

Mock Adjudication 2005 - Rudolph's Revenge

Scenario

Dramatis Personae:

The Pangalactic Bahhumbug Corp. LLP. (A Main Contractor)

Mary, Christmas and Rudolph Limited (A roofing Subcontractor) (MCR)

Owner: The Three Bears Corporation plc.

The Story so far.....

In 1997 the Referring Party was engaged by the Owner to build new factory premises for porridge production on a brown field site at Nether Wallop to the Owner's consultants' design. The contract duration was 36 months commencing on 1st April 1997. The main contract was the NEC (November 1995) form of contract.

During the course of the works, the Referring Party, in or about April or May 1999 engaged the Responding Party to install the weatherproof roofing system for the factory to the design provided by the Owner's engineer. The roofing works were practically complete on 9 December 1999.

The factory was declared practically complete on 31st March 2000.

On 15th March 2004 following a severe thunderstorm, leaks were discovered in the roof which caused the loss of the day's production, damage to the porridge boilers as a result of the porridge solidifying and caused the Public Health Inspector to close the whole production line for several weeks whilst remedial works were undertaken.

Certain disputes came before Mr Tony Bingham acting as adjudicator on 9th December 2004.

Mr Bingham and his pupils decided as follows:

1. There was a contract for construction works which was in writing but not on either basis contended for by the parties but merely on the exchange of letters but without importing either sets of contract conditions contended for;
2. The Scheme applied to the construction contract and to his adjudication;
3. That he was not obliged to take any action in the light of the Proceeds of Crime Act 2002 and the Money Laundering Regulations 2003;

4. That the advice given by Pangalactic's former lawyers Messrs Sheister, Hitman and Corleone to Baron Hardup, managing director and majority shareholder in Pangalactic was privileged;
5. He was not able to decide that his decision was confidential;
6. He made no decision on whether MCR should indemnify Pangalactic in respect of the request for a declaration that MCR indemnify Pangalactic for (a) all loss and damage recoverable from Pangalactic by the Three Bears Corporation Plc; and (b) all costs and expenditure incurred by Pangalactic in defending the proceedings commenced by the Three Bears Corporation, as there was insufficient evidence before him on which he could make a Decision;

The Adjudication:

Following the decision of Mr Bingham, both parties considered that the Scheme applied to their contract. Both wished to refer the disputes below to adjudication.

Pangalactic applied to the National Organisation of Elven Labourers (NOEL) who appointed Mr Bingham to the earlier adjudication with a request that Mr Bingham be appointed again. Mr Bingham was not available as he was away writing a year's worth of articles for Building, so on 10th November 2005 NOEL appointed Mr John Rushton as adjudicator.

MCR however had simultaneously applied to The Yorkshire Union of Lefthanded Electricians (YULE) for the appointment of an adjudicator and on 10th November 2005 YULE appointed Ms Delia Dumaresq as adjudicator.

Neither adjudicator has given way to the other but it has been agreed that a joint hearing will take place in order to save costs.

The Disputes:

Since the last Adjudication, the Three Bears Corporation Plc., have won their case before Mr Justice Once against Pangalactic who have been ordered to pay 12 Partridges in a Pear Tree etc., to Three Bears Corporation Plc., together with costs of 5 gold rings.

Pangalactic have issued the adjudication to recover these items from MCR; MCR have issued their adjudication for a declaration that these items are not recoverable due to the intervention of the Ice Gala referred to in the previous adjudication which was not raised before Mr Justice Once and that in any event the claim will shortly be time barred as no proceedings have yet been issued and MCR were not joined into the proceedings with the Three Bears Corporation.

The Documents

MCR seeks to rely on a document which had been provided to it by a disaffected ex-employee of the PBC, one Grumpy, who had been dismissed by PCB for sexually harassing a filing clerk one Ms. S. White.

The document is a letter from the former legal advisers to Pangalactic at the time when they were tendering the roofing works.

That letter was in response to a request for advice from Baron Hardup, the (then) managing director and the major shareholder in Pangalactic concerning the form of subcontract which is being suggested by MCR and in particular on the "new" Adjudication procedure he had heard was coming into effect. This letter outlines the rights and obligations of Pangalactic should that form of subcontract be entered into and then launches into a long diatribe against the adjudication process and certain potential Adjudicators in particular. It concludes by suggesting that certain photographs could be made available if the one of the named Adjudicators did not "do the business".

Pangalactic seeks to have the letter excluded from the bundle to be put before the YULE Adjudicator.

MCR contends that the advice in the letter was not provided to the "client" and following the decision in *Three Rivers District Council -v- The Governor and Company of the Bank of England* (Nos. 5 and 6). It further contends is not subject to litigation privilege as it was not given for the dominant purpose of advice in connection with anticipated or pending court proceedings. Adjudication proceedings are not "court" proceedings as envisaged by *Re L* [1997] AC 16, 24-5. In any event in view of Section 108(2)(f) of the Housing Grants, Construction and Regeneration Act 1996, Adjudication proceedings are not necessarily adversarial consequently litigation privilege does not attach to the document.

The bundle, prepared by Pangalactic contains without prejudice correspondence concerning attempts to settle the issue between Pangalactic and MCR in which MCR has made a number of financial offers to resolve the matter. MCR objects to the inclusion of these documents before the adjudicator appointed by NOEL.

Evidence of fact/Expert Evidence

One of the Adjudicators, who is friends with one Mr D Ubious, a well known Roofing Engineer, decides to enlist his expert help on certain matters in connection with the roof.

MCR relies on the expert opinion of a Mr Jack Tar, who has decided to attend the hearing out of curiosity.

Questions

1. **Adjudication:**

- 1.1. which if any of the adjudicators should give way;
- 1.2. since there has been no binding decision by one of the adjudicators is there anything to prevent a second adjudicator being properly appointed?
- 1.3. could the adjudicators agree without the consent of the parties to provide a joint Decision?
- 1.4. What would be the outcome if on the same facts the adjudicators came to different Decisions on the same issues?
- 1.5. Will the Decision of Mr Bingham that there was insufficient evidence for him to Decide on whether MCR should indemnify Pangalactic prevent the current adjudicators from re-hearing the dispute?
- 1.6. Was Mr. Bingham's decision valid since it was made in conjunction with approximately 50 pupils on 9th December 2004?

2. **Limitation:**

- 2.1. Does adjudication stop time running?
- 2.2. What are the ramifications of the adjudication decision being delivered after expiry of the limitation period?

3. **Privilege:**

- 3.1. Does the fact that the law has changed enable a matter to be reconsidered in a subsequent adjudication?

4. **Expert Evidence:**

- 4.1. Is there anything to prevent the cross examination of experts or indeed witnesses of fact in an adjudication?
- 4.2. What inference should an adjudicator draw from the unwillingness of the expert to be cross-examined?

5. **Adjudicator investigating facts and the Law:**

- 5.1. Should the adjudicator involve Mr D Ubious as part of his/her obligations to take the initiative in ascertaining the facts and the law when neither party has agreed?
- 5.2. Can his evidence be heard by the second adjudicator?

6. **Without Prejudice Documents:**

- 6.1. Should the without prejudice correspondence be admitted?
- 6.2. should the adjudicators read the without prejudice correspondence before deciding?
- 6.3. Can this issue be reopened as Mr Bingham decided (pre House of Lords reasons) that the documents were not privileged.