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Dispatch

Understanding arbitration agreements

Briggs Marine Contractors Ltd v Bakkafrost Scotland Ltd

[2023] ScotCS CSOH_6

The parties entered into a written contract where Briggs undertook to recover a barge owned by Bakkafrost which had sunk, and to provide certain other services, for a fixed fee. Briggs said that the contract was frustrated and that the parties subsequently entered into an oral agreement for the provision of different services for a price of costs plus 15%. Bakkafrost, as a preliminary point, said that there was a clause in the contract, which said that "any dispute arising out of or in connection with" shall be referred to arbitration. The contract was governed by English law.

Under the contract, Briggs were only entitled to the fixed fee if the barge was recovered: "no cure, no pay". Briggs said that its divers discovered that the vessel was emitting dangerously high levels of hydrogen sulphide, such that it became too dangerous to continue to provide the services specified and that, as a result, the contract was frustrated.

Following various discussions, there was an oral agreement for the venting of the barge and the removal of the cargo in return for which Briggs was to be paid its costs, plus 15%. Bakkafrost said that this was nothing more than an oral variation of the original contract in relation to price and methodology.

Lord Reid noted that the parties had agreed five propositions setting out the relevant approach to be taken to construction of arbitration clauses:

(i) Arbitration clauses should be liberally construed. In other words, the courts should pay little attention to the linguistic nuance and precise phraseology of arbitration clauses.
(ii) The exercise of construction starts from the presumption that the parties, as rational business people, are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal: the one-stop arbitration approach.
(iii) If the parties wish to exclude certain matters from the one-stop approach, they must either say so expressly.
(iv) In the absence of any express provision excluding a particular issue from arbitration, only the most forceful evidence of a purpose to exclude a claim from arbitration could prevail.
(v) Where there is doubt over the scope of an arbitral clause, the issue should be resolved in favour of arbitration as arbitration clauses should be construed as broadly as possible.

Bakkafrost said that, by applying these principles, particularly the "one-stop" approach, the parties had intended all disputes arising out of their relationship to be decided by arbitration. The subject matter of the action plainly arose out of and was connected with the relationship created by the original contract: the salvage operation.

Briggs submitted that, although the parties were the same, the contract and the oral agreement applied to wholly different subject matters. The contract had provided for the barge to be recovered for a fixed fee on a no cure, no fee basis, whereas the oral agreement was for the provision of different services, which had to be rendered subsea due to the dangerous nature of the gas. It was pure coincidence that Briggs had the necessary skills to carry out the work agreed in the oral agreement. The only matter in issue here was the oral agreement, which contained no arbitration agreement. The original contract prohibited any oral variation. There was no question of different tribunals deciding different matters arising out of the same agreement.

Lord Reid noted that it was going too far to say that the one-stop approach, presumably intended by rational business people, had the consequence that every subsequent agreement between the same parties was subject to the same arbitration agreement. To determine whether or not there is a sufficient connection between the dispute and contract necessarily involved determining what the dispute was, and then asking whether that could be said to be a dispute which arose out of, or was in connection with, the contract. This must always be a fact-sensitive question.

The dispute here concerned Briggs' entitlement to be paid under an alleged oral agreement for the venting of the defender's barge and the recovery of the cargo. That contract, if it was entered into at all, was entered into, said Briggs, because the original contract WFC had been frustrated. Bakkafrost said that the oral agreement simply had the effect of varying the contract. Lord Reid held that the matters in dispute arose out of (or were in connection with) the original contract. Briggs actually accepted that, were they to seek a declaration that the contract had been frustrated, any dispute about that would be a matter covered by the arbitration clause. Further, Bakkafrost's argument that any oral agreement simply varied the contract was, itself, a dispute which arose out of, or was in connection with, the contract.

Further, there was a clear overlap between the facts underlying the two contracts. The services under both included the recovery of cargo from the same barge, located in the same position. It was nothing to the point that the basis for payment was different, or that the task had become more difficult, or that not every salvage company had the necessary skills to undertake the second agreement. There was a close causal connection between the two agreements since one arose out of the other.

The dispute should be resolved through arbitration.

Adjudication: summary enforcement

J & B Hopkins Ltd v A&V Building Solution Ltd

[2023] EWHC 301 (TCC)

J&B sought summary enforcement of an adjudication decision. The dispute arose out of a sub-contract under which A&V, as subcontractor, undertook to carry out plumbing installation works at a university campus. In the Referral, A&V had alleged that J&B was in breach of the sub-contract in a number of respects and that J&B were unreasonably withholding sums of some £430k. The Adjudicator was requested to:

"to review and decide on matters pertaining to the Referring Party's claim for the breaches and subsequent Final Account for outstanding payment/late payments considered due for the works ... in the sum of £455,526.53 plus vat or such other sum as the Adjudicator shall determine ..."

The Adjudicator decided that A&V had failed to prove any entitlement to the sums claimed and, having declared that the true value of the sub-contract works was £289k, ordered that A&V pay to J&B a balance of £83k as well as his fees. The day before the enforcement hearing, A&V issued an application asking the Judge, to suspend the enforcement proceedings and issue judgment in A&V's favour. A&V said that J&B had not complied with the TCC Pre-Action Protocol by failing to respond to a letter of claim sent on behalf of A&V dated 2 December 2022. The letter set out A&V's complaints about what had happened and sought payment of some £277k.

The Judge noted a number of problems with the application. It was only filed the day before the hearing. The Pre-Action Protocol does not apply to adjudication enforcement cases. It was, therefore, not necessary for J&B to respond to A&V's letter as a pre-condition to proceeding with its application to enforce the Decision. Further, whilst J&B was "a little late in answering A&V's letter," it did so. The Judge refused the application. Either J&B was entitled to enforce the decision, or it was not.

As a starting point, the Judge reminded the parties that there are only very limited grounds upon which adjudicators' decisions will not be enforced by means of summary judgment.

A&V made complaints about J&B bringing labour onto site to carry out A&V works before the expiry of the relevant notice periods. The Judge reviewed the evidence and concluded that there was no breach, and proper notices were given. It was also clear that the adjudicator had considered the points put forward by A&V and rejected them, largely on factual grounds. As the Judge noted, it was not for the court to judge whether the adjudicator had reached the correct conclusion on the facts as found by them or on the law.

A&V said that J&B had failed to grant extensions of time, which should have been granted, and that, by preventing A&V access to the IAuditor system, J&B prevented A&V carrying out its works. The Judge noted that there was nothing in the sub-contract which gave A&V a contractual entitlement to access JBH's IAuditor. It was an internal paperwork system put in place to monitor quality and handovers. It was a software package, and not linked in any way to access to the site or workfaces. J&B was of the view that A&V had failed to explain by reference to contemporaneous records that it had suffered any delay and noted that A&V had not provided any critical path/cause and effect analysis in support of its alleged delays. It simply relied upon a series of emails which show that there was limited access to workfaces. Again, the Judge preferred the evidence of J&B. No evidence had been provided identifying the cause of a delay and the effect which it would have on the Completion Date. On a "labour only" sub-contract, a simple, "as planned" – v – "as built" programme, with annotations of any delaying factors would be reasonable to illustrate the effect of any delaying factors on the completion date.

This part of the adjudicator's decision was heavily criticised by A&V. Whilst the adjudicator had not mentioned the IAuditor system , the adjudicator had accepted the evidence from J&B relevant to that issue.

Further A&V were concerned that the adjudicator here did not refer to an earlier decision where the adjudicator had found in favour of A&V. However, the position of A&V in the adjudication at issue was that the adjudicator was not bound by the earlier decision and could revisit issues from the earlier adjudication. The Judge also noted that the decision as to whether they were bound on a particular issue is a question for an adjudicator to answer. If the adjudicator reaches the wrong answer, it is not a matter going to jurisdiction, so long as the adjudicator has not, overall, decided the same or substantially the same dispute as has been decided in a prior decision. Ultimately, here, the Judge noted that the adjudicator had made a decision based upon factual and legal conclusions at which he was entitled to arrive.

The Judge acknowledged that the decision must have come as a "considerable shock" to A&V. It was the party seeking payment, but ended up with a decision that it was liable to J&B. Second, whilst it had previously been successful before a different adjudicator, here the conclusions reached were directly contrary to those previously reached. There were also issues where it would have been better for the adjudicator to raise them with the parties before expressing a view upon it and where the adjudicator could have set out his reasoning.

However, did this all mean, as the Judge put it, that the decision was: "*so riddled with error as to show that the Adjudicator did not do his duty under the Scheme and that there was in the result a denial of natural justice.*"

The Judge said no. It amounted to saying that because of the numbers of errors made by the adjudicator, coupled with the perceived limited time spent on the adjudication, there had been bias and a breach of natural justice on the part of the adjudicator. The Judge was clear that there was nothing to justify the allegation of bias. The Judge noted that "delving" into what was put before the adjudicator revealed that, not unusually, they were faced with "a mass of material not always accompanied by a clear route map as to how best to proceed."

Here, the adjudicator had "*entered into that process, in the limited timescale afforded to Adjudicators, diligently and thoughtfully.*" If there were some areas where, with the benefit of hindsight, things might have been done differently, there was nothing in the matters raised which crossed the threshold so as to establish a breach of natural justice which would justify refusing to enforce the decision. The decision was enforced.

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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