

CONSTRUCTION : BULLETIN

Nominating Adjudicators: Don't Abuse The Process!

The recent case of **Eurocom Ltd v Siemens PLC** has set alarm bells ringing within the construction industry, particularly with regard to the process of appointing an adjudicator.

Background

Siemens engaged Eurocom under a subcontract in April 2011 to install communications systems at two major London underground stations. A number of disputes arose including delay to commencement of the work, variations, prolongation and disruption.

On 1 August 2012, Siemens sought to terminate Eurocom's employment under the subcontract.

On 8 August 2012, Eurocom served a Notice of Adjudication on Siemens ("the First Adjudication") claiming substantial monies. Matthew Molloy was appointed as adjudicator by the RICS. He issued his decision on 27 September 2012 confirming that no monies were payable to Eurocom and that circa £35,000 was owed to Siemens by Eurocom, although no payment was actually ordered to be made.

Following service of a substantial claim document by Eurocom in October 2013, on 21 November 2013 Eurocom instructed their representatives, Knowles, to serve a Notice of Adjudication on Siemens ("the Second Adjudication"). Knowles gave Siemens notice that they would be applying to the RICS for appointment of an adjudicator.

The RICS has a standard application form, which includes the following question: "Are there any Adjudicators

who would have a conflict of interest in this case?"

Knowles completed its response to this question as follows:

"We would advise that the following should not be appointed..."

The response went on to list a number of individuals including Mr Molloy, but the response did not state that Mr Molloy had a conflict of interest; it merely stated that he had acted previously.

Siemens were not sent a copy of this application form at the time even though the RICS explanatory note suggests the form should be copied to the respondent by the referring party.

On 22 November 2013, the RICS nominated Anthony Bingham as the adjudicator in the Second Adjudication.

On 7 January 2014, Siemens eventually received a copy of Knowles' completed application form for the appointment of an adjudicator.

On 28 January 2014 Mr Bingham issued his decision in the Second Adjudication, which found that Eurocom was entitled to circa £1.6m from Siemens.

After making enquires, Siemens found that a number of the individuals listed in Knowles' response to the conflict of interest question did not, in fact, have a conflict of interest.

On 25 July 2014 Eurocom commenced proceedings against Siemens to enforce the decision made in the Second Adjudication.



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A number of arguments were raised by Siemens in resisting enforcement, but the key points were:

1. *“Whether the appointment of the adjudicator in the Second Adjudication was invalid because of the information provided by Knowles to the RICS in making the application for the appointment of an adjudicator”*; and
2. *“Whether the decision in the Second Adjudication sought to adjudicate again on the same or substantially the same matters as had been referred to and/or decided in the First Adjudication.”*

Appointment of the Adjudicator

In assessing whether such an appointment was valid, Mr Justice Ramsey considered three issues:

1. **Whether a false statement was made.** The question *“Are there any Adjudicators who would have a conflict of interest in this case?”* is clear and plainly any names listed in response to this question would suggest a conflict of interest and therefore could not be appointed as adjudicator. As a number of the individuals listed, including Mr Molloy, did not have a conflict of interest, Knowles had answered the question falsely.
2. **Whether the false statement was made deliberately or recklessly.** On the face of the evidence presented, there was a very strong prima facie case that Knowles had deliberately or recklessly answered the question falsely so as to exclude adjudicators that they did not want to be appointed by the RICS, including Mr Molloy.
3. **The effect of the false statement.** Mr Justice Ramsey found that *“where there has been a material fraudulent misrepresentation in the process of applying to the adjudication nominating body, the application for a nomination of an adjudicator is invalid and it is as if no application had been made.”*

The Judge found on the facts that the false statement made by Knowles was material and was improperly made so as to eliminate potential candidates as adjudicator on the basis they had a conflict of interest when, in fact, they had none. He concluded that Siemens had established a sufficiently strong case that the nomination of the adjudicator in this case was invalid and therefore the adjudicator was not properly appointed because there was a fraudulent misrepresentation by those acting on behalf of Eurocom in making the application for the appointment of an adjudicator. As a result, Mr Bingham did not have jurisdiction to act as adjudicator and thus his decision in the Second Adjudication could not be enforced.

Overlap between First and Second Adjudication

This issue was irrelevant to the outcome of the case as the Judge had already concluded that the adjudicator did not have jurisdiction. However, for the sake of completeness, he considered it important to deal with this issue in order to provide guidance in future adjudication proceedings.

Siemens argued that the claims in both the First and Second Adjudications contained a substantial overlap and, therefore, any decision on them in the Second Adjudication was invalid.

Eurocom asserted that the two adjudications differed because the First Adjudication was an interim account claim whilst the Second Adjudication related to a separate final account claim submitted in October 2013.

The Judge swiftly dispensed with Eurocom’s assertion: it is an established principle in adjudication that an adjudicator is precluded from deciding a claim where the same claim has been the subject of a decision in an earlier adjudication.

In a determinative statement, Mr Justice Ramsey said: *“A party who has sought and obtained an adjudication decision dealing with the value of all variations cannot then seek to have another adjudicator determine claims*

for the same variations by way of a ‘second bite of the cherry’.”

Analysis

As regards the appointment issue, referring parties and their representatives must be extremely careful when they complete and submit application forms for the appointment of an adjudicator.

You cannot exclude adjudicators from being appointed, except where a genuine conflict of interest exists, such as, for example:

- where the adjudicator is acting for a third party with a competing interest to either of the adjudicating parties; or
- where the adjudicator will have a personal interest in the outcome of the adjudication proceedings.

Although the case of *Makers UK Ltd v The Mayor and Burgesses of the London Borough of Camden* (2008) confirmed it is sometimes acceptable to make representations as to who should act as adjudicator, unless an adjudicator is named in the contract or has previously been appointed under the subcontract on a related matter, referring parties should now think very carefully before suggesting individuals in any application for the appointment of an adjudicator. Likewise, nominating bodies such as the RICS should think twice before acting on such a request by a referring party.

The Eurocom/Siemens case also illustrates that courts will not tolerate acts by a referring party which results in the *“pool of possible adjudicators”* being *“improperly limited”*. This was achieved by Knowles stating who could not act as adjudicator, but, arguably, the same result may be achieved when a referring party names particular individuals who should act as adjudicator.

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