Adjudication of construction disputes

Pentland Investments v Aitken Turnbull Architects [2018] SC EDIN 16.

Adjudication is a very useful and swift means of resolving construction disputes in the course of a project which allows works to progress until final resolution. As Lord Ackner put it in the House of Lords debate on the drearily named Housing Grants, Construction and Regeneration Act 1996: "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."

Section 108 of the 1996 Act provides that a party to a construction contract has the right to refer a dispute for adjudication. Where any of the qualifying conditions under that section are not met, the adjudication provisions of the Scheme for Construction Contracts apply. This is embodied in the Scheme for Construction Contracts (Scotland) Regulations 1998 and applied in this case. Regulation 8(2) provides:

"The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on related disputes under different contracts, whether or not one or more of those parties is a party to those disputes."

The adjudicator appointed to the dispute also had another related dispute referred to him at the same time involving another contractor. Aitken Turnbull declined to consent to that dispute being dealt with at the same time. That objection was disregarded by the adjudicator who proceeded to determine the dispute and thereafter made an award to Pentland. The architects participated under reservation of their position and refused to pay the award. The case was then referred to the Sheriff Court for enforcement of payment in terms of the adjudicator's award.

The Sheriff dismissed the claim for payment. He set out a set of principles which apply in such cases which is useful for parties involved in construction contracts to be aware of. The main reasons for his decision were as follows:

The essence of the procedure introduced by sec 108 is practicality. A dispute referred to an adjudicator must be prepared, heard and decided within 28 days, which is likely to be a demanding timescale. In general terms then, it will be difficult for an adjudicator to reach a sound decision within a short time scale if he requires to consider more than one dispute at a time. There is also an issue regarding natural justice in that there is a risk that the adjudicator might take into account or be influenced by matters which he has become aware of in relation to the connected

dispute when dealing with the one referred to him by one of the parties. In those circumstances, one or other or both of the parties might not be aware of those matters and therefore could not comment upon them.

Having said that, Regulation 8(2) allows an adjudicator to hear multiple adjudications at the same time. This does not derogate from, or contradict, section 108 of the 1996 Act. The adjudicator may not do so, however, unless he has the consent of all the parties. Any party has the absolute right not to consent. The appointed adjudicator in this case did not request or receive that consent. His proceeding to hear and decide this adjudication at the same time as another adjudication of a related dispute, without the defender's consent, was *ultra vires*. Therefore, the decision could not stand and the claim for payment following from it could not be enforced.

Whilst dispute resolution of this kind is a useful alternative to the main courts, it can be subject to abuse. In the case of *T Clarke (Scotland) Ltd v MMAXX Underfloor Heating* 2015 SC 233, a judge in the Outer House of 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 who stated that the court would be slow to interfere in the adjudication process unless there was clear evidence of an abuse of process.

It has been said that adjudicate provides a form of rough justice. Leaving aside extreme cases such as the one just mentioned, it is nonetheless very useful in the context of the construction industry and follows a current trend towards greater use of alternative means of dispute resolution. On that note, readers might be interested to know that both counsel in the *Pentland* case, myself, and increasing numbers of the Faculty of Advocates hold certification in recognised forms of Alternative Dispute Resolution such as Arbitration and Mediation.

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