

Adjudication - Article 6 –v- the Construction Act

Nowadays it is not at all uncommon to hear the phrase ‘breach of human rights’ or see reference to ‘Article 6 of the European Convention of Human Rights’. Indeed such reference was made in the interesting case of *Elanay Contracts –v- The Vestry (2000) TCC*.

Several matters were raised as to why the Adjudicator’s decision between the parties should not be enforceable. One of those reasons was in respect of the purported breach of Article 6 of the European Convention of Human Rights. Hats off to them I say for bringing in the kitchen sink approach. Indeed if need be why not bring the supremacy of European Law to sort out the Construction Act?

Well all appeared hunky dory. Article 6 was referred to in respect of another case between *Donbowbeher BV –v- Netherlands* that inter alia raised the small matter of the requirement that both parties should have an equal and fair hearing.

‘Each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent’.

Vestry complained that matters such as late receipt of documentation and the fact that a key figure in their case was prevented from taking part as they could have due to family matters had all presented them with an unfair opportunity to have their case heard, contrary to Article 6.

There was a lot at stake at this juncture. Would the Act be allowed to carry on unhindered or would the requirements of Europe and particular Article 6 provide a potentially enormous escape route for parties to outwit the Act?

The courts were robust. No they said the Act is not contrary to Article 6 for reasons not least being that:

1. The proceedings in adjudication are in private rather than in public, a requirement of Article 6; and
2. The decision of the Adjudicator is not a final determination since it may be revisited.

It might be interesting to consider what then would be the outcome if the decision, under terms agreed between the parties, becomes final by the importing of a time bar? Would the public –v- private requirement still keep the Act out of the gaze of Article 6? Perhaps someone out there has a case that will be the guinea pig to answer that question?

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