Fenwick Elliott
The construction & energy law specialists

Issue 154 April 2013

Dispatch

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

Case update: good faith in long-term contracts

Mid-Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd

[2013] EWCA 200 Civ

We first reported on this case in Issue 142. In considering whether or not Compass had been entitled to terminate their long-term facilities contract, the court had to consider the meaning of clause 3.5 which imposed a duty to cooperate in good faith:

"3.5 The Trust and the Contractor will co-operate with each other in good faith and will take all reasonable action as is necessary for the efficient transmission of information and instructions and to enable the Trust or ... any Beneficiary to derive the full benefit of the Contract."

At first instance Mr Justice Cranston had concluded, amongst other things, that the Trust's conduct constituted a breach of its obligation to cooperate in good faith, and that the Trust had acted (in breach of an implied term) in an arbitrary and/or irrational manner in exercising its power to make deductions from monthly payments and award service failure points. This gave Compass the right to terminate. However the Trust also had the right to terminate the contract because of a series of service failures by Compass. Since both parties were entitled to terminate, neither could succeed in their substantial claims for post-termination losses. Compass appealed.

Compass said that it did not have any discretion in relation to the awarding of service failure points or the making of deductions. The contract contained precise rules as to how service failure points and deductions should be calculated. This left no room for any discretion which meant that there could be no implied term requiring the Trust not to act in an arbitrary, irrational or capricious manner when assessing these matters.

LJ Jackson agreed. The Trust was a public authority delivering a vital service to vulnerable members of the public. It rightly demanded high standards from all those with whom it contracts. The Trust could not be criticised if it awarded the full number of service failure points or if it made the full amount of any deduction which it was entitled to make. The discretion conferred by clause 5.8 simply permitted the Trust to decide whether or not to exercise an absolute contractual right. There was therefore no justification for implying a term that the Trust would not act in an arbitrary, irrational or capricious manner. If the Trust awarded more than the correct number of service failure points or deducted more than the correct amount from any monthly payment, then that was a breach of the express provisions of the relevant clause.

At first instance, the Judge noted that the Trust and Compass had entered into a long-term contract for the delivery of food and other services within a hospital. The performance of this contract would require continuous and detailed cooperation. He considered that it accorded with commercial common sense for there to be a general obligation on both parties to cooperate in good faith.

The Trust said that if the parties had intended to impose a general duty to cooperate with one another in good faith, they would have stated this in a stand-alone sentence with a full stop at the end. They did the opposite of that in clause 3.5. This was a very detailed contract, where the obligations of the parties and the consequences of any failings were spelt out in great detail. Commercial common sense therefore did not favour the addition of a general over-arching duty to cooperate in good faith.

LJ Jackson began by noting that there is no general doctrine of "good faith" in English contract law. If the parties wish to impose such a duty they must do so expressly. He then held that he agreed with the Trust. The content of a duty of good faith is heavily conditioned by its context. The obligation to cooperate in good faith was not a general one which qualified or reinforced all of the obligations on the parties in all situations where they interacted. The obligation to cooperate in good faith was specifically focused upon the two purposes stated in the second half of that sentence.

In the context of clause 3.5 of the conditions the obligation to cooperate in good faith simply meant that the parties would work together honestly endeavouring to achieve the two stated purposes.

The CA then had to consider whether the Trust was in breach of clause 3.5 by awarding excessive service failure points or making excessive deductions from monthly payments. The Trust had made substantial deductions in July and August 2009 which exceeded the true amount that the Trust was entitled to deduct. This was a breach of the contract. However, these unilateral deductions were not breaches of clause 3.5: this was in part because there had been no finding by the trial Judge that the Trust was acting dishonestly, as opposed to mistakenly applying the provisions of a complicated contract. These deductions were irrelevant to the two stated purposes of clause 3.5. Further, the Trust cured the breach by repaying all of the sums that it had wrongfully deducted.

This left the question as to whether the award of an excessive number of service failure points, which was not in the view of the CA, a breach of clause 3.5, amounted to a material breach of the contract.

LJ Jackson said that a material breach must be substantial, a serious matter, rather than a matter of little consequence. If there was a material breach then Compass could cancel the long-term contract on just one month's notice. The Judge noted that it was not disputed that Compass had incurred more than 1,400 service failure points which meant that the Trust was itself entitled to terminate and that insofar as the Trust had awarded points in excess of 1,400, the additional points had no contractual effect. Further, at the date of the purported termination by Compass, the Trust had made it clear that it would be reviewing its previous award of service failure points. There was, therefore, no material breach and Compass had not been entitled to terminate.

Public procurement: applying the legal test

Lowry Brothers Ltd & Anr v Northern Ireland Water Ltd

[2013] NIQB 23

Lowry challenged the outcome of a procurement exercise concerning the procurement of contracts as part of a framework consisting of five lots for the improvement of water and sewerage services in Northern Ireland. The PQQ described the selection process. Stage 1 entailed a pass/fail evaluation, based on the completed questionnaire. Stage 2 was to be a "detailed assessment" involving those who had successfully completed stage 1. The maximum anticipated number of applicants to be invited to engage in Stage 2 was 16 for each of Lots 2 and 4. The maximum anticipated number of applicants to be appointed to the framework, following both stages, was 8 in respect of each of Lots 2 and 4. Lowry passed Stage 1. The criteria for Stage 2 was weighted heavily in favour of resources and construction experience. Lowry was successful on Lot 4 but not Lot 2.

Lowry specifically complained about the scores allocated in respect of five questions. For these questions on Lot 4, it scored 20 points more than on Lot 2. Lowry said that this amounted to an unlawful disparity. There was no material distinction between the requirements for each lot, with the result that its substantially similar answers to the questions concerned should have attracted substantially the same marks. The Defendant said that whilst the expenditure that was anticipated under each of the multiple projects was similar, the nature of the work that was required to be undertaken was very different. Different lots required different services. Unlike Lot 2, Lot 4 did not require much in the way of M&E works. Any reasonably well-informed tenderer would have immediately appreciated that there were important distinctions between Lot 2 and Lot 4.

Judge McCloskey outlined the most important legal principles for the court to consider:

(i) A manifest error in the marking of a tenderer's bid equates with a clearly demonstrated defect in assessment/evaluation.
(ii) The error must be material: defects belonging to a vacuum, with no material consequence, are not actionable.
(iii) By virtue of the principle of transparency, selection criteria must be disclosed in the published structure and rules of the contract procurement exercise and must not confer unrestricted choice on the contracting authority.
(iv) The professed knowledge and understanding of the tenderers are to be viewed through the prism of the hypothetical reasonably well informed-tenderer.

The Judge was clear that the Defendant was procuring a framework agreement. This meant that if Lowry were to succeed in its claim for an injunction, this would mean that the Defendant would have to suspend the entire framework. It was not the case that it could proceed with the four lots, which were not the subject of this case. There was a two-stage test for the court to consider. Did Lowry have a good arguable case and, on the balance of convenience, was it right to grant an injunction and halt the procurement process? As part of the second question, the court would need to ask whether damages would be an adequate remedy and what the demands of the public interest were.

A court will only disturb the decision of a contracting authority where there has been a manifest error. Here the Judge referred to detailed arguments developed on behalf of Lowry which involved a micro-analysis of the scores awarded. In doing so, the Judge came to the view that Lowry was not comparing like with like. Looking at the OJEU Notice and the more detailed PQQ, it was clear that there was a distinction between "non-infrastructure assets" and "infrastructure assets" which was further highlighted in the "design and build" characteristic of Lot 2, in contrast with the "build [only] feature of Lot 4". This was, in the view of the Judge, a distinction of substance which meant that there was a distinction between the two lots in question. This manifest division clearly required differently tailored responses by bidders to questions which were common to Lot 2 and Lot 4. The same answer did not necessarily deserve the same score. Lowry's claim therefore failed.

When it came to the balance of convenience, the Judge took into account that Lowry was prepared to offer an undertaking in damages that might occur as a result of the halting of the procurement process. However, the Judge also noted that whilst it might not be an easy exercise to assess any damages that may be awarded to Lowry, this did not mean that the damages would be inadequate. Further, the Judge felt that the public interest factor was the most important of the ingredients in the balance of convenience equation. The Defendant's case was that there was a compelling public interest in completing this procurement exercise to enable badly needed water and waste water projects to be executed. In the view of the Judge, with each passing month, the damage to the public interest became increasingly visible and tangible. Again, this meant that Lowry's claim failed.

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