sought to make into the contract between Aspect and Higgins for the purposes of business efficacy, and the term Aspect sought to be implied did not go without saying. There was nothing within the Scheme that gave the losing party a right to sue for sums paid from the date of payment, in compliance with an adjudicator's decision. This was not what Parliament intended and there was no policy reason why this would be necessary.

Practice point

If you are dissatisfied with an adjudicator's decision, you should examine your options at an early stage and act quickly, ideally as soon as the decision has been issued. If you do so, not only will you not fall foul of limitation, but you will also be at a tactical advantage by issuing proceedings for a declaration.

Conclusion

There is nothing too surprising about any of the above decisions. They provide further examples of the courts' robust stance on challenges to the enforcement of adjudicators' decisions, and support the role of adjudication as an interim binding and expeditious dispute resolution procedure, the essence of which is to provide cash flow.

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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