

Insight from an arbitrator - a view from the bench, with Particular Focus on Australsia

Russell Thirgood (Arbitra)

Procurement Law in Construction – The Use of Variations

Deok Joo Rhee QC (39 Essex Chambers)

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The Metropolitan Borough Council of Sefton v Allenbuild Limited HT-2022-MAN-000013

Background

The parties engaged in an adjudication, in which the adjudicator found the Claimant was owed around £2,204,217.13 (on 17 January 2022). The Claimant applied to the Court to enforce the adjudicator's decision.

The Defendant applied to the Court to stay the enforcement proceedings, on the basis that section 9(4) of the Arbitration Act 1996 (which states that parties to an arbitration agreement can apply to the Court to stay proceedings, intended to allow the parties to arbitrate instead of litigate). The Defendant also referred to a notice of dissatisfaction which was issued soon after the adjudicator's decision.

Judgment

The Judge held that any clause in a Construction contract which restricts a party's right to refer a dispute 'at any time' will not be consistent with section 108(5) of the Housing Grants, Construction and Regeneration Act 1996 (as amended) and would be replaced by the applicable sections of the Scheme for Construction Contracts (or the CIC model procedure used for this particular contract).

The Judge held that, as a result of the solicitor's not raising an objection to the adjudicator's jurisdiction (or reserving a right to) during the adjudication (the object would have been based on the fact the adjudication was referred to under the Scheme and not the CIC model procedure) then they could not make such an objection to the adjudicator's jurisdiction after the adjudication had completed.

The Judge also held that the authorities state that a notice of dissatisfaction must make it clear what challenge it is making to the adjudicator's jurisdiction. A notice needs to specify that a valid jurisdictional challenge does exist.

The notice of dissatisfaction issued in this case did not make it clear that a challenge was being made to the validity of the adjudicator's decision.

The Judge held, in relation to whether or not a stay should be allowed under Section 9 of the Arbitration Act, that a stay will not be granted if the dispute does not fall within the remit of the arbitration provision.

Under the Scheme and the CIC adjudication procedure, a party is excluded from referring a challenge to an adjudicator's award to arbitration in respect of a number of specified disputes. The provisions make it clear that a matter will be finally determined either by litigation, arbitration or agreement. A Court should refuse a stay because the parties have agreed that a party is not allowed to dispute an adjudicator's decision via arbitration (as per paragraph 23 of the Scheme).

For further information, please see: https://www.bailii.org/ew/cases/EWHC/TCC/2022/1443.html

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Mallino Development Limited v Essex Demolition Contractors Limited [2022] EWHC 1418 (TCC)

Background

The Claimant engaged the Defendant to carry out various demolition, excavation and other works in 3 sections for a hotel development.

The Contract entered into between the parties allowed the Claimant to tender for the other aspects of each section of the works (but not the demolition), the Claimant was obliged to invite the Defendant to tender.

The Defendant carried out the section 1 and 2 works. The Claimant proceeded to engage another contractor to carry out section 3 works without inviting the Defendant to tender or carrying out any form of competitive tendering process.

The Defendant issued two adjudications, one relating to the Claimant breaching its obligations to the Defendant and the other relating to the Defendant being entitled to its lost profit and overhead contribution. The adjudicator awarded that the Claimant did breach its obligations and that the Defendant was entitled to a proportion of its claimed losses.

The Claimant admitted that it did breach its obligations but that the adjudication was wrong to award the Defendant any losses.

Judgment

The Judge held that the re-tendering clause obliged the Claimant to re-tender for the section 3 works and to include the Defendant in the tendering process.

The Judge did not consider that the Defendant was guaranteed to be engaged if it had engaged in the tender process.

The Judge stated that the Defendant needed to satisfy two criteria in determining if it had lost its opportunity/chance:

- The Defendant would have re-tendered for the section 3 works, using its previous tender;
- The Defendant had a real or substantial chance of its tendering being successful.

The Judge held, on the facts, that the Defendant would have re-tendered for the section 3 works and it had a real or substantial chance of being successful. The reasons for the latter being:

- No evidence was provided that other contractors would want to be part of a competitive tender.

- The Claimant wanted to ensure the Works were carried out in a cost-efficient manner. The Defendant's initial tender was £500,000 less than the contract the Defendant engaged for the section 3 works.

- There was a good relationship between the CEO of the Claimant and a representative of the Defendant.
- The wording of the tender clause implies that the Defendant would be strongly considered during the tendering process.

- The evidence provided showed that the Defendant was highly experienced, primarily in demolition but also other complex construction projects.

The Judge found that the criteria to determine what the quantum of the Defendant's claim is it to:

- Assess the value of any benefit it would receive if it was awarded the Section 3 work; and

- Assess the size of the chance that they might have been awarded the contract.

The Judge held that, as a result of the reasons he provided to show that the Defendant had a real chance of being successful during the tender, that the Defendant had a 66% chance of being awarded the contract.

Therefore, the Defendant was entitled to 66% of the profit and overheads it expected to incur (the Defendant claimed £321,391.71 and was awarded £212,118.53).

For further information, please see: https://www.bailii.org/ew/cases/EWHC/TCC/2022/1418.html

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Pretoria Energy Company (Chittering) Ltd v Blankney Estates Ltd [2022] EWHC 1467 (Ch)

Background

The Claimant (Pretoria Energy Company) was the tenant, who agreed and signed Heads of Terms (HoT) with the Defendant (Blankney Estates), the landlord. Signed in November 2013, the HoT granted the Claimant a right to lease a site for 25 years.

The site was occupied by a factory, and once the Claimant obtained planning permission for the development of a new Anaerobic Digestion Plant, the Defendant began the demolition of the factory on site.

However, the local authority intervened and suspended any further work, on the basis that specific planning conditions were not complied with.

Issues

The Defendant initially notified the Claimant the exclusivity period (the period during which negotiations with third parties were prohibited) under the HoT had expired, and new HoT would be drafted to replace these. However, the Defendant subsequently informed the Claimant the exclusivity period could no longer be granted due to concerns with the Claimant.

The Claimant issued proceedings against the Defendant for breach of contract.

Were the HoT legally binding?

Judgment

The judge dismissed the Claimant's claim for breach, for the following reasons:

1. There was no binding obligation on the Defendant to lease the site to the Claimant, as the exclusivity period ended in July 2014 and the Defendant was entitled to liaise with third parties regarding the site;

2. The Landlord and Tenant Act 1954 did not apply to the HoT, which shows that neither party intended to be bound by the HoT or form a binding contract, until the required processes had been complied with; and

3. The HoT did not include essential provisions in order to be deemed the final contract i.e it was silent on aspects relating to the Anaerobic Digestion Plant.

For further information, please see: https://www.bailii.org/ew/cases/EWHC/Ch/2022/1467.html

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Imperial Chemical Industries Limited v Merit Merrell Technology Limited [2017] EWHC 1763 (TCC)

Background

The Claimant, Imperial Chemical Industries Limited, a specialist in paint and chemical businesses, entered into an NEC3 Engineering and Construction Contract June 2005 with 2006 and 2011 amendments ("the Contract") with the Defendant, Merit Merrell Technology Limited, a specialist engineering piping manufacturer, to carry out works relating to the construction of a new paint manufacturing facility in Northumberland ("the Plant").

The contract value was approximately £1.9 million and the Plant was anticipated to produce 2 million litres of paint products per week.

During the project, the Defendant's work under the Contract had expanded due to instructions from the Project Manager, Projen, and there were concerns regarding the quality of the welds and value of the works carried out by the Defendant, as they were paid more than the initial contract value.

There were also delays and the project had exceeded its budget by around August 2014. At this time, the original personnel for the Claimant were replaced by personnel from AzkoNobel, which acquired the Claimant's business, whilst remaining a separate legal entity.

AzkoNobel's aim was to improve progress of the project, and after having discovered defects with the works, were liaising with the Defendant to agree a resolution, although the Defendant challenged the defective works.

At this point, Projen had resigned and another project manager was appointed from the Claimant's parent company.

Mr Boerboom stated he was appointed as Project Manager in October 2014 (subsequent to Projen resigning), although this contradicted his first witness statement which stated he was appointed Project Manager just after July 2014, albeit the Defendant was not notified of this.

Issues

There were numerous issues to be determined by the Court, and the main ones concerning the project manager were:

1. The identity of the Project Manager under the Contract; and
2. Whether the appointment of a replacement Project Manager, Mr Boerboom (a Director of Engineering for the Claimant's parent company, AzkoNobel), after the original Project Manager resigned, was valid?

Judgment

Under the Contract, the named Project Manager and Supervisor was Projen, and the Court differentiated between the two roles of a Project Manager; one as an agent to issue instructions on behalf of the Employer, and the other to make decisions (as per Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd [2006] EWHC 89 (TCC)).

In Scheldebouw BV v St James Homes, there was a trade contract between the Contractor and Employer for design and installation works, and a separate construction management agreement between the Employer and a construction manager, MACE for decision making. The trade contract set out MACE was the construction manager under the project.

During the works, MACE was removed as the construction manager and the Employer appointed itself to fulfil that role. Subsequently, the Contractor issued proceedings disputing the Employer's self-appointment and repudiatory breach of the trade contract. The Judge held the Employer was not permitted to appoint itself as the construction manager, primarily on the basis that the Employer and decision maker are required to be two separate entities and the decision-maker is "required to act in a manner which has variously been described as independent, impartial, fair and honest."

In giving the judgment, the Court relied on the principles applied in the above case and held that Projen were the Project Manager, and after resignation, Mr Boerboom was never validly appointed as Project Manager, and therefore the role remained unoccupied.

For further information, please see: https://www.bailii.org/ew/cases/EWHC/TCC/2017/1763.html