Crystallisation of disputes before adjudication

25 November 2020

Introduction

When adjudication commences, one of the common challenges of the adjudicator's jurisdiction presented by the responding party is that the alleged dispute has not crystallised. This could result in, if there is merit in the argument, the adjudicator resigning or if not, the responding party reserving its position with regards to the adjudicator's jurisdiction and refusing to comply with the adjudicator's decision; in the last scenario, enforcement of the decision is decided by the court, following application for summary judgement by the referring party.

The responding party's argument in such cases is that at the time of serving the notice of adjudication, the alleged dispute was not a matter that has previously arisen so as to be considered and rejected, or that even if it has arisen, has not been rejected; therefore, there is no dispute and consequently the adjudicator lacks jurisdiction.

What is a dispute?

In accordance with Section 108 of the Housing Grants, Construction and Regeneration Act 1996 as subsequently amended ("the Act"), a party to a construction contract has the right to refer a dispute arising under the contract and for this purpose "dispute" includes <u>any difference</u>.

It follows that if the existence of a dispute is established, then a party to a construction contract can refer it to adjudication; furthermore, this can be done "at any time" as provided by the Act.

When does a dispute have crystallised?

This question could be answered by reference to paragraph 7.95 in *Coulson on Construction Adjudication* (fourth edition, Oxford University Press, 2018), where LJ Coulson addresses the difficulties arising when responding parties complain about the adjudicator's decision concentrating on matters that, at the time of the issue of the notice of adjudication, they did not even realise were in dispute or that the dispute had not crystallised between the parties or had not even been discussed:

"*In principle, the answer to these difficulties is straightforward. The dispute in the notice of adjudication must have crystallised between the parties prior to the service of that notice, even though such crystallisation may require no more than the service of a claim by the claiming party and subsequent inactivity, for a fairly short period, by the responding party.* "

LJ Coulson further comments on the development of the law and refers to cases that have provided the necessary clarity on the matter. So has the recent case of *LJH Paving Limited v Meeres Civil Engineering Limited* [2019] EWHC 2601 (TCC), which is discussed below.

The LJH case (published on 10 October 2019)

LJH Paving Limited ("LJH") applied for summary judgement in relation to the enforcement of four adjudicator's decisions regarding three contracts. Meeres Civil Engineering Limited ("Meeres") refused to comply with one of the decisions on the grounds of

- i) the dispute not having crystallised, and
- ii) the decision relating to multiple contracts.

The Court granted summary judgement and rejected Meeres defence on both grounds.

With regards to the crystallisation issue, the judge stated in paragraph 14 of the decision that "*The law relating to circumstances in which it can be argued that a dispute has not crystallised is now well established…"* and concluded by reference to previous cases[1] that (paraphrasing):

- The word "dispute" should be given its normal meaning.
- The mere fact that one party notifies the other of a claim does not automatically give rise to a dispute unless and until it emerges that the claim is not admitted; that emergence could entail a rejection or an inference drawn from discussions or even the respondent simply remaining silent for a period of time.
- However, if a claim is so nebulous and ill-defined that it cannot be sensibly responded to, then silence or non-admission are unlikely to give rise to a dispute for the purposes of dispute resolution.
- Nevertheless, the last principle is a question of fact and, it would be unlikely that an inference about lack of crystallisation would be drawn from purported reasonable requests for information in lieu of response to the claim.

Accordingly, the judge found that the requests made by Meeres fell into that category because LJH's claim was clear and far from nebulous or ill-defined; the fact that Meeres contended that supporting evidence was not submitted although requested was not a reason to argue that no dispute existed but rather justifies the opposite, i.e. that it was disputing the claim.

Notwithstanding the above reasons, the judge further found that Meeres "unequivocally" rejected the claim when it contested that it has not been submitted in accordance with the contract, which was sufficient to create the dispute that LJH referred to adjudication.

Conclusion

Parties to a construction contract need to make sure that their dispute has crystallised before they serve the notice of adjudication. Although the adjudicator, or later the courts, will most likely adopt a pragmatic approach to decide if a "dispute" has arisen even if the claim has gone unanswered for a short period of time, it is not advisable for a referring party taking such a risk, as it will lead to uncertainty regarding the outcome (having the adjudicator's jurisdiction challenged by the responding party) and / or unnecessary enforcement costs.

Fortunately, the case law to date provides invaluable guidance for parties to avoid this risk and be able to assess if their dispute is crystal clear.

For assistance in related matters, you can contact us at info@pronea.co.uk

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[1]: Cases cited in the decision in relation to the crystallisation matter:
- *Fastrack Construction Ltd v Morrison Construction Ltd* [2000] BLR 168
- *Amec Civil Engineering Ltd v Secretary of State for Transport* [2004] EWHC 2339 (TCC) and Court of Appeal: [2005] EWCA Civ 291
- *AMD Environmental Ltd v Cumberland Construction Ltd* [2016] 165 Con LR 191