

CONSTRUCTION : BULLETIN

Challenging a Final Certificate

When are adjudication proceedings deemed to commence?

Many JCT contracts include a clause which provides that the final certificate constitutes conclusive evidence that all sums due to the Contractor have been paid unless proceedings challenging the content of the certificate are commenced within a specific period of time. It is important for anyone wishing to challenge a final certificate to ensure they commence proceedings before the time limit expires.

The recent case of *University of Brighton v Dovehouse Interiors Ltd* considered when an adjudication is commenced for the purposes of challenging a final certificate and highlights the perils of leaving a challenge to the last minute.

Background

The University of Brighton (the “**University**”) engaged Dovehouse Interiors Ltd (“**Dovehouse**”) under a JCT Intermediate Building Contract with Contractor’s Design 2005 Rev 2 2009 with bespoke amendments to fit out a new university campus.

The works were completed late and a dispute arose about sums payable to Dovehouse. The final certificate was issued on 9 December 2013 in the sum of £2.099 million, but Dovehouse claimed that it was entitled to payment of £3.6 million. Clause 1.9.2 of the contract provided that the final certificate would not become conclusive if adjudication proceedings were commenced not later than 28 days after the issue of the final certificate. However, the parties agreed to extend this time limit to 66 days to allow for negotiations. This meant that the final certificate did not

become conclusive until 14 February 2014.

On 13 February 2014, Dovehouse sought to challenge the final certificate by serving a notice of adjudication via its claims consultants Knowles. The following day, Dovehouse applied to the Royal Institution of Chartered Surveyors (“**RICS**”) for the appointment of an adjudicator. An adjudicator was appointed and Dovehouse served its referral notice on 20 February 2014.

However, the adjudicator nominating body specified in the contract was the Chartered Institute of Arbitrators (the “**CI Arb**”), not the RICS, so on 21 February 2014 the adjudicator resigned on the basis that he did not have jurisdiction due to his appointment having been made by the wrong nominating body.

On 24 February 2014, Dovehouse issued a second notice of adjudication, this time referring to the CI Arb and not the RICS.

The University applied to court for a declaration that Dovehouse had failed to commence the adjudication within 66 days of the date of issue of the final certificate and that the final certificate had therefore become conclusive.

The University argued that the adjudication had not been properly commenced in time because:

1. Adjudication does not commence under the Scheme for Construction Contracts (England and Wales) Regulations



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1998 (as amended) (the “Scheme”) until the referral notice is served, and as the referral was not served before 14 February 2014, it was late.

2. The first notice of adjudication was invalid because it referred to a different University address from the one stated in the Contract Particulars.
3. Adjudication proceedings had not commenced in time because the first adjudicator had resigned due to the mix-up with the nominating bodies.

“Commencement” of proceedings

The court rejected the University’s first argument, stating that adjudication proceedings are “commenced” for the purpose of challenging the final certificate when the notice of adjudication is served. The date of service of the referral is not relevant.

The court considered that the notice of adjudication is a critical document which defines the scope of the adjudication. There would be no need for a notice of adjudication if it is the referral notice that commences the process. The court also thought it was significant that if an adjudicator resigns, a new notice of adjudication must be served to re-start the adjudication process. All of these factors pointed to the notice of adjudication being the document which commences the adjudication.

Invalidity in the notice of adjudication

The court acknowledged the accepted legal position that a notice of adjudication must clearly identify the dispute and the redress sought. However, the court held that the first notice of adjudication was valid notwithstanding Dovehouse’s failure to use the address stated in the contract for service of notices on the University.

The court said that although the Scheme requires that the notice of adjudication must set out the names and addresses of the parties to the contract, Dovehouse’s failure to use the correct University address specified in the Contract Particulars was only a technical failure. That failure did not prevent the notice of

adjudication from achieving its purpose of informing the University of the dispute and defining the dispute, so it was not sufficiently material as to invalidate the notice. There was no question of the University having not received the notice.

The court also rejected an argument that the notice of adjudication had been served at the wrong address on the basis that there is no specific requirement for a particular method or place of service under the Scheme.

Resignation of the adjudicator

The court also rejected the University’s third argument. All that Dovehouse was required to do for the purposes of the conclusivity clause was to give a valid notice of adjudication within the stated time limit, which it did.

Once Dovehouse had issued the notice of adjudication, no further step was required to be taken for the purposes of the conclusivity clause. The clause did not require the valid appointment of an adjudicator or valid service of a referral notice.

Furthermore, the Scheme did not require Dovehouse to specify the adjudicator nominating body in the notice of adjudication, so naming the wrong nominating body could not invalidate it.

Conclusion

The court held that Dovehouse had successfully commenced adjudication proceedings in time for the purpose of preventing the final certificate from becoming conclusive. The adjudication (which the parties had agreed to stay for the purposes of dealing with these legal proceedings) could therefore continue.

Analysis

This case is a very good example of the perils of leaving things to the last minute. It is also a reminder of the importance of ensuring that notices are served strictly in accordance with the contract. These legal proceedings might have been avoided entirely if Dovehouse’s claims consultants had checked the contract for the correct adjudicator nominating body and University address. Perhaps these

errors may not have occurred if the notice of adjudication had been served in plenty of time before the deadline expired.

This case is interesting because it suggests that only a relatively serious deficiency in the notice of adjudication would prevent the notice from being valid for the purposes of preventing the final certificate from becoming conclusive. Nevertheless, it is best practice to ensure the notice of adjudication is not deficient in any way before serving it.

It should be noted that this case does not give parties the option of abusing the contractual process by simply serving a notice of adjudication to prevent the final certificate from becoming conclusive and then not pursuing the adjudication proceedings. The court stated that if a party serves a notice of adjudication within the time limit but then abandons the pursuit of the adjudication proceedings, that party’s right to challenge the final certificate would fall away if the deadline for challenges had expired. Accordingly, anyone intending to challenge a final certificate must ensure they are ready to pursue their case in full before the deadline expires.

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