Fenwick Elliott
The construction law specialists

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Dispatch

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Adjudication: payment of adjudicators

Systech International Ltd v PC Harrington Contractors Ltd
[2011] EWHC 2722 (TCC)

This case involved the recoverability of adjudicators' fees where the decision was said to be unenforceable by reason of a failure to comply with the rules of natural justice. It was suggested that there had been a total failure of consideration. Harrington had instigated proceedings in which they successfully argued that the Adjudicator had "*unwittingly [fallen] below the standards which are required to enable the decision or decisions to be enforced.*" The grounds included that, by ruling wrongly that issues relating to the final account were outside his jurisdiction, he had put himself in the position that he could not and would not deal with a defence, and further the adjudicator had dealt with the final account exclusion as a matter of jurisdiction without giving either of the parties the opportunity to be heard on that point.

The Referring Party had no funds and so Systech sought recovery of the adjudicator's fees from Harrington, who also argued that there was an implied term of the contract of engagement that the adjudicator was obliged to conduct the adjudications in accordance with the principles of natural justice. Systech argued that the adjudicator was engaged to act as adjudicator and that he was not simply engaged to produce a decision. The adjudicator said that he breached the rules of natural justice and asserted that the earlier judgment does not bind him. The adjudicator gave evidence and was, as Mr. Justice Akenhead noted, extensively cross-examined about the reasonableness of his fees and the hours recorded but, following that, the parties agreed on a figures as figures basis the quantum, which was reduced by just over 25%.

Mr. Justice Akenhead explained how the doctrine of total failure of consideration can arise:

(a) In relation to contracts, it is the law relating to quasi-contract and restitution to which one must have regard in addressing total failure of consideration.
(b) One must determine as a matter of ordinary principles of *contractual interpretation what the essential contractual performance bargained for was.*
(c) Where the bargained for performance is on analysis the provision of one or even a number of services or things, there must on analysis, on the facts, be a total or complete failure to perform on the part of the provider.
(d) Where there has been a total or complete failure to provide any of the services or things bargained for, there will be a total failure of consideration. Where some of the services or things bargained for have been provided, there has not been a "total" failure of consideration.

If the contract, properly construed, involves the provision of at least more than one service, it will be difficult to say that there has been a total failure of consideration where some of the services have been provided but not all of them. As the Judge noted, there were no authorities relating to an adjudicator's entitlement to fees in circumstances where there is a decision, which is unenforceable by reason of a breach of the rules of natural justice. Here the Judge decided that he had to consider what the adjudicator had contractually or otherwise undertaken to provide and, unless there has been a total failure of consideration or bad faith on the part of the adjudicator, the adjudicator would be entitled to payment pursuant to the relationship. He did not think that the earlier decision could be said to be binding on the adjudicator, as the adjudicator had not been a party to those proceedings.

Looking at the Scheme and the adjudicator's terms and conditions, Mr. Justice Akenhead held that the bargained-for performance here was the provision of the role of adjudicator which covered not only the production of the decision but also the discharge of the remaining aspects of the role including the conduct of the adjudication leading up to the decision. He also noted that in construction contracts, *"it is difficult wholly to avoid considerations of policy."* Adjudicators are effectively performing a statutory role in that an adjudicator is not merely being employed to produce a decision but also in broad terms to put into effect Parliament's intentions. This meant that one should be "somewhat slower" to infer that what parties and adjudicators intended in their terms and conditions was something which excluded payment in circumstances where an adjudicator had done his honest best to perform their role as adjudicator, even if ultimately the decision is unenforceable. That said, the Judge cautioned that the position might well be different if there was any suggestion of dishonesty or bad faith on the part of the adjudicator, not that this was suggested in any way here. Therefore, whilst there were here breaches of the rules of natural justice and the decisions issued were unenforceable by reason of the adjudicator's honest and unwitting breaches of the rules of natural justice, the Judge concluded that:

It therefore follows from this reasoning that it cannot be said that there has here been a total failure of consideration by the Adjudicator in this case. As the breakdown of his timesheets indicate, he spent a not insignificant time dealing with jurisdictional objections raised by Harrington itself (which Harrington asked him to deal with), reviewing the Referral, the Response, the Reply and the Rejoinder and the very substantial amount of documentation and evidence attached to some of those documents as well as communicating with the parties. All of this was a partial discharge of his role as adjudicator. There has not been a "total" failure and the consideration or bargained-for performance is not "whole and indivisible" and there has been in effect at the very least partial performance by the Adjudicator.

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Arbitration: impartiality of arbitrators

A & Others v B & Anr
[2011] EWHC 2345 (Ch)

Mr Justice Flaux had to consider an application to remove a sole arbitrator and set aside an award for serious irregularity on grounds that there were justifiable doubts as to the arbitrator's impartiality. A dispute had arisen under a share sale and purchase agreement ("SPA"). B commenced arbitration proceedings under the Rules of the London Court of International Arbitration ("LCIA"). The parties' solicitors agreed to appoint a QC to act as sole arbitrator. The arbitrator had previously been instructed by both parties' solicitors in unrelated matters.

In respect of the arbitrator's instruction from B's solicitors, this had resulted in unrelated litigation before the commercial court. This settled in 2008 and was stayed under a Tomlin order. The partner with conduct of that litigation, and generally the legal team, was different to that engaged in the arbitration proceedings. On 8 May 2009, the arbitrator signed a statement of independence, in compliance with the LCIA Rules, confirming that he was impartial and independent. The arbitration proceeded with a final hearing in September 2010. In late November 2009 the litigation had been reactivated and the matter was listed for trial in late November 2010. The arbitrator was instructed by B's solicitors to advise their clients which he did. In early December 2010 the arbitrator wrote to the parties informing them of his involvement . The letter did not immediately provoke an adverse response from A's solicitors, however, when the partial award was issued in favour of B, A's solicitors applied to the LCIA to remove the Arbitrator under Article 10(3) of the LCIA Rules. The application was rejected and A applied to the court to remove the arbitrator and challenge the award.

The application to remove the arbitrator and set aside the award was dismissed. The Judge considered that a fair-minded and informed observer, who was presumed to know how the legal profession worked, would consider that because the arbitrator acted as counsel for one of the firms of solicitors acting in the arbitration, (whether in the past or simultaneously with the arbitration) there was a real possibility of apparent bias. As to non-disclosure until late in the day, the Judge commented that this failure was clearly inadvertent and a fair minded and informed observer would not consider that the delay would have a bearing on whether there was apparent or unconscious bias. The non-disclosure did not constitute a serious irregularity, not least because of the high threshold that was required to be satisfied to set aside an award on such grounds. The Judge indicated that the issue of whether there is a real possibility of apparent bias should be considered by adopting a common sense approach:

"It is a fact that judges of the Commercial Court (whether through having been instructed by particular firms of solicitors whilst at the Bar or through experience of case management and trial of cases as judges) build up a picture of the strengths and weaknesses of particular firms of solicitors or indeed of individual solicitors, just as they do of individual members of the Bar. Accordingly they will have more confidence in some firms or individual solicitors (or members of the Bar) than in others. No-one could sensibly suggest that a judge should have to recuse him or herself in such situations. Were that so, there would be no judges sitting."

Case update: public procurement

Henry Brothers (Magherafelt) Ltd & Others v Department of Education for Northern Ireland
[2011] NICA 59

It was back in Issues 96 and 101 that we first reported on this case. The CA in Northern Ireland, has now finally decided that the High Court was correct in setting aside a framework agreement entered into by the Department of Education for Northern Ireland following breaches of the 2006 Procurement Regulations. The Department had appealed against the original decision on the grounds that the judge erred in finding that (1) price was a mandatory criterion in the selection process for the most economically advantageous tender, (2) the building contractors' claim was not statute barred and (3) he had the power to set aside the framework agreement.

The case is a reminder as to how quickly the procurement landscape is changing. Since the original decision, the 2006 rules have been superseded by the Public Contracts (Amendment) Regulations 2009 which came into effect on 20 December 2009. The 2009 Regulations removed the previous distinction between "framework agreements" and "contracts" which was a key factor in the third issue here. If the CA had found that a framework agreement was a contract for the purpose of the 2006 Regulations, that would have prevented it from setting aside the framework agreement. Today, the regulations make it clear that a specific contract will not be considered to be ineffective merely because a declaration of ineffectiveness has been made in respect of the framework agreement. The court must consider each specific contract in its own right.

Further, public contracts are now governed by the Public Procurement (Miscellaneous Amendments) Regulations 2011 which were implemented on 1 October 2011, and it is interesting to see how the new legislation has changed the way that claims must proceed. Under the 2006 Regulations (prior to their amendment), the limitation time limit was 3 months not 30 days. Here, looking at 2011 case law, the CA indicated that the cause of action only arises where a breach of the 2006 Regulations is alleged. Anticipation of a breach is not sufficient. Further the breach can consist of any infringement of the regulations which gives rise to the risk of loss or damage. Time of course runs from the date when the economic operator first knew, or ought to have known, that grounds for starting proceedings had arisen.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.
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