FENWICK ELLIOTT

The construction & energy law specialists

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

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Dispatch

Case update: adjudication & insolvency

Bresco Electrical Services Ltd (In Liquidation) v Lonsdale (Electrical) Ltd

[2020] UKSC 25

We have previously written about the *Bresco* case in Issues 219 and 224. On 17 June 2020, Lord Briggs gave judgment of the Supreme Court. This is an important judgment for a number of reasons. First, it is a significant endorsement by the Supreme Court of the value of adjudication. Lord Briggs noted the: "*chorus of observations, from experienced TCC judges and textbook writers*" to the effect that adjudication does, in most cases, achieve a resolution of the underlying dispute which becomes final. He also confirmed that adjudication has: "*as was always intended, become a mainstream method of ADR, leading to the speedy, cost effective and final resolution of most of the many disputes that are referred to adjudication.*"

These comments perhaps help to explain why the Supreme Court allowed the appeal by Bresco and decided that there is no incompatibility between the statutory adjudication and insolvency regimes. As a result of this judgment, liquidators both in this case and generally, will, subject to certain important qualifications, be able to pursue claims through adjudication. That said, whilst the Supreme Court held that adjudicators would have jurisdiction to consider disputes referred by insolvent companies, it also made clear that the TCC would continue to have discretion to consider whether or not to enforce the adjudicator's decision. Lord Briggs was clearly reaffirming the current position that: "*Where there remains a real risk that the summary enforcement of an adjudication will deprive the respondent of its right to have recourse to the company's claim as security (pro tanto) for its cross-claim, then the court will be astute to refuse summary judgment.*"

In adopting this view, the Supreme Court has taken a similar position to two recent judgments, *Meadowside Building Developments Ltd v 12-18 Hill Street Management Co Ltd* (Issue 233), and *Balfour Beatty Civil Engineering Ltd v Astec Projects Ltd* (Issue 239), where the TCC seemed to accept that adjudications brought by insolvent companies could potentially proceed subject to proper security being provided to the potential responding party. Astec obtained funding from a boutique investment fund, which focused on construction insolvencies and had legal expenses and after the event insurance. Even so, the court would only allow the adjudications to proceed if adequate security was given in respect of the decision amount and any potential adverse costs orders (including enforcement and any subsequent action to bring about a final resolution of the dispute). This may well be the future way forward, as Lord Briggs also noted that in many cases the liquidator might not seek to summarily enforce the decision or alternatively might offer appropriate undertakings in terms of costs or to ring-fence any enforcement proceeds.

In the short term, it is likely that the Supreme Court decision will lead to a revival of adjudications that may have been put on hold pending the judgment and will also no doubt lead to a number of claims being brought on behalf of companies in liquidation. The corollary will be that respondents to these adjudications may now seek security or similar undertakings from the liquidators. The *Wimbledon v Vago* principles too remain in place, which mean that adjudication decisions obtained by insolvent companies will still be vulnerable to applications for a stay. The key to how this plays out will be the approach taken by the TCC as the court inevitably faces a temporary increase in enforcement challenges in this type of adjudication. Something to watch out for.

Case update: adjudication & severance

Dickie & Moore Ltd v McLeish & Others

[2020] CSIH 38

This was an appeal from the decision discussed in Issue 234. As Lord Drummond Young said, the critical question at issue was the extent to which and the basis on which a court may enforce an adjudicator's award where part of that award is outside the adjudicator's jurisdiction because the dispute purportedly considered in that part had not crystallized. Lord Drummond Young also stepped back like Lord Briggs in *Bresco* to review the adjudication process. He was of the opinion:

"*that the provisions of the Scheme should be interpreted in such a way that they achieve its fundamental purpose, which is to enable contractors and subcontractors to obtain payment of sums to which they have been found due without undue delay. In particular, the intention is to avoid delay caused by lengthy dispute-resolution procedure.*"

The Judge continued that:

"*the fundamental point is that the procedures used are intended to be simple, straightforward and immediately effective. Those considerations should in our view guide the approach to interpretation of the Scheme. In relation to an adjudicator's award that is partially valid and partially invalid, the valid part should in our opinion be enforced if that is realistically practicable … in approaching severance we consider that the court should adopt a practical and flexible approach that seeks to enforce the valid parts of the decision unless they are significantly tainted by the adjudicator's reasoning in relation to the invalid parts.*"

Lord Drummond Young was of the view that if an adjudicator erroneously adjudicates on one dispute and validly adjudicates on another dispute, the latter will be enforced "*unless it is simply not possible verbally or mathematically to identify what his decision*" on the other matter was. The Judge described this as the adoption of "*a strong practical test*".

Whilst the adjudicator's extension of time award, of 13 weeks, and the associated award for loss and expense of £63,093.47 could not stand, because the dispute had not crystallized, there were other elements of the adjudicator's decision that could properly be enforced, as they were "untainted" by the decision and reasoning in relation to extension of time and loss and expense. For example, the court could not see why the treatment of a claim for extension of time and its consequences should have a bearing on other matters, say payments for measured work or additional works. Those were for work actually performed, not the increase in costs caused by delay. The court therefore agreed with the decision at first instance: the key question was whether there existed a "core nucleus" of the adjudicator's decision that could safely be enforced.

Good faith and co-operation

Essex County Council v UBB Waste (Essex) Ltd

[2020] EWHC 1581(TCC)

ECC entered into a 25-year contract with UBB for the design, construction, financing, commissioning, operation and maintenance of a mechanical biological waste treatment plant. The facility was built and on 25 November 2014 it was certified as having passed the Readiness Tests, which led to the Commissioning Period. The plant was required to pass the Acceptance Tests before 12 July 2015. It did not do so. ECC said that UBB had failed to design and construct the facility so that it was capable of passing the Acceptance Tests. One of the many issues in the case related to the existence (or not) of any implied terms as to good faith and co-operation.

Mr Justice Pepperall considered that there were a number of factors which told in favour of this contract being a relational contract. These were:

- The contract was long term and the parties plainly intended that they should have a long-term relationship.
- The long-term PFI contract required a close collaborative working relationship in which, the Parties "*must have intended that their respective roles be performed with integrity and with fidelity to their bargain and their shared environmental objectives*".
- Whilst the relationship was essentially commercial, the parties intended that they should each repose trust and confidence in the other.
- The contract required a high degree of communication and co-operation.
- The contract required a significant investment by both parties.
- The contract involved exclusivity between the parties.

As a result Mr Justice Pepperall held that:

"*this 25-year PFI contract is a paradigm example of a relational contract in which the law implies a duty of good faith*".

What did that mean? The Judge referred to the decision of Leggatt LJ in the case of *Sheikh Al Nehayan Case v Kent* [2018] EWHC 333 (Comm), where he said:

"In Paciocco v. Australia and New Zealand Banking Group Ltd [2015] FCAFC 50, at [288], in the Federal Court of Australia, Allsop CJ summarised the usual content of the obligation of good faith as an obligation to act honestly and with fidelity to the bargain; an obligation not to act dishonestly and not to act to undermine the bargain entered or the substance of the contractual benefit bargained for; and an obligation to act reasonably and with fair dealing having regard to the interests of the parties (which will, inevitably, at times conflict) and to the provisions, aims and purposes of the contract, objectively ascertained. In my view, this summary is also consistent with the English case law as it has so far developed, with the caveat that the obligation of fair dealing is not a demanding one and does no more than require a party to refrain from conduct which in the relevant context would be regarded as commercially unacceptable by reasonable and honest people..."

Accordingly, the Judge concluded that:

- "*Whether a party has not acted in good faith is an objective test.*"
- "*Dishonest conduct will be a breach of the duty of good faith, but dishonesty is not of itself a necessary ingredient of an allegation of breach. Rather the question is whether the conduct would be regarded as 'commercially unacceptable' by reasonable and honest people.*"
- "*What will be required in any individual case will depend upon the contractual and factual context.*"

Duties of an expert: a reminder

Essex County Council v UBB Waste (Essex) Ltd

[2020] EWHC 1581 (TCC),

This was also another case where questions were raised over the independence of one of the experts. The issues included that:

- The expert's firm played a "substantial role" on the project over an extended period of time during which the firm billed "many hundreds of thousands of pounds" This was held by Mr Justice Pepperall to be itself a conflict of interest.
- The expert failed properly to differentiate between the provision of consultancy services to a client and the provision of independent expert evidence. This was described by the judge as a failure to "appreciate the difficulty in both devising UBB's strategy and then offering expert opinion evidence upon such strategy.
- Whilst the expert was correct to conclude that it would have been inappropriate to have acted as an expert while his firm was subject to an actual claim in respect of their consultancy work on the project, the expert ought also to have identified that UBB's agreement that there was no current claim did not resolve the problem. There appeared to be an express linkage between UBB's agreement that there was no current claim and the expert's willingness to give expert evidence supportive of UBB. This could only raise questions about the expert's independence, impartiality and objectivity.
- The remaining possibility of a claim meant that it was in the expert's interest, as a significant shareholder in the company, to defeat the claims against UBB.

The result was that the Judge treated the expert's evidence with caution, expressing further concern that the expert had failed properly to distinguish between advocacy for a client and the rigour required when acting as an independent expert.

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.

Dispatch is a newsletter and does not provide legal advice.

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