

Adjudication: Conduct of the parties and extensions of time



As most readers of this blog will be aware, construction adjudications are intended to provide a swift resolution to disputes under construction contracts that the regime applies to. By statute, the decision of an adjudicator must be issued no later than 28 days after receipt of the referral notice. This can be extended to 42 days with the consent of the referring party or to a longer period with agreement of both the referring and responding parties.

In *Baldwin & Another v JR Pickstock Limited* (2018) the High Court had to consider two issues: First, what was the extent of extensions of time granted to the adjudicator? Second, if no decision had been issued by the expiry of the last extension granted, what was the status of the adjudicator (as a matter of contract)?

The Facts

Mr Baldwin was appointed as the adjudicator to a construction dispute around the beginning of March 2016. JR Pickstock Limited was the referring party. It was a term of Mr Baldwin's appointment that if there was a challenge to his jurisdiction which was successful then he was contractually entitled to resign prior to issuing his decision and in those circumstances JR Pickstock Limited would be liable to meet his fees.

During the currency of the adjudication Mr Baldwin requested a number of extensions of time. Extensions of time to 20 May 2016 appear to have been expressly agreed by the parties but Mr Baldwin sought further extensions to 7 June 2016, in part as a result of submissions made by Pickstock. Pickstock's representatives at no stage expressly declined to consent to extensions beyond 20 May 2016.

On 31 May 2016, following the passing of the last expressly agreed extension of time, Pickstock's representatives



asserted that Mr Baldwin was out of time for reaching his decision. After several protracted rounds of correspondence between the parties Mr Baldwin, on 3 June 2016, issued an ultimatum: Agree an extension as he sought, otherwise he would resign. No agreement was forthcoming and on 9 June 2016 Mr Baldwin advised the parties that the failure to agree represented a valid challenge to his jurisdiction so he was resigning. He then issued Pickstock with an invoice for his fees, in accordance with the terms and conditions referred to above. Pickstock refused to pay.

The Decision

As to the first question the Court confirmed that an extension to 20 May 2016 was expressly agreed. However that was not the limit of the extensions it was prepared to find. First, as a matter of construction, the Court held that an email written by Pickstock's representative constituted agreement to an extension to 27 May 2016. Second and importantly the Court determined that it was implicit in the conduct of Pickstock that by its actions it in fact consented to an extension to 7 June 2016. As to this point the court considered noted that Mr Baldwin requested an extension to 7 June 2016 to reach his decision in light of Pickstock's own last round of submissions. The Court determined that the absence of an express rejection to that request amounted to tacit agreement to it and that silence by a party could nevertheless amount to agreement where the extension sought is reasonably required as a result of the conduct of the silent party.

Therefore the court concluded that, on the first question, extensions to 7 June 2016 had been agreed to. However no decision was issued by that date, so what is the status of the adjudicator and his entitlement to be paid? The court concluded that the effect of not issuing a decision by 7 June 2016 had the effect of Mr Baldwin's appointment lapsing. From this point there was no appointment from him to resign from. The effect of this is that the provisions in his terms and conditions regarding payment simply fell away. Had the resignation occurred before expiry of the extension then it would have been valid and the entitlement to be paid would have followed but crucially his failure to act before the expiry of the last extension was fatal to his claim.

It is an unfortunate decision and in a number of respects unusual. The key messages to take from the decision are:

- Do not assume that silence will amount to a rejection of an adjudicator's request for an extension. The court bent over backwards to find ways to conclude that extensions had been agreed to by Pickstock. It was also highly critical of their conduct in responding to Mr Baldwin's requests and the manner by which they challenged his status.
- As a party to an adjudication you will not be allowed to act unreasonably when it comes to extensions of time. The Court's finding that time was extended to 7 June 2016 was on the basis that Pickstock's own conduct warranted such an extension.
- As an adjudicator do not lose sight of the statutory deadlines. The risks in a failure to comply can be disastrous.

How we can help

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