

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Dispatch

Withdrawing and re-starting your adjudication

Jacobs UK Ltd v Skanska Construction UK Ltd [2017] EWHC 2395 (TCC)

Here, Jacobs sought an injunction to restrain Skanska from proceeding with an adjudication, following Skanska's withdrawal from an earlier adjudication. Jacobs said that a party to an adjudication is not entitled to withdraw a dispute from adjudication and refer the same, or substantially the same, dispute to a second adjudication.

On 8 February 2017 Skanska gave notice of an intention to refer a dispute as to the adequacy of the design services provided by Jacobs to adjudication. The parties reached agreement as to the applicable procedural rules and a detailed timetable for the adjudication, which was recorded in an exchange of emails on 13 February 2017. The Referral would be served on 17 February 2017, the Response on 24 March 2017 and the Reply on 7 April 2017. The Referral and Response were served in accordance with the agreed timetable and Jacobs incurred substantial costs in responding to Skanska's claim in the adjudication.

However, Skanska's counsel became unavailable and Skanska was unable to serve its reply by 7 April 2017 as agreed. Skanska requested an extension of time from Jacobs but the request was refused. The adjudicator would only agree an extension if both parties agreed. On 7 April 2017 Skanska withdrew its reference to adjudication and invited the adjudicator to resign. On 11 April 2017 the adjudicator resigned. On 21 June 2017 Skanska gave a fresh notice of an intention to refer the dispute to a second adjudication. This contained broadly the same claims against Jacobs, albeit the scope of the dispute was narrowed, and the methodology and quantum of the damages claimed were revised.

Jacobs commenced Part 8 proceedings seeking a declaration that in proceeding with the second adjudication Skanska were acting unlawfully. Jacobs said that the parties had agreed that the reference of this dispute should be to an adjudicator appointed under the Scheme and that the adjudication should be conducted in accordance with an agreed timetable. Jacobs had a right to a resolution process which was fair to both parties and did not confer an uncovenanted advantage on the referring party beyond that implicit in the rough and ready adjudication process. The way Skanska had acted meant that the process was unfair, unreasonable and oppressive.

Skanska said that there was no concept of abuse of process in adjudication and a referring party was free to obtain whatever tactical advantage it can. A party has the right to start adjudication in relation to a dispute at any time. This gave a party an unrestricted right to start, abandon and pursue serial adjudications in respect of the same dispute.

Mrs Justice O'Farrell agreed that the adjudication procedure envisaged by the HGCRA was a rough and ready one. A referring party has a clear advantage in selecting the timing and scope of the dispute. The timetable is very tight, regardless of the size

and complexity of the dispute. Any inherent unfairness in the adjudication process is justified by the advantage of speed and efficiency in obtaining a decision and balanced by the temporary effect of any decision.

The Judge noted that a party can withdraw a claim even after the referral. In *Midland Expressway v Carillion* [2006] EWHC 1505 it was held that a party could withdraw its claim which had been inadequately formulated and which could not succeed as it presently stood, and that there was nothing in the HGCRA or the Scheme to suggest otherwise. In *Lanes Group plc v Galliford Try Infrastructure Ltd* [2012] EWCA Civ 1617, a referring party withdrew and started again, following the appointment of an adjudicator they preferred not to have.

However, the Judge was clear that it did not follow that the courts will never intervene to prevent a party from pursuing a claim in adjudication. Under section 37 of the Senior Courts Act 1981 the court had a power to grant an injunction restraining a party from commencing or continuing an adjudication that was unreasonable and oppressive. This was a question of fact. Potentially, if a party started and stopped serial adjudications in respect of a claim and so required the other party to incur irrecoverable costs, then this could amount to unreasonable and oppressive behaviour.

Here, the adjudicator in the first adjudication did not reach a decision. Therefore the adjudicator in the second adjudication would have jurisdiction to determine the dispute referred. The Judge considered that Skanska's withdrawal of the claim was unreasonable. The unavailability of counsel was

"rarely a good excuse for failing to meet an agreed timetable, especially where the party in default is the referring party who controls the timing and scope of the reference".

However, the court would not intervene unless the further reference was both unreasonable and oppressive. Here, the substance of the claims remained the same and therefore Jacobs would be entitled to rely in large part on its prepared response. There was new material, including new quantum expert evidence, and it was anticipated that there might be new arguments raised by Skanska following Jacobs' response. Therefore Jacobs would probably seek the right to submit a rejoinder. However, the Judge did not consider that the inconvenience and additional costs suffered by Jacobs as a result of the second adjudication were so severe or exceptional as to warrant intervention by the courts by way of injunctive relief.

That said, Mrs Justice O'Farrell did consider that Jacobs was entitled to any wasted or additional costs caused by Skanska's failure to comply with the agreement of 13 February 2017. It was common ground that, in the absence of agreement giving the adjudicator jurisdiction to award costs, a party's costs of adjudication proceedings are not recoverable. However, here the parties had entered into an ad hoc agreement under which the procedure and timetable to resolve the referred dispute in the first adjudication were agreed and fixed. That went beyond mere agreement as to the timetable to be directed by the adjudicator in respect of an existing contractual or statutory adjudication and imposed new enforceable obligations on the parties.

Skanska's failure to serve its reply or continue with the first adjudication was a breach of the ad hoc agreement, entitling Jacobs to its wasted or additional costs as damages. This was not all the costs incurred in connection with the first adjudication, only those wasted or additional costs caused by Skanska's failure to comply with the agreed procedure and timetable.

Concurrent delay

North Midland Building Ltd v Cyden Homes Ltd [2017] EWHC 2414 (TCC)

Here, the claimant, the contractor and the defendant, the employer, had agreed certain bespoke amendments to the JCT Design and Build Contract 2005, one of which concerned the way in which extensions of time would be dealt with in certain circumstances. Clause 2.25.1.3(b) as amended read as follows:

"2.25.

1. any of the events which are stated to be a cause of delay is a Relevant Event; and

2. completion of the Works or of any Section has been or is likely to be delayed thereby beyond the relevant Completion Date,

3. and provided that

(a) the Contractor has made reasonable and proper efforts to mitigate such delay; and

(b) any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account

then, save where these Conditions expressly provide otherwise, the Employer shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he then estimates to be fair and reasonable."

Sub-clause (3) was the part added by the parties to the standard clause. The clause as amended added into the extension of time machinery the proviso that, in assessing an extension of time, "any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account".

The works were delayed and North Midland applied for an extension of time for a variety of reasons. As part of their reply, Cyden maintained that if there were two delaying events occurring at the same time and causing concurrent delay to completion of the works, with one event which otherwise entitled the claimant to an extension of time, and the other being "another delay for which the Contractor is responsible", then the contractor would not be entitled to an extension of time in respect of those two delaying events. North Midland disagreed.

North Midland placed reliance upon the doctrine of prevention. Mr Justice Fraser explained that:

"Essentially the prevention principle is something that arises where something occurs, for which it is said the employer is responsible, that prevents the contractor from complying with his obligations, usually the obligation to complete the works by the completion date."

The Judge further noted that in *Multiplex Construction (UK) Ltd v Honeywell Control Systems Ltd* [2007] BLR 195, Mr Justice Jackson (as he then was) had considered the relationship between the prevention principle and time at large, setting out that:

(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause delay beyond the contractual completion date.

(ii) Acts of prevention by an employer do not set time at large, if the contract provides for extension of time in respect of those events.

(iii) Insofar as the extension of time clause is ambiguous, it should be construed in favour of the contractor.

North Midland said that as a consequence of the first two propositions time was at large. Mr Justice Fraser explained that:

"the concept of 'time at large' does not mean that the contractor has an indefinite time to complete the works. If the completion date in the contract, and the mechanism for having that extended by means of awarding so many weeks to an originally agreed completion date, are inoperable or for some other reason no longer applicable, in general terms the contractor's obligation becomes one to complete the works within a reasonable time. That is what the shorthand expression 'time at large' is usually understood to mean."

North Midland said that dealing with concurrent delay in the way that the employer had dealt with it in response to the application for an extension of time was unfair and not in accordance with the terms of the contract. An extension of time ought to be granted without taking account of concurrent delays for which the claimant is responsible, and disallowing those latter periods. However, the Judge made it clear that he did not consider that the prevention principle arose at all.

In fact, Mr Justice Fraser was "crystal clear" that the parties had agreed that if the contractor were responsible for a delaying event which caused delay at the same time as, or during, that caused by a Relevant Event, then the delay caused by the Relevant Event "shall not be taken into account" when assessing the extension of time. That did not raise any issues of construction whatsoever. The parties were free to agree whatever they liked in terms of how the risk of concurrent delay should be allocated. There was no rule of law that prevented the parties from agreeing that concurrent delay be dealt with in any particular way.

At the end of his judgment, Mr Justice Fraser referred to a discussion about whether, where concurrent delay exists, the prevention principle is engaged at all, referring for example to the words of Mr Justice Coulson (as he then was) in the case of *Jerram Falkus Construction Ltd v Fenice Investments Inc (No.4)* [2011] EWHC 1935 (TCC):

"Accordingly, I conclude that, for the prevention principle to apply, the contractor must be able to demonstrate that the employer's acts or omissions have prevented the contractor from achieving an earlier completion date and that, if that earlier completion date would not have been achieved anyway, because of concurrent delays caused by the contractor's own default, the prevention principle will not apply."

It was suggested that these words should not be followed. Mr Justice Fraser disagreed and advised parties where disputes occurred about this point to proceed on the basis that the prevention principle is not engaged where there is concurrent delay.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986

Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN



www.fenwickelliott.com