

Getting the right party to the party: Who can refer a dispute to adjudication?

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Under the Housing Grants, Construction and Regeneration Act 1996 (“the Act”), any party to a construction contract has the statutory right to refer a dispute to adjudication “at any time”. However, before a dispute can proceed to adjudication, a fundamental question must first be addressed: *who actually has the right to commence the adjudication?* In principle, employers, contractors, subcontractors and consultants may all refer disputes to adjudication, provided the underlying agreement qualifies as a “construction contract” under the Act. Sounds straightforward, right? Not always. In practice, disputes can arise over whether the party commencing the adjudication is actually the correct party to do so, or whether the party can refer at all, in the case of residential occupiers. This is not simply a technical issue. If adjudication is initiated by the wrong party, or is not entitled to refer at all, the adjudicator may lack jurisdiction, and any decision reached could ultimately be unenforceable.

Recent case law illustrates that the courts continue to scrutinise this issue closely and decisions from the Technology and Construction Court (TCC) demonstrate that determining who has the right to adjudicate can be more complex than it might first appear.

1. Can assignees refer a dispute to adjudication?

In the recent case of *Paragon Group Ltd v FK Facades Ltd*, the TCC considered whether an assignee of a construction contract could refer a dispute to adjudication.

Background

The contractor, FK Facades Limited (“FK”), entered into an amended JCT 2016 Minor Works Contract (“the Contract”) with Office Depot International (UK) Limited (“the employer”) for remedial works to a property in Manchester. The employer subsequently assigned the Contract to OT Group Ltd, which later assigned it again to Paragon Group Limited (“Paragon”). A dispute arose between Paragon and FK concerning delays to completion of the remedial works. Paragon claimed that FK was responsible for the delay and sought liquidated damages and referred the dispute to adjudication. The adjudicator found in Paragon’s favour and awarded £80,500. FK did not make payment, and Paragon commenced enforcement proceedings in the TCC.

The Contract

Article 6 of the Contract provided that if any dispute arose under the Contract, either party could refer it to adjudication in accordance with clause 7.2, which incorporated the Scheme for Construction Contracts (England and Wales) Regulations 1998. The assignment clause had been amended to allow the employer to assign the benefit of the Contract at any time without the contractor's consent. The contractor, however, could not assign the benefit of the Contract without the employer's prior written consent.

Judgment

The Court ruled in favour of Paragon and held that, as an assignee of the Contract, it was entitled to refer a dispute to adjudication. The adjudicator's decision was therefore enforced. Paragon relied on the principles of statutory assignment under section 136 of the Law of Property Act 1925, which provides that assignment transfers the legal right to a debt or thing in action together with all associated remedies. The Court accepted that this included the right to refer a dispute to adjudication unless the contract expressly stated otherwise. FK argued that the Scheme only allowed "any party to a construction contract" to refer a dispute, and that Paragon was not a named party to the Contract. The Court rejected this argument, noting that the drafting of the Scheme did not clearly exclude assignees and that the term "party" could include a legal assignee. The Court also observed that if the original contracting parties wished to prevent assignees from referring disputes to adjudication, they could have expressly stated this in the contract.

Permission to appeal has been granted, so the position may yet be revisited by the Court of Appeal.

2. What about parties to a Joint Venture?

The case of *Darchem Engineering Ltd v Bouygues Travaux Publics & Anor* last month tackled a different issue and appears to be the first case on whether a single member of an unincorporated joint venture may commence adjudication proceedings in its own right.

Background

The dispute arose out of subcontract works carried out at the Hinkley Point C nuclear power station project. The subcontract was entered into between two unincorporated joint ventures. On the contractor side was BYLOR, a joint venture comprising Bouygues Travaux Publics and Laing O'Rourke Delivery Limited and on the sub-contractor side was EDEL, a joint venture comprising Darchem Engineering Ltd and Framatome Limited.

Darchem commenced adjudication proceedings alone and obtained a decision awarding it approximately £23.9 million. This was the third adjudication it had initiated without its joint venture company. Darchem argued that it was entitled to commence adjudication either because it was itself a "Party" to the subcontract or because it could act jointly and severally on behalf of the subcontractor joint venture. BYLOR challenged the adjudicator's jurisdiction in each adjudication, arguing that Darchem was not itself a party to the subcontract and therefore lacked standing to refer disputes to adjudication. The adjudicator rejected BYLOR's jurisdictional challenge and proceeded to issue a decision in Darchem's favour. When Darchem sought to enforce the adjudicator's decision by summary judgment in the TCC, that jurisdictional challenge came before the Court.

Judgment

The Court considered two issues. First, whether Darchem was itself a "Party" to the subcontract and therefore entitled to commence adjudication in its own name. Second, if Darchem was not a party, whether it could nonetheless commence adjudication in the name of the subcontractor joint venture (EDEL).

Mr Justice Constable held that, properly construed, the subcontract was bilateral. The “Parties” to the subcontract were the Contractor (BYLOR) and the Subcontractor (EDEL), rather than the individual companies comprising the joint ventures. The conditions of the subcontract defined “Parties” as the Contractor and the Subcontractor, and the drafting throughout the subcontract referred to language such as “either Party”, “both Parties” and “the other Party”. The Court also noted that certain clauses contained specific provisions stating that references to a “Party” would include each joint venture member for particular purposes, such as termination. The Court considered that the absence of equivalent wording in the adjudication provisions indicated that the individual joint venture members were not intended to be Parties for the purposes of adjudication.

Darchem relied on wording in part of the subcontract which stated that “*all of the above are together known as the ‘Parties’*”. The Court rejected this argument and held that the wording referred to the companies which together comprised the two joint ventures, rather than creating separate contractual parties. The Court also rejected Darchem’s alternative argument that it could commence adjudication on behalf of the subcontractor joint venture. Although the joint venturers had joint and several liability under the subcontract, the Court held that the subcontract did not confer a unilateral right on a single joint venture member to exercise contractual rights on behalf of the joint venture. Clause 12.6 of the subcontract addressed the situation where the subcontractor comprised multiple companies acting in joint venture and contemplated the notification of a joint venture leader with authority to bind the joint venture. No such notification had been made in this case.

The Court held that Darchem was not a Party to the subcontract and had no authority to commence adjudication on behalf of the subcontractor. The adjudicator therefore lacked jurisdiction, their decision was void, and the application for summary judgment was dismissed.

3. And, residential occupiers?

Finally, the case of [Rbh Building Contractors Ltd v Ashley James, Tracy James](#) from last year is one that myself and James Frampton of Keating Chambers spoke about at a couple of recent [SCL events](#) on the subject of how to get paid, and I think provides us with an important reminder of the residential occupier exemption.

The background

RBH Building Contractors Ltd (RBH) was engaged to provide project management and construction services for the development of a luxury residential property owned by Ashley and Tracy James in North Devon. The arrangement between the parties was not recorded in a formal written contract. Instead, the relationship was based largely on oral agreements and informal communications, with RBH overseeing the works and coordinating subcontractors during construction. During the course of the project, the relationship between the parties deteriorated and RBH ceased involvement in the works. RBH subsequently submitted a payment application for approximately £663,000, which it said was outstanding for work carried out. The homeowners disputed the claim and issued a pay less notice stating that £0 was due.

RBH then commenced adjudication proceedings, arguing that the pay less notice was invalid and that the full amount claimed had become payable. The adjudicator found in RBH’s favour and ordered the homeowners to pay the claimed sum. RBH sought to enforce the adjudicator’s decision in the TCC. The central issue before the TCC was whether the dispute could properly be referred to adjudication at all. Section 106 of the Act creates an important exception to the statutory right to adjudicate: it does not apply to contracts with residential occupiers, meaning individuals who occupy or intend to occupy the property as their dwelling. The homeowners argued that they fell within this “residential occupier” exception, and therefore the adjudicator lacked jurisdiction to decide the dispute. RBH argued that the project was effectively a development project and that the owners did not genuinely intend to occupy the property.

Judgment

The TCC refused to enforce the adjudicator's decision. The Court held that the defendants had a real prospect of establishing that they were residential occupiers at the time the contract was formed. Evidence suggested that the owners intended to live in the property once construction was complete. If that were correct, the contract would fall within the residential occupier exception under section 106, meaning the statutory right to adjudicate would not apply. Because the adjudicator's jurisdiction depended on the existence of that statutory right, the Court concluded that there was a serious jurisdictional issue which required a full trial. Even though, at the time of enforcement, the employers had "changed their mind" about occupancy, the earlier intention was sufficient to give them a real prospect of success. As a result, the adjudicator's decision was not summarily enforced.

The Court also considered the validity of the pay less notice issued by the homeowners and indicated that a notice does not need detailed calculations to be valid, provided a reasonable recipient can understand the basis on which payment is withheld.

So, what can we take from all this?

1. The statutory right to adjudicate is broad, but it is not unlimited - a dispute must be referred by the correct legal party with the contractual right to do so.
2. The contractual definition of the "Parties" matters. Determining who the contracting parties are is essential when identifying who has the right to commence adjudication. If adjudication is commenced by the wrong entity, the adjudicator may lack jurisdiction, and the decision may be unenforceable.
3. Assignment clauses can transfer the right to adjudicate and should not be treated as boilerplate. Unless expressly excluded, an assignee of a construction contract may be entitled to commence adjudication. This can have significant implications for parties' rights as the right to adjudicate can pass to an assignee of the contract, meaning contractors may face adjudications from parties who were not originally involved in the project.
4. Individual members of a joint venture cannot usually act alone and adjudication must generally be brought in the name of the contractual entity rather than by one of its constituent members. Parties should therefore pay close attention to: (i) who the contracting parties are under the relevant construction contract; (ii) whether any assignment of rights has taken place; and (iii) whether the contract is held by a joint venture, consortium, or special purpose vehicle. Without such clarity, attempts by a single joint venture member to pursue claims independently may fail.
5. Clear contractual drafting is essential (when isn't it?). One can never underestimate the importance of carefully reviewing contractual provisions, including definitions of the "Parties" and any clauses governing the authority of joint venture members to act on behalf of the joint venture.

6. Not all construction disputes can be referred to adjudication. Where a contract falls within the residential occupier exception, the statutory adjudication regime will not apply unless the parties have expressly agreed to adjudication in the contract.

7. The TCC still generally adopts a robust approach to enforcing adjudicators' decisions. However, it will carefully examine jurisdictional challenges where the right to adjudicate is in dispute.

In short, whether the issue arises through assignment, joint venture arrangements, contractual definitions of the parties or intentions of the parties at the time of contracting, the identity of the referring party really does matter and ensuring that adjudication is commenced by the correct entity is essential. Failure to do so may lead to costly jurisdictional challenges and, ultimately, unenforceable decisions, which doesn't sound like much of a party to me.



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