FENWICK ELLIOTT

The construction & energy law specialists

Issue 234 - December 2019

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

Dispatch

Expert determination: final & binding?

K & J Townmore Construction Ltd v Kildare and Wicklow Education and Training Board
[2019] IEHC 666

This Irish case related to disputes which had been ongoing since 2016. Various dispute resolution procedures had been put in place including expert determination. This led to a number of expert determinations being issued in favour of K & J which led to the present case before Mr Justice David Barniville. One of the many issues for the Judge was whether or not the expert determinations were "final and binding". The expert determination agreement recorded that the parties would be bound by the terms and conditions set out in the revised terms and by any determination or series of determinations issued by the expert in accordance with the jurisdiction and powers given to the expert as set out in those revised terms. It was also agreed that the determinations would be "documents which are in the contemplation of the Agreement formed between the Parties on the 28th October, 2015" (i.e. the contract).

Under Clause 2, the parties agreed to "take up and consider Binding any Determination, or series of Determinations, within [10] working days of receipt". At paragraph A, it was agreed between the parties that by submitting to expert determination on the terms agreed, the parties were taken to have conferred on the expert the jurisdiction and powers set out "to be exercised insofar as the Law allows and in [the expert's] discretion as they may judge expedient for the purpose of ensuring the just and expeditious economical and final determination of the dispute referred to [the expert]".

The parties agreed that the agreement for expert determination did amend, replace or supplant part of Clause 13 of the contract (which provided for conciliation and arbitration) insofar as the disputes which were the subject of the expert determination procedure were concerned. The difference between them was the extent to which it did. The agreement for expert determination did not expressly state the effect that it was intended to have on the contract and, in particular, on the dispute resolution provisions of the contract.

One of the issues for the court was whether or not the agreement for expert determination provided for an agreement that was "final and binding". The agreement used the terms but not together. The Judge was of the view that on its express terms, the agreement did provide for the determinations issued by the expert to be both "final" and "binding". However even if that was not the case, the Judge noted that both parties accepted that the default position, in the case of any expert determination, was that the determination would be final and binding (subject to the very limited potential for challenge). The Judge referred to an Irish decision (Dunnes Stores v McCann [2018] IECA 238 where Hogan J referred to a short description of the process of expert determination which can be found in John Kendall's Expert Determination (London, 1996)) and noted that:

"Determination by expert can thus be regarded as a 'simple, informal, cost-effective, confidential and final form of dispute resolution' "

Therefore, even if the parties had not made express provision in the agreement for the determinations of the expert to be "final" and "binding", the default position would, in any event, have been that they were final and binding. It would have been open to the parties to agree that the determinations of the expert did not have such final and binding effect. However, that would need to be done in clear words to alter and/or displace the default meaning. That had not been done here.

Further, under section 6(10) of the Irish Construction Contracts Act, a decision of an adjudicator is stated to be "binding until the payment dispute is finally settled by the parties" or a different decision is reached at arbitration or in proceedings in relation to the adjudicator's decision. This was not the same as an expert's determination. The binding nature of the adjudicator's decision is expressly qualified or conditioned by the words used in the act. The decision is "binding" but only binding "until" the payment dispute is "finally settled". There was no such qualification in the expert determination agreement in relation to the "binding" nature of any determination.

Expert evidence: duties to the court

Ashley Wilde Group Ltd v BCPL Ltd
[2019] EWHC 3166 (IPEC)

This was a copyright dispute relating to two celebrity bedding ranges for Kylie Minogue and Caprice. In HHJ Clarke's judgment, there was a section headed "Problems with Expert Evidence", which began with a reminder that under CPR 35.3, an expert's overriding duty is to the court. PD35 provides that "Experts and those instructing them are expected to have regard to the guidance contained in the Guidance for the Instruction of Experts in Civil Claims 2014 at www.judiciary.gov.uk". The Judge emphasised that the Guidance " does apply if experts who were formerly instructed only to advise, are later instructed as an expert witness to prepare or give evidence in the proceedings". As another reminder, the Guidance notes at paragraph 32 that:

"11. Experts must provide opinions that are independent, regardless of the pressures of litigation. A useful test of independence is that the expert would express the same opinion if given the same instructions by another party. Experts should not take it upon themselves to promote the point of view of the party instructing them or engage in the role of advocates or mediators."

One of the experts was originally asked to provide an informal opinion based on instructions, which asked the expert only to look at similarities which were supportive of the client's case of copying, and not differences which might undermine that case. The Judge highlighted that the expert should have recognised the difficulties of moving from a role in which he was specifically asked to identify evidence that supported one party's case, to a role as a court-appointed independent expert with requirements of impartiality and objectivity, if necessary starting the analysis afresh. That would have established compliance with the duties owed to the court. The Judge also considered that those instructing the expert should also take some responsibility for this failing. The Judge said this:

"I should make clear that I do not doubt Mr Herbert's bona fides or professionalism. I believe that he came to court to express his honestly held opinion about the case. However he came to it initially in a role which specifically required him not to approach his assessment objectively and impartially (and I do not criticise him for this – he was specifically hired to produce advice to support Ashley Wilde's case) and did not amend his approach when his role changed to that of an expert with the duty to be independent, objective and impartial. That is where, I fear, he went wrong, and I consider that he has, perhaps without realising it, maintained a partial approach which has caused him to identify too closely with his client's case."

This meant that the court could not accept the expert's opinions as being reliable, especially as those opinions were the same as the opinions he reached when he was carrying out "a purely partisan exercise" to support Ashley Wilde's case.

Adjudication enforcement: severance

Dickie & Moore Ltd v McLeish & Others Part 2
[2019] CSOH 87

We first discussed this case in Issue 232. Lord Doherty found that "a very material part of the dispute described in the Notice had not crystallised before the Notice was served". This meant that the question of severance arose. Could the time-related disputes be severed from the rest of the dispute?

D&M submitted that while the court had found that the adjudicator did not have jurisdiction to deal with part of the dispute because it had not crystallised at the date of the notice of adjudication, the remainder of the dispute had crystallised and the adjudicator had had jurisdiction to deal with it. In principle, severance should be available provided that the court was satisfied that the parts of the decision that were enforced were not dependent upon, and had not been affected by the reasoning in, the part of the decision dealing with extension of time and related loss and expense. Here, it was clear that the issues of extension of time and loss and expense had been dealt with separately from most of the other issues. The court could be confident that the adjudicator's approach to the sums awarded was unaffected by the jurisdictional error. They had been dealt with separately and independently from his consideration of extension of time and loss and expense.

McLeish submitted that a single dispute had been referred to adjudication. However, the adjudicator had not had jurisdiction to determine that single dispute because part of it had not crystallised. Second, on a proper construction of the contract the parties had contracted to be bound by "the decision" of the adjudicator (paragraph 23(2) of the Scheme). They had not agreed to be bound by part of the decision where the adjudicator had lacked jurisdiction in relation to another part. Whilst there were a number of cases where the courts had been willing to sever and enforce parts of an adjudicator's decision which were clearly and obviously untainted by the nullity of another part of the decision, here there were no parts of the decision where it could be said that it was clear and obvious that the reasoning had been untainted by the adjudicator's decision on extension of time and related loss and expense. For example, the finding that liquidated damages ought not to have been deducted, was a consequence of the decision to grant an extension of time.

Lord Doherty noted that the Scheme contemplated that a "dispute" is a matter in respect of which the adjudicator has jurisdiction. Where an adjudicator's decision is partly within and partly outwith jurisdiction only the part within jurisdiction can be binding. He also referred to a commentary in Building Law Monthly, vol. 36, issue 7 (July 2019), which stated that:

"This more flexible and pragmatic approach to severance is to be welcomed, although it will require the courts to make difficult assessments as to whether it is possible to identify a "core nucleus" of the decision of the adjudicator that "can be safely enforced". While it will on occasion give rise to difficulty it is preferable to a blanket approach which simply denies the possibility of severance."

This led the Judge to conclude that:

"In the present case, whether on a proper analysis (a) the part of the decision within jurisdiction ought to be treated as involving a separate dispute from the part of the decision which was outwith jurisdiction (and for the reasons given, I think it should), or (b) the whole decision ought to be treated as involving a single dispute, severance is competent provided that a core nucleus of the decision can be safely enforced."

This meant that, "plainly" the extension of time award, and the associated loss and expense award could not stand. Neither could the decision that the liquidated damages be repaid as this followed inexorably from the decision that there should be an extension of time of 13 weeks. A smaller deduction of £3,741.36 for gas used during the extension of time period was also removed.

However, Lord Doherty was of the view that it could be said "with confidence" that all other parts of the decision were untainted by adjudicator's decision and reasoning in relation to the extension of time and loss and expense awards. The adjudicator's valuation of Bill of Quantity works, variations, and architect's instructions, and the decisions whether (and if so, to what extent) deductions made could be justified, were made separately and independently from the extension of time and loss and expense decisions; and further the former decisions and calculations were not in any way dependent upon or influenced by the latter.

Lord Doherty was satisfied that it was clear that there was a "core nucleus" of the decision which could be safely enforced. When it came to interest, as the adjudicator had awarded simple interest on the principal sum awarded at the rate of 5% over base rate, there was no reason to think that this was in any way influenced by the adjudicator's consideration of extension of time and loss and expense, and accordingly no difficulty in applying interest on the same basis to the principal sum making up the core nucleus of the award.

This left the adjudicator's fees. Lord Doherty held that whilst it was "unlikely" that the adjudicator would have apportioned his fees differently if his award had been restricted to the sums which the Judge identified as making up the core nucleus of the decision which could safely be enforced, it was not "clear or obvious" that it would have been the same. It would not be right to second guess what the adjudicator would have done. Therefore, the apportionment of fees could not be safely enforced. This in turn left the question as to whether McLeish were obliged to relieve D&M of a part of those fees. It was agreed that they were.

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.

Edited by Jeremy Glover, Partner
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
Fenwick Elliott LLP
Aldwych House
71 -91 Aldwych
London WC2B 4HN