



“University of Brighton”

Gillian Cruickshanks reviews *University of Brighton v Dovehouse Interiors*¹, a recent TCC case involving an Application for a Part 8 Declaration

Summary

The TCC considers when Adjudication is commenced for the purposes of determining a Part 8 Application and confirms Adjudication is commenced when a Party makes known its intention to refer a dispute, not upon issue of the Referral; failure to select the correct nominating body or use the correct address of the Responding Party will not restart the clock.

The Facts

Dovehouse Interiors were appointed by the University of Brighton to carry out fit out works with a completion date of 29 July 2012². Practical Completion was certified on 30 October 2012. In order to allow time to resolve their disagreements over the final certificate, the parties agreed to amend clause 1.9.2, which specified the deadline for the date at which the final certificate became conclusive evidence of effect having been given to all deductions and additions to the Contract Sum, extensions of time and reimbursement for loss and/ or expense and to settlement of any claims arising out of any Relevant Matter or any other basis for claim.

The clause stated:

1.9.2 If any adjudication, arbitration or other proceedings are commenced by either Party before or not later than 28 days after the Final Certificate has been issued, the Final Certificate shall be conclusive evidence as provided in clause 1.9.1 save only in respect of the matters to which those proceedings relate" ("the saving proviso").

The Contract Administrator issued the Final Certificate on 9 December 2013; the amendment to clause 1.9.2 extended the deadline from 28 to 66 days, creating a new deadline of 14 February 2014.

Following the issue of the Final Certificate, the parties disputed various matters including Dovehouse's entitlement to an extension of time, proper evaluation of variations, Dovehouse's liability to the University for costs to address incomplete and defective works and Dovehouse's entitlement to recover loss and expense in respect of delay and/ or disruption.

On 13 February 2014, Dovehouse issued a Notice of Adjudication, giving a name and address of the University which, whilst it was an address to which Dovehouse had previously sent correspondence, was the not the address nominated in the contract as the one to which Notices should be addressed.

The following day, Dovehouse sought the appointment of an Adjudicator from RICS. The Adjudicator consequently appointed, subsequently resigned on the basis that the Referring Party was required to seek the selection of an adjudicator from CI Arb, not RICS.

Dovehouse subsequently issued a second notice of adjudication on 24 February 2014.

This second notice being issued beyond the revised 66-day deadline, the University applied to the Court for a declaration under Part 8 of the Civil Procedure Rules that the Final Certificate served as conclusive evidence of the matters outlined above and sought to prevent Dovehouse from taking any further steps in the Adjudication pending the outcome of the application.

¹ [2014] EWHC 940 (TCC)

² The contract between the parties incorporated the terms of the Intermediate Building Contract with Contractor's Design 2005 Edition, Revision 2 (2009).



Legal Arguments

The central issue in the declaration application is whether or not Dovehouse "*commenced*" "*adjudication*" "*proceedings*" within the meaning of clause 1.9.2 of the Contract by 14th February 2014.

The University presented two arguments: that a Notice of Adjudication served under section of the Scheme for Construction Contracts 1998 (The Scheme) was insufficient of itself to constitute commencement of proceedings and that proceedings were only truly commenced following the issue of the Referral Notice under paragraph 7 of The Scheme. Alternatively, the University argued that Dovehouse were outside the deadline of 14 February because it was the second notice which took effect as an adjudication process.

The TCC considered the purpose of the deadline in clause 1.9.2 and the potential consequences of construing the Scheme in the manner described the University. The Court agreed with the argument proposed by Dovehouse that it is possible for a Referral Notice to fall outside the seven day period from the Notice of Adjudication through no fault of the Referring Party, where nomination of the Adjudicator does not take place within the required time frame. In these circumstances, the Referring Party would lose its protection under clause 1.9.2. Further, the Court commented,

*"...where the consequences for a referring party in missing the deadline imposed in clause 1.9.2 may (indeed are likely to) be severe, the parties can be taken to have intended and wanted certainty and control over the date of commencement of proceedings. Construing the Scheme in the manner contended for by the University does not achieve that control or certainty and does not accord with commercial common sense"*³

The Court also discussed the meaning of commencement of proceedings by comparison with the commencement of arbitration proceedings and Court proceedings, stating that, "*there is no doubt that proceedings are commenced in the courts without a judge being appointed, just as arbitration proceedings may be commenced without an arbitrator being appointed*"⁴

In respect of the missed deadline argument, Dovehouse sought to rely upon the Tracy Bennett Case⁵ which was similar on the facts; one aborted attempt at appointing an adjudicator, followed by a successful one outside the specified conclusive evidence time frame. The TCC rejected Bennett's argument that the first notice of intention to adjudicate was of no effect, holding that the first notice was served within the specified time frame and although proceedings had been abandoned on that occasion, the subsequent appointment and proceedings effectively flowed from the first notice.

Conclusion

In dismissing the Part 8 Application, the TCC rejected the submission that Adjudication proceedings were not commenced until the issue of the Referral Notice and held that they are commenced by the issue of an Notice of Adjudication under paragraph 1 of the Scheme.

The TCC followed the line of reasoning in Tracey and similarly rejected the submission that it was second Notice of Adjudication which took effect and also disposed of any invalidity argument in respect of Dovehouse using the wrong address for the University in serving the Notice of Adjudication; stating, "*There is no doubt that the omission of an additional address for the University in no way affected the fact that the First Notice achieved its purpose of informing the University of the dispute being raised against it by Dovehouse.... This was not a fundamental non-compliance*"

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³ Ibid, at para 49

⁴ Ibid, at para 41(d)

⁵ Tracy Bennett v FMK Construction [2005] EWHC 1268 (TCC)