Fenwick Elliott
The construction & energy law specialists

Issue 173 November 2014

Dispatch

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

FIDIC: Dispute boards

Peterborough City Council v Enterprise Managed Services Ltd

[2014] EWHC 3193 (TCC)

Peterborough engaged EMS to design and install a 1.5 MW solar energy plant. The Contract was made on the FIDIC General Conditions of Contract for EPC/Turnkey Projects (or Silver Book), and provided that if the plant did not generate 55 kW of power by 31 July 2011 then EMS would be liable to pay liquidated damages of £1.3m to the Council ("the Price Reduction").

Sub-clauses 20.2–20.7 set out the procedure for dispute resolution by a Dispute Adjudication Board ("DAB") to be appointed on an ad hoc basis after any dispute had arisen. The Red and Pink Books require the parties to establish a dispute board from the outset of the project, known as a standing board. Sub-clause 20.8 provided that if at the time a dispute arose there was no DAB in place "… *whether by reason of the expiry of the DAB's appointment or otherwise*" then either party could go to court.

Following completion Peterborough alleged that the plant had failed to achieve the required power output and claimed the Price Reduction. On 6 January 2014 Peterborough issued a letter of claim under the Pre-action Protocol. EMS responded that in accordance with the Contract terms the dispute ought to be referred to a DAB. During July 2014 EMS gave notice of its intention to refer the dispute to a DAB and since no DAB had by then been established, on 26 August 2014 EMS applied for the appointment of a DAB adjudicator. Peterborough issued court proceedings on 11 August 2014 and on 27 August 2014, EMS issued an application for an order to stay these proceedings.

Mr Justice Edwards-Stuart was therefore asked to consider whether or not the terms of the contract required a dispute to be referred to adjudication by a DAB first as a pre-condition to any court proceedings. If that was correct, should the court exercise its discretion and order that the Council's proceedings be stayed?

Peterborough argued that sub-clause 20.8 provided an opt-out from DAB adjudication but that if reference of a dispute to a DAB was mandatory, the court proceedings should be allowed to continue on the grounds that:

(i) what was a complex dispute was unsuitable for a "rough and ready" DAB adjudication procedure; and

(ii) any DAB adjudication would be an expensive waste of time as it was inevitable that the losing party would go to court.

On the first issue the Judge decided that upon a proper interpretation of the Contract, sub-clause 20.8 would only apply to give Peterborough a unilateral right to opt out of DAB adjudication if the parties had agreed to appoint a standing DAB at the outset. Accordingly, given that sub-clause 20.2 provided for ad hoc DAB appointments, the Judge accepted EMS's argument that the Contract required the determination of the dispute through DAB adjudication prior to any litigation. The right to refer a dispute to adjudication arises under sub-clause 20.4 as soon as a DAB has been appointed, whether under sub-clause 20.2 or 20.3.

The wording of sub-clause 20.8 did give rise to confusion, resolved by the Judge's approach in distinguishing between contracts that provided for a permanent DAB to be established at the outset and contracts that, as in this case, allowed for ad hoc appointments. Given that on Peterborough's submission, sub-clauses 20.2–20.7 would have been rendered meaningless, this was a rational and commercially sensible approach to adopt.

Peterborough submitted that any decision by the DAB would almost inevitably provoke a notice of dissatisfaction from one or other party. Accordingly, to embark on the fairly lengthy (and therefore expensive) adjudication procedure under the contract would be a wholly or at least largely unproductive exercise. The dispute raised complex questions of construction and application of legislation, mandatory codes and standard industry practice and would require extensive disclosure. Therefore the "rough and ready" process of adjudication was entirely inapt to resolve this dispute.

However, the Judge noted that this was nothing new: the complexity of a potential dispute about when the required power output was achieved was foreseeable from the outset, yet nevertheless the parties chose to incorporate the adjudication machinery in the FIDIC form of contract. Both parties therefore agreed to the "rough and ready" adjudication procedure.

That said, in circumstances where the parties had not yet invested time or money in the DAB adjudication, the Judge was sympathetic to Peterborough's case that the court proceedings should not be supplanted by adjudication.

However, the over-riding principle as illustrated by the legal authorities, for example *DGT Steel & Cladding v Cubitt Building* (see Issue 86), clearly showed a presumption in favour of leaving parties to resolve their disputes in the manner they had agreed to in their contract.

Accordingly, the Judge ordered that the court proceedings were to be stayed.

Adjudication/Arbitration: NEC & notices

Fermanagh District Council v Gibson (Banbridge) Ltd

[2014] NICA 46

Fermanagh entered into a contract with Gibson for the construction of a waste management facility. The form of the contract was the NEC2 Engineering and Target Contract. On 23 October 2012 the adjudicator decided that Fermanagh should pay Gibson £2,126,390.29 plus VAT and interest. Fermanagh believed the amount truly due was £302,156.61 plus VAT and declined to pay the amount the adjudicator assessed as due.

By a decision on 4 February 2013 Weatherup J rejected Fermanagh's challenges to the adjudicator's jurisdiction. As you would expect with an NEC Contract, it provided for a reference of a dispute to arbitration within four weeks of the adjudicator's decision. On 5 February 2013 Fermanagh served a notice described as a notice of arbitration. An arbitrator was appointed. A time bar point having been taken, the arbitrator stayed proceedings pending an application to the court to extend time. By an application dated 22 April 2013 Fermanagh applied under section 12 of the Arbitration Act 1996 for an extension of time to refer to arbitration the dispute which had arisen under the contract.

At first instance, a Judge held that where the jurisdiction of the adjudicator was in issue and the question of the adjudicator's jurisdiction was to be considered by the court before the substantive dispute was considered by an arbitrator, the parties would have contemplated that the time provision might not apply. Here, the overall process anticipated that ultimately there would be a substantive assessment of the final value of the contract, whether achieved by arbitration or something else. A substantive hearing had not occurred in respect of the disputed value of the final work. It was therefore just to extend the time to allow the substance of the matter to be considered by arbitration. Gibson appealed.

On appeal the court noted that when the adjudicator gave his decision on 25 September 2012 it was clear to Fermanagh that the adjudicator had reached a decision with which it did not agree. It considered that a very much smaller sum was due to Gibson. There was thus clearly a serious dispute between the parties. If the adjudicator was acting within jurisdiction, the contract provided only one way to challenge its effect: by giving notice of an intention to refer the matter disputed to a tribunal.

Having decided to reject the adjudicator's decision on the ground that he had no jurisdiction, Fermanagh adopted a high-risk strategy of ignoring the adjudicator's assessment, contesting Gibson's claim to enforce the adjudicator's decision and not serving a notice of intention to refer to arbitration, notwithstanding that the contract clearly said that an adjudicator's decision stands as binding unless taken to arbitration. All this is known to or should reasonably be appreciated by parties when they enter into the NEC contract.

Accordingly it should reasonably have been in contemplation of the parties that a situation might arise where one party's claim might be upheld by an adjudicator in circumstances disputed by the other, both as to quantum and as to whether the adjudicator should proceed to adjudicate in the circumstances and the appeal was allowed.

Adjudication: injunctions to prevent referrals

T Clarke (Scotland) Ltd v Mmaxx Underfloor Heating Ltd

[2014] CSIH 83

Mmaxx was the subcontractor tasked with the mechanical and electrical works at a primary school in Scotland. Between June 2013 and March 2014 there were nine adjudications: eight initiated by Mmaxx and one by Clarke. Mmaxx had lost seven of the adjudications it commenced and only made a recovery of 10% in the eighth. Clarke sought an interdict (or injunction) to prevent Mmaxx from commencing any further adjudications.

That application was refused even though the court noted that Clarke had disclosed a "troubling picture". Given the "*slew of adjudications*" it was understandable that Clarke should query Mmaxx's underlying motives. However, whilst there was a "*cloud of suspicion*" hanging over Mmaxx's conduct, the circumstances did not clearly show that Mmaxx had acted unreasonably and oppressively. Clarke appealed. Lord Bracadle noted that Clarke was not seeking to prevent Mmaxx from pursuing a particular adjudication embarked on in bad faith or on an untruthful basis. Clarke sought to prevent Mmaxx from referring any future dispute, whether or not it was brought on a legitimate basis. To do so would be:

"a significant innovation on the contractual dealings between the parties and a significant limitation on the right provided by Parliament in the 1996 Act. The potential to involve the denial of a well-founded claim was precisely the reason advanced ...for the sparing use of the power to intervene to prevent an abuse of process."

Past words or acts could not turn a future genuine dispute into bad faith. If the court were to be involved at all it could only be on an adjudication by adjudication basis. Lord Bracardle accepted that the alleged conduct of Mmaxx gave cause for concern. The claims surrounding the third adjudication were of a serious nature. These might possibly have founded a basis for the court to intervene in relation to that adjudication. However, here the key consideration was that the grant of interim interdict would prohibit Mmaxx from initiating any further adjudication, no matter how genuine and well vouched. Accordingly, the application was refused.

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.

Follow us on and

Edited by Jeremy Glover, Partner, Fenwick Elliott LLP
jglover@fenwickelliott.com
Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN

www.fenwickelliott.com