“THIS HOUSE BELIEVES ADJUDICATION IS BETTER THAN COURT”

Debates form part of the Kings College Construction Law Association’s programme of events each year to air current questions and contentions in the industry by both lawyers – who are used to arguing everything – and construction professionals - who generally do not! The combination of expertise was excellently displayed at the end of January when the above motion was:

Proposed by James Bowling, Barrister at 4 Pump Court, and Seconded by Peter Phillippo, Chairman of Tudor Rose LLP; and,

Opposed by David Sawtell, Barrister at Lamb Chambers, and Seconded by Gary Kitt, Partner and Head of Contract Solutions at Arcadis

And excellently and moderated by Jonathan Cope, Director of MCMS specialists in all reas of construction dispute resolution in court and by adjudication.

A summary of the arguments follows – and the result of the vote given at the end.

PROPOSING THE MOTION

Mr Bowling opened the Debate by first asking by a show of hands who in the room had used adjudication, and thereafter, who had need to appeal the Adjudicator’s decision. Although he said at this point he could sit down, with almost a full house of raised hands demonstrating that “obviously” adjudication was better than court, he continued to outline further why this was the case in the construction industry.

Leaving aside Mr Bowling’s excellent and full exposition of what was meant by “better” and “better for whom”, he argued that as adjudication had initially been consented to by the majority of parties, it was evident that the parties considered this form of dispute resolution best for them in the event of a disagreement.

There was always a choice of adjudication or court, but even on the original show of hands, parties rarely chose to go to court. There was a number of reasons why this was the case:

a. Adjudication was much quicker, taking 28 days, although longer if required. By contrast, Court takes 18 months to two years, not taking into account the requirements of the Pre Action Protocol for Construction and Engineering Disputes, which applies to all construction claims in the courts.

b. Adjudications are regularly dealt with whilst the project works continue to be carried out. Court proceedings are rather more all-consuming and only rarely would an action in Court allow the project still to continue
c. Adjudication costs are a limited risk, whereas Technology Construction Court (TCC) costs, even for a small dispute, could cost in the region of £250,000.00 to £500,000.00. There's also the additional risk of paying the other side's costs which could, in turn, increase expense to over £1million.

Although it was conceded there were no hard statistics available, Mr Bowling argued it was obvious to those in the profession and industry that the vast majority of construction disputes start with adjudication and end there. TCC litigation was considerably reduced with the TCC dealing with only the very difficult and large cases, which, after all, is "what it was designed for". Parties were taking their disputes to adjudication and leaving them there because they were satisfied with the procedure and the outcome.

Mr Bowling felt sure that his fellow lawyers would not like the arguments put forward by him, saying that adjudication was not best for the parties and that "lawyers know that litigation is best!" He concluded, however, that the law, and the people who work with it, are the servants of the industry, not the other way round, and that it is the latter who should decide what they want. The construction industry had taken adjudication and adopted it as its own which was all the argument needed for the proposition of the Motion as a self-evident truth.

OPPOSING THE MOTION

Mr Sawtell opened his opposition by providing some background to the origins of adjudication in construction by referring to the" humble ambition" of the 1994 Latham Report[i] to replace the "certifier" with a more impartial figure. This ambition had however been overtaken by an industry over-eager for a swift decision at the expense of the efficacy of the decision. Rather it was "*adjudication, not litigation, which is the 'long running series', no matter how quick it is."*[ii]

The Housing Grants, Construction and Regeneration Act 1996 (as amended) (**Construction Act**), giving a party to a construction contract a statutory right to adjudicate, imposed a state imposed "diktat" on the parties against their will, and was, he considered, an instrument impairing the party's freedom of contract.

The process of litigation in English Law provided confidence in the process and outcome that quick, dirty and temporary adjudications could not do.

Far from freeing up construction contracts, the prospect of adjudication paralysed their administration by raising, at any and all times, the possibility of an adjudication on seven days' notice. Even if a party 'won' the adjudication and, despite the procedural shortcuts, the 'right' result was achieved, the parties could still be bogged down in litigation for years: in which case, the point of adjudication was worse than lost and could even be seen to be "duplicitous." Even if a decision was backed by summary judgment, it could still be resisted by an application for a stay, rendering nugatory all of the work done up until then.

Additionally, the adjudication result was still not 'final enough' for the purpose of insolvency: the Construction Act and the Insolvency Act 1986 play extremely badly together (*see Bresco Electrical Services Ltd v Michael Lonsdale (Electrical Ltd, Cannot Corporate Ltd v Primus Build Ltd [2019*]).[iii]

The fact that there had been a distinct reluctance to adopt the Construction Act model of adjudication outside English construction law, or indeed any similar model outside the construction industry, such as, real property, shipping or insurance, is deserving of note. Adjudication as a form of ADR had largely only been received in common law countries and certainly not civil jurisdictions such as France or Germany. Even where adjudication had been adopted, as in the Australian East Coast, it significantly differed from the Construction Act model.

Mr Sawtell argued that adjudication provided only a "mercurial stopgap decision" on the parties against their will and was fundamentally flawed, conceptually and practically. It was no wonder then that other areas of the law, and other jurisdictions, were both intrigued and appalled by it.

SECONDING THE MOTION

Mr Phillippo referred to an Arcadis 2018 Global Construction Disputes Report[iv] whose Guest Editor was David Mosey, the Director of the Centre of Construction Law and Dispute Resolution at Kings College London. He argued that the report provided authority that adjudication was more commonly used in the UK ahead of party and party negotiation and mediation: the three most common methods of Alternative Dispute Resolution used in the UK

for disputes. The resolution of such adjudications, which were valued below £250,000.00, during 2017, averaged 10 months, reversing the trend of the previous two years, where disputes took longer to resolve. Compared to other jurisdictions, the UK had the shortest average time taken to resolve such disputes – some 3.5 months quicker than the Middle East, ranked second in the report to the UK.

Mr Phillippo accepted that adjudication was something of a "blunt tool" but that contractors worked with blunt tools and the use of adjudication kept the industry stable and provided greater confidence to third party investors, bankers and stakeholders that lower cost disputes could be settled speedily.

SECONDING THE OPPOSITION

Mr Kitt, seconding the Opposition, and as an initial point of information, referred specifically to the Arcadis Report as presented by Mr Phillippo, stating that the use of such a report was misleading: the motion for debate did not refer to value of dispute, only whether its resolution was better considered in Court or Adjudication. Referring to statistics in the Arcadis report was therefore of no assistance to the proposition of the argument. The Arcadis report's conclusion was that adjudication was good for small cases, which was not relevant to the Motion.

Mr Kitt argued that:

a. Procedurally the Construction Act gave an unfair tactical advantage to the Applicant over the Responding Party by allowing them to "ambush" the other side with lengthy submissions which could be difficult to respond to in the short time allocated.
b. It was not correct to say that the parties had both chosen to go down the route of adjudication as it was more often imposed on the Responding Party.
c. Procedurally the appointment of Adjudicator was with the Referring Party who could, and often did, take the opportunity to manipulate the choice of Adjudicator by "adjudicator shopping". This was obviously not possible in any reference to the Court.
d. Jurisdictional arguments were often made tactically, delaying the process and throwing up unnecessary obtuse arguments which could never be raised in litigation in the court.
e. Although the 28 day timetable was an Adjudicator's target time for consideration of a dispute, that time limit was very easily extended if necessary and agreed.

f. There was no guidance to be followed regarding how an Adjudicator could test the evidence, or indeed what type and quality of evidence was appropriate in any dispute.
g. Although there were any number of training bodies there was no overall satisfactory class of accredited adjudicator. Experience over time had demonstrated a wide variety of high and low talent and expertise, leading to decisions which came of something of a "surprise" to both sides. The decision of the University of *Warwick v Balfour Beatty Group Ltd [2018]* [v] was cited as an example.

Mr Kitt concluded that the use of adjudication potentially paralysed the effective administration of construction contracts, actually serving to increase litigation and costs and delaying and obstructing any final decision and remedies in the event of a default. A party seeking the right, and therefore 'better', decision looked for a fully transparent process and would therefore favour one by issuing proceedings in the Court.

SPEAKERS CONCLUDING REMARKS

Mr Sawtell emphasised that statutory adjudication as it applied to the construction industry was a radical step too far by the legislature in the law of contract. The implications of mandatory adjudication provisions into a construction contract was a restriction on the parties' freedom of contract and although popular as a principle of law, a better outcome to a dispute would be given by the courts.

Mr Bowling acknowledged the arguments put forward by the opposition but considered them arguments of "perfection". In his and Mr Phillippo's view, and that of the majority in the industry, cheap and effective dispute resolution in the form of adjudication was far better than the courts.

VOTE – AND WRITER'S OVERALL CONCLUSION

The arguments put forward by both sides were equally convincing. Although on a final vote the Motion was comprehensively passed: 55 for the Motion, 17 against, with 12 abstentions. There was a general consensus that although Adjudication was here to stay in the construction industry, proving a success in speed of determination, it was not "better" for all construction disputes. High cost and or complex construction disputes would still require the rigour of the Courts in terms of procedure and legal expertise.

Anne Wright – Lawrence Stephens Solicitors and Kings College Construction Law Association.

[i] Sir Michael Latham's Report "Constructing Excellence" introduced adjudication as an alternative to litigation.

[ii] This phrase was taken from Fraser J in Imperial Chemical Industries Ltd v Merit Merrell Technolgy Ltd (no.3) [2018] EWHC 1577 (TCC) 178 ConLR 89 at [1].

[iii] Global Construction Disputes 2018 "Does the Construct ion Industry Learn from its Mistakes?" published and compiled by Arcadis Design & Consultancy

[v] HHK McKenna in the TCC granted a declaration concerning the meaning of practical completion in an amended JCT Building Contract demonstrating an efficient use of TCC procedure to address a point originally referred to adjudication.