

Construction and Engineering eNews – February 2012

Employer-nominated adjudicator clauses challenged

Sprunt Limited –v- Camden LBC [2011] EWHC3199, TCC Akenhead J also (2011) CILL

Facts

Sprunt was an architect's firm, which entered into a Framework Agreement with Camden for the supply of building consultancy services. Camden's standard terms, incorporated in the Framework Agreement, provided that Camden was to be "*the specified nominating body*" to appoint an Adjudicator for any dispute between them. The parties subsequently fell out over fees for a particular job, and Sprunt started an adjudication, applying to the RICS to appoint an adjudicator. Camden objected that the RICS was not the contractual nominating body. The RICS appointed an adjudicator who rejected this challenge, and went ahead with a Decision ordering Camden to pay Sprunt £150,000.

Camden refused to pay on the basis that the RICS appointment was invalid because only Camden had the right to appoint the Adjudicator.

HELD:

This Adjudicator appointment clause was contrary to the principles of Section 108 of the HGCR and therefore the Statutory Scheme applied, under which a person commencing an adjudication is entitled to approach any appropriate "*adjudicator nominating body*", such as the RICS.

Comment:

1. There were other things wrong with adjudication clause in the Framework Agreement, including an attempt by Camden to provide that an adjudication decision should be suspended from taking effect in certain circumstances. Both this and the attempt to give one party the right to nominate the Adjudicator were sufficient grounds to invalidate this adjudication clause. Where an adjudication provision is in some sense defective, then the whole clause gets replaced by the Statutory Scheme.
2. At paragraphs 44-51 of his judgement, Akenhead J robustly condemned the practice of appointing one's own adjudicator because it was "inherently unsound and contrary to the policy of the HGCR for the contract to specify that one side should nominate the adjudicator." Section 108(2)(e) of the Act requires the Contract to impose a duty of impartiality upon the Adjudicator, which cannot be safely done where one of the parties is responsible for giving the Adjudicator a potentially lucrative fee paying appointment.
3. The Judge saw further serious objection in the possibility that a nominator might "choose a horse for the course", or might even deliberately appoint someone who was so expensive (say a top QC) that the Referring Party would be deterred from proceeding.
4. Contrast the situation which the parties agree an adjudicator in advance (for example dispute adjudication boards under FIDIC). We suggest that this is not caught by Akenhead's

reasoning. The parties have the freedom to contract, and if they choose a particular adjudicator in advance for their potential disputes, this is not in principle a breach of Section 108.

Official Guidance issued by the NEC on the production of Works Information

NEC3 Engineering and Construction Contract Works Information Guidance, January 2012

There are 6 distinct Documents in the NEC scheme:

- Form of Agreement;
 - Conditions of Contract;
 - Contract Data;
 - Prices/Activities Schedule/Bill of Quantities;
 - Works Information (Employer's and Contractor's, 2 separate parts); and
 - Site Information
1. This Guidance is designed to ensure the parties do not confuse the different functions. The Guidance is divided into several sections or "Chapters".
 2. Specific guidance is given at chapter 3 on how to draft Works Information, avoiding traditional language and vague terminology, with a number of worked examples. Eliminating subjectivity in the evaluation of performance is particularly stressed. There is a great deal of guidance which lawyers could usefully follow, for example to use the simplest possible words when drafting. Simple words have few syllables. Sentences should be as short as possible. Verbs and nouns are usually precise, adverbs and adjectives are usually imprecise.
 3. Chapter 4 provides a valuable crib sheet on where the expression "*Works Information*" appears in the NEC clauses, with an explanatory note in each instance on how this impacts on what has to be contained in the Works Information document.
 4. Chapter 5 reminds us that there is already a straightforward precedent for the structure of the Works Information document in the NEC3 standard Guidance Notes.
 5. Chapter 6 is particularly useful (albeit brief) in assisting the parties where the contract is let on a design build basis. In that case there will be a division of the Works Information into an Employer's section and a Contractor's section. The Contractor's section will include the Contractor's Proposals and the design details of the works which he is undertaking to design. We are reminded that there should be no ambiguity or consistency between the Contractor's and the Employer's WI documents, and that the Employer's WI documents should be prepared first. If the Employer accepts a proposal from the Contractor which is contrary to the Employer's stated design approach, then the Employer's Works Information should be

6. changed to remove any redundant or conflicting content. This is particularly important because the Employer's WI is treated as having priority over the Contractor's WI under sub-clause 60.1(1).
7. This 38-page guidance document can be downloaded free from <http://www.blissbooks.co.uk/images/1067423.pdf>. If you find this helpful you may also wish to join the LinkedIn Group "*construction law case bites*"

Bias and Manipulation of Adjudicators

Lanes Group –v- Galliford Try (CILL); [2011] EWCA CIV 1617, Court of Appeal

Facts

1. Galliford Try had the main contract to refurbish the Inverness Train Maintenance Depot and appointed Lanes to carry out roofing and glazing works. Galliford then sacked Lanes for alleged failure to proceed with due diligence, and followed up with a notice of adjudication seeking a declaration that it had lawfully determined Lanes' sub-contract. The ICE was the nominating body. The ICE was going to appoint Mark Dixon who had acted in a previous adjudication but Lanes objected to him so the ICE nominated Howard Klein. Galliford objected to him on the basis that its solicitors had had an argument with him on a previous matter acting for a different client. The ICE went ahead with the nomination.
2. Galliford refused to serve a notice of referral upon Mr Klein and 10 days later wrote to the ICE arguing that the nomination had lapsed and asking for a new nomination. The ICE nominated its third choice, Mr Atkinson. He proceeded with the Adjudication even though Lanes tried and failed to get an injunction to stop it from going ahead.
3. Mr Atkinson issued a document entitled "*Preliminary Views and Findings of Fact*" intended to assist the parties and stressing that he had not made his mind up on any of these points but wanted submissions on matters as they seemed to him. Lanes objected to this but went on with the adjudication. In due course, the Adjudicator came out with a Decision which was substantially the same as his preliminary views. He found against Lanes, who refused to pay on the grounds of his apparent bias as demonstrated by his preliminary views.

Court of Appeal Held:

1. There is nothing objectionable in a Judge or an adjudicator setting out his or her provisional view at an early stage of proceedings so that the parties have an opportunity to correct any errors in the Judge or Adjudicator's thinking, or to concentrate on matters which appear to be influencing him. It is wrong to reach a final decision before one is in possession of all the relevant evidence and arguments which the parties wish to put before the Adjudicator. There is however a clear distinction between (a) reaching a final Decision prematurely, and (b) reaching a provisional view which is disclosed for the assistance of the parties. Mr Atkinson's use of the preliminary views document was entirely legitimate.

2. The Court of Appeal described Galliford's behaviour as "*forum shopping*". Jackson LJ observed that forum shopping was never attractive but the service of an adjudication notice and the appointment of an adjudicator do not start time running nor do they clothe the Adjudicator with jurisdiction (paragraph 40 of his Judgment). The Adjudicator has no powers until there has been a Notice of Referral (*Hart Investments –v- Fidler*). In fact, even after there has been a referral, the Claimant has the right to drop one of the heads of claim and reserve it for a later adjudication (*Midland Expressway –v- Carillion*). Thus Mr Atkinson's appointment was valid and his decision was binding on the parties for the time being.

Comment:

1. Adjudication is increasingly a tactical game in which serious advantage could be gained by one party over the other by such methods. The Court of Appeal's Decision was given reluctantly but from now on any party that wants to play the system will often be able to manoeuvre until it gets an Adjudicator which it regards as like-minded.
2. In the *Sprunt* Decision, also mentioned in this newsletter series, an employer was not able to directly pick an Adjudicator by acting as nominating body, but it may be thought that this Court of Appeal Decision gives almost as good an opening to whichever party chooses to be the aggressor in adjudication to choose an Adjudicator who suits.

For further information, help or advice please contact **Rob Langley** on **0191 211 7975**, **Mark Smith** on **0191 211 7955** or **Alan Ross** on **0191 211 7983** , email advice@muckle-llp.com or contact any one of our **Construction team** on **0191 211 7777**.