

Adjudication in construction disputes

Mars Black Sheep Hotels Ltd v Douglas & Stewart Ltd [2019] CSOH 64.

In the words of Lord Ackner in the House of Lords: “Adjudication is a highly satisfactory process. It comes under the rubric of “pay now argue later” which is a sensible way of dealing expeditiously and relatively inexpensively with disputes which might hold up completion of important contracts.”

The above case recently decided in the Commercial Court arose from a construction contract and provides another recent example of the use in practice of the adjudication procedure. The pursuer company is a hotelier. It entered into a contract with the defender company for substantial construction works at three hotel properties owned by the pursuer. The contract between the parties incorporated the standard terms of the SBBC Scottish Minor Works Building Contract (2011). In terms of clause 7 and clause 8.2 of the conditions of the standard form contract, either party was entitled to refer any dispute or difference arising from the contract to adjudication.

Between Autumn 2018 and May 2019, substantial works had been carried out for which the pursuer had made payments totalling in excess of £6.5m. The parties then fell into dispute as to whether further payments were due. The defender gave notice of its intention to suspend performance of the contract. The pursuer responded by giving notice of termination of contract. Thereafter, the defender served a notice of adjudication, followed six days later by a notice of referral (to an Adjudicator).

In response, the pursuer raised court proceedings seeking a number of remedies which included interdict against the defender taking any further steps in furtherance of the adjudication already commenced and suspension of that adjudication. It also sought and obtained interim interdict. That meant that the defender could not proceed with the adjudication until such time as the court action raised by the pursuer had concluded. Accordingly, the defender sought to recall the interim interdict at a hearing before Lord Docherty.

Lord Docherty decided to recall the interim interdict thereby allowing the defender to proceed with the adjudication process. As part of the decision, he required to establish the balance of convenience. In other words, which party would suffer the greater prejudice if the order for recall was either granted or not granted.

If the interdict were not recalled, he noted that the defender would be deprived of the right to go to adjudication. It would not have the opportunity of persuading an Adjudicator that a provisional decision should be made in its favour. Rather, it would

require to vindicate its position by litigation or arbitration, with the delay and expense that that is likely to involve. In his view, Parliament intended that parties to construction contracts should have the right to refer disputes to adjudication. The court should be very wary indeed of preventing a party from pursuing a right to adjudication.

That determination reflected the decision in the case of *T Clarke (Scotland) Ltd v MMAXX Underfloor Heating* 2015 SC 233. In that case, a judge in the Court of Session refused to grant an interdict against a defender, who had raised 8 separate adjudications within a 9 month period, preventing it from raising any further. This was upheld by the Inner House on appeal which made the following observations:

- The purpose of the legislation introducing the adjudication procedure was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional, interim basis.
- The decision of an adjudicator is binding and is to be complied with until the dispute is finally resolved.
- It is therefore an important practical procedure available to those who operate in the construction industry.
- It is a right provided by Parliament and in that particular case (as here) was incorporated into the contract between the pursuer and the defender.

It was said that the above considerations indicate that the court should be slow to intervene in the adjudication process. In other words, a party should not be prevented from pursuing its right to adjudication save in the most exceptional circumstances.

The recent decision from Lord Docherty affirms the above observations demonstrating the usefulness of the adjudication procedure for parties wishing to avoid full-blown litigation.

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