Tony Bingham A contractor used a procedural trap to try to torpedo an adjudicator's decision against it. Unfortunately for the contractor, it blew up in its face

CHOOSE YOUR WEAPON

THEY POINTED TO A GOTCHA. SINCE THE REFERRAL WAS SERVED ON 31 JANUARY, THE DECISION WAS DUE ON 28 FEBRUARY, SO BEING ONE DAY LATE IT HAD NO EFFECT. THAT WAS BOTH RIGHT AND WRONG

The contractor GD City Holdings Limited has struggled to torpedo the adjudicator's decisions on this job. The employer, KNN Colburn LLO, is the developer converting a retail space in Brady Street, London E1, into five flats. The modest size of the job hasn't stopped enthusiastic falling out, and a handful of adjudications. The most recent round in adjudication saw GD City Holdings come to the High Court arguing four reasons why the judge should see off the adjudicator's order for a modest £33,000-odd to be paid by the contractor to the employer. I bet the High Court costs came close to that same figure. Nor would it be a surprise that by lumping the High Court enforcement costs onto the adjudicator's order, the total lump is £60k instead of £33k. On top of that the contractor copped it for the £7k adjudicator's fees.

Go back to the very start of the adjudication. The notice of adjudication arrived, then a few days later the referral was served by the employer (KNN Colburn) on the adjudicator and contractor. That service of the referral, under the JCT rules, is the starting pistol shot for the 28-day race. You calculate day 28 from that service date. It so often happens that the referral comes in two parts: first an email turns up with the story, argument and more. Next day, as happened here, the supporting documents turn up. If the email story is served on (as here) 31 January but the supporting appendices on 1 February, when does the 28 days run from? The adjudicator here is very experienced. He said it ran from 1 February. I suspect he was being fair to the responding party. He then put in writing that day 28 would be 1 March, being 28 days from 1 February.

Come 1 March, the adjudicator Matt Bastone kept to his word and served up the decision. That's when he decided GD City Holdings owed the employer the £33k. Up popped the lawyers for GD City Holdings. They pointed to a gotcha. Since the referral was served on 31 January, the decision was due on 28 February, so being one day late it had no effect. That was both right and wrong. The judge decided that the Scheme's rules for adjudication say the referral story itself shall be accompanied by the construction contract and those other documents the referring party intends to rely on. But the Scheme also says that the adjudicator shall reach his decision not later than 28 days after the date of referral. The supporting files are not usually part of the referral notice, said the judge. So the 28 days runs from 31 January. Hurrah, said the contractor; hang on, said the judge. Did you notice that the adjudicator wrote to the parties telling them that the 28th day was 1 March? He wasn't pulled up on that until the losing contractor got the award. In other words, GD City Holdings played adjudications all that time without shouting about the error. It was an attempt to spring a procedural trap, said Mr Justice Stuart-Smith. Go back to the finding that the referral does not usually include the supporting appendices. It's not always right to say that. The judge reminded us that there may be documents needed with the referral story, otherwise it can be so deficient that it affects the validity of the adjudication process. Hmm. I don't think we can proceed in this way. Too vague. The 28 days should start when all the confounded files land.

GD CITY HOLDINGS PLAYED ADJUDICATIONS ALL THAT TIME WITHOUT SHOUTING ABOUT THE ERROR. IT WAS AN ATTEMPT TO SPRING A PROCEDURAL TRAP

We haven't finished with the effort to torpedo the decision. The contractor makes another three points. Two of them said that the previous adjudicator, Philip Eyre, had already determined the amount of damages for delay to be paid by the contractor and other matters too. This time the objection was taken during the adjudication. It was a question of objective interpretation of the previous adjudicator's decision. This judge agreed with the later adjudicator about what his predecessor decided. It was a clearly written earlier award; so that disposed of points two and three.

The fourth point also failed but is important. GD City Holdings' lawyers could not find in the award any sign that an argument about a particular clause in the contract had been dealt with. It's all too easy in this 28-day system to miss an argument in the documents. The "ordinary" position in those circumstances is that the decision remains enforceable. Exceptionally, it is fair to say that an independent oversight that has a significant effect on the overall result could render the decision void. It didn't in this case. The judicial view is that mistakes are to be expected, even big ones. The safety net is "pay now and argue later".

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Gary Sinden Contractors are still using some of the dirty tricks they learned in the depths of recession to squeeze supply chains. But they may not get away with it for much longer

THORNS IN THE GREEN SHOOTS

Back in July Ann Minogue reflected on the damaged legal and commercial landscape since the crash of 2007, and noted that some green shoots are hopefully emerging (The remains of the day, 19 July, page 39).

While there is no doubt that the industry as a whole shares such sentiment and hope, it must be remembered that many companies are trying to survive merely on the hope of next year's profits, and hoping that they will still be around to benefit from these green shoots.

Main contractors currently are fighting for business survival or stock market approval and therefore their supply chain continues to be financially battered. So, yes, green shoots, but beware of the contractual thorns of existing recession-induced practices that will no doubt continue, at least in the short to medium term.

One particularly novel trick I have seen grow in use recently is the issuing of additional works via a new short form order rather than simply a variation to the main subcontract. The sum is subsequently not paid for some spurious reason and a dispute is crystallized. However, being a stand-alone contract, each one would individually have to be brought to adjudication, which is often cost prohibitive with no recovery of the nomination fee or referral costs – even if successful.

On a similar theme, but less scientific, is simply holding back the last £X,000 against each subcontractor on a project. The subcontractor – fearful of generating a dispute and therefore falling off the main contractor's approved list (let alone the risk and cost of formal recovery) – will often take the hit and simply move on.

By no means will every subcontractor accept such abuse of leverage against them, but even a few across a main contractor's portfolio can give a quick fix to both its cash flow and end-of-year accounts.

The recent change to the Construction Act in respect of retentions has seen some subcontracts produced with the final moiety not being released for two to three years after completion. One account I am currently looking at only releases 10% of the retention sum in the first instance rather than the typical 50%, and this is with the government as the end user.

I suspect the threat of telling the client what they are doing to their supply chain will quickly correct this misdemeanor, which is being carried out by a tier 1 main contractor.

Quite how main contractors think they are entitled to make liquidated damages a profit centre is beyond me, and it certainly isn't an approach taught at "surveyor school", as far as I am aware.

Having provided services for multiple subcontractors on the same project, I have experienced client-levied damages to the main contractor being fully levied to four separate subcontractor accounts.

This wasn't a "man and van" working from his garage but another tier 1 main contractor.

While the illegal and/or morally unjust practices detailed above make grim reading, all is not lost for the supply chain. Often such actions are caused by main contractor red-ink-drenched internal cost value comparisons (CVC) leading to such desperate actions. In their haste to remedy the financial position of the project by whatever means, often technical breaches occur.

Additionally, the use of "pre-action letters" is effective, particularly when directed towards the financial director who does not want a county court judgment affecting the business credit rating.

Equally, the escalation of the unethical practices to the main contractor's senior management team often leads to financial submission by them. It is very difficult for them to support these actions when they are trying to promote the company's values (which flies in the face of these actions).

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In conclusion, I would urge the supply chain always to seek advice if they feel they are being mistreated. Usually there is a way to bring the situation to a satisfactory conclusion.

And to those main contractors who have used the recession to weigh down the scales of justice in their favour, a warning – the supply chain will be leaner and stronger as we collectively emerge out of recession, and as the dynamics of supply and demand shift, you might just find that you will need them more than they currently need you.

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