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.

Issue 249 - March 2021

Dispatch

Adjudication: foreign jurisdiction clauses

Motacus Constructions Ltd v Paolo Castelli SpA

[2021] EWHC 356 (TCC)

This was an unusual application for summary enforcement of an adjudication decision in the sum of £450k. PC SpA said that the court did not have jurisdiction to determine the application because it had been brought in breach of a clause in the contract which conferred exclusive jurisdiction on the courts of Paris, France. Did this clause prevent the TCC in England from hearing a claim for a breach of the term implied by paragraph 23 of the Scheme that the decision of an adjudicator binds the parties until the final determination of the dispute?

The works in question were carried out at a London hotel. The governing law of the contract was the law of Italy. Although PC SpA reserved its position during the adjudication, it did not provide any evidence of Italian or French law or procedure. HHJ Hodge QC noted that absent such evidence, the presumption was that the foreign law was the same as English law.

Motacus said that it would be "manifestly" contrary to the public policy enshrined in the HGCRA not to enforce the decision. Further, the enforcement of an adjudicator's decision was the enforcement of an interim decision. It therefore fell outside the scope of the 2005 Hague Convention and so PC SpA could not rely on its provisions. What was before the court was not the underlying dispute but whether an interim procedure and remedy had been followed and granted. If the court enforced the decision, the parties were still free to litigate that underlying dispute in the courts of Paris.

PC SpA submitted that the court did not have jurisdiction to determine the request for summary judgment, which had been brought in breach of the exclusive jurisdiction clause agreed between the parties as set out at clause 19 of the construction contract. The relevant question for the court was whether the enforcement of the alleged breach of the term implied by para 28 of the Scheme should take place in England (or Wales) or in France. The answer to this question was that the parties had agreed in clause 19 of the contract that all disputes arising out of their contract must be settled by the courts of Paris, France.

The Judge agreed that the reality of the application here was that the court was being invited to grant an interim, rather than a final and conclusive, remedy. The position was consistent with the position under construction contracts containing arbitration clauses – see *MBE Electrical Contractors Ltd v Honeywell Control Systems Ltd* [2010] EWHC 2244 (TCC). Where a contract contains an arbitration clause, the "pay now, argue later" policy of the HGCRA requires the enforcement by the courts of the interim adjudicator's award before the final determination by the chosen forum. The whole purpose of the HGCRA is to ensure that the adjudicator's decision is binding until it is successfully challenged by arbitration or in court. In the ordinary case, the sum awarded by an adjudicator must be paid; and the paying party cannot seek to avoid payment by staying the enforcement proceedings for arbitration. A similar approach applied here, in the face of a foreign exclusive jurisdiction clause.

Liquidated damages: non-completion certificates

D Mclaughlin and Sons Ltd v Linthouse Housing Association Ltd

[2021] Scot SAC Civ 5

Linthouse commenced proceedings against DM, seeking declaration about the true value of what was termed "the final certificate sum". Was there a contractual entitlement to withhold sums retained by way of liquidated damages? The date for completion of the Works was 28 October 2016; completion was actually achieved on 15 June 2017. The necessary contractual notices followed including a notice of intention to deduct liquidated damages. On 11 May 2018, the architect granted an extension of time of five weeks and a new completion date of 2 December 2018 was fixed. That had the effect of cancelling the earlier Non-Completion Certificate. No new Non-Completion Certificate was issued. DM repaid the damages deducted by reference to the five-week extension and continued to withhold the rest. At first instance, the Sheriff said that because no further certificate was issued, DM had no basis for withholding the remaining liquidated damages.

DM said that the fixing of a later completion date did not mean that they lost the right to liquidated damages. If that had been the case, the contract would have expressly provided for that. To imply such an obligation would give rise to draconian consequences on an employer and go against commercial common sense. DM did have a valid contractual basis upon which to withhold liquidated damages under the contract. As such, Linthouse had no entitlement to the liquidated damages sum. To hold otherwise would be to unjustly reward Linthouse in relieving it of the consequences of a 28-week period of delay. Linthouse said that the contract was clear that the ability of a party to impose liquidated damages was subject to the suspensive conditions laid out in the contract. There was no valid Non-Completion Certificate which meant that those conditions were not satisfied.

The court disagreed with DM. The position in relation to the deduction of liquidated damages in the absence of a valid Non-Completion Certificate had been clear for a considerable period of time. Where a Non-Completion Certificate was required, the absence of such new certificates was fatal to these claims (*Octoesse LLP v Trak Special Projects Ltd*, *Dispatch* Issue 199).

Adjudication and the NEC form

The Fraserburgh Harbour Commissioners Against McLaughlin & Harvey Ltd

[2021] ScotCS CSOH_8

The question for Lady Wolffe was whether clause W2.4 of the NEC 3 Contract in the form agreed between the parties operated as a contractual bar to preclude resort to the court (or to arbitration) if a dispute between the parties falling within the scope of clause W2 had not first been referred to adjudication.

FHC wanted to carry out works to deepen part of Fraserburgh Harbour. After completion of the works, FHC identified what it said were defects in the works, arising from the failure to conduct the works in conformity with the contract and the specified methodology. FHC brought an action before the court for damages in excess of £7 million. M&H said that the terms of clause W2 of the contract were a mandatory step prior to the issue of court proceedings. FHC had not referred the current dispute to adjudication. In fact there was a further issue. The "tribunal" provided for in the Contract was "arbitration".

Clause W2 provided as follows:

"W2.4 (1) ...A Party does not refer any dispute under or in connection with this contract to the tribunal unless it has first been decided by the Adjudicator in accordance with this contract.

(2) If, after the Adjudicator notifies his decision a Party is dissatisfied, that Party may notify the other Party of the matter which he disputes and state that he intends to refer it to the tribunal. The dispute may not be referred to the tribunal unless this notification is given within four weeks of the notification of the Adjudicator's decision."

M&H referred to the *NEC Guidance Notes* which state that:

"The intention is that all disputes are first referred to and decided by the Adjudicator, who is jointly appointed by the Employer and Contractor and is to act independently of them."

"[A] dispute cannot be referred to the tribunal unless it has first been decided by the Adjudicator."

Therefore FHC had agreed not to litigate about the present dispute before a court (or, indeed, by way of arbitration) without having first adjudicated upon it. The requirement imposed by clause W2.4 was that adjudication is a mandatory step in a dispute before there can be any referral of that dispute to another tribunal (be that a court or arbitration). FHC had not complied with that mandatory requirement.

FHC said that the law of Scotland was that an arbitration clause does not entirely exclude the jurisdiction of the court to entertain the suit. It prevented the court from deciding the merits of any dispute. FHC said that clause W2.4 referred "any dispute" arising under the Contract to a private dispute resolution mechanism – i.e. to private judges. Clause W4.1(1) permitted a party to refer a dispute to adjudication. This was to ensure compliance with the right to go to adjudication at any time provided for by section 108 of the HGCRA. Further, given that the contract data defined "the tribunal" as "arbitration", the words of this clause required that an arbitration could not commence without an adjudication having taken place. The adjudication was therefore a precondition for having the merits of the dispute determined by arbitration. But the clause did not exclude the ability of the court to entertain a suit, even if the merits of any dispute in relation to the matter were to be decided by a private decision-making process. There were no words which sought to exclude or alter the normal jurisdiction of the court, other than by the reference of the dispute to the process of adjudication followed by arbitration.

FHC maintained that the Contract did not preclude a party from essentially side-stepping the contractually agreed route to resolve any dispute in order to advance directly to the court to do so. Clear words were required to oust the court's jurisdiction.

The Judge disagreed. The contract "simply" required that a precondition to resort to the "tribunal" of choice was that there was first an adjudication on the matter in dispute, which was followed by a timeous notice of dissatisfaction with that determination. This was a contractual bar.

FHC's view was inconsistent with the express words of the Contract, which provided for "any dispute" to be resolved in accordance with the specified procedure, being an adjudication and, if a party was dissatisfied with that determination, an appeal from that to the stipulated "tribunal" (here, arbitration) within the time period specified in clause W2.4 (2). Lady Wolffe said that:

"it is clear from the language used, as well as its interrelationship with other parts of Clause W4.2, that these provisions were intended to be definitive as to the means for determining any disputes between the parties and the sequence in which they were to be taken. On the pursuer's approach, these provisions could simply be ignored in favour of an unqualified right of direct recourse to the Court without any stipulated timeframe. This would, in effect, permit a parallel regime of dispute resolution which is wholly at odds with the clear words and detailed specification of the means for dispute resolution provided for in the Contract."

FHC's approach also made no allowance for and cut across the right to refer a dispute to adjudication. The Judge noted that:

"so important is the right to refer a dispute to adjudication, that any provision of a contract which frustrates this right is displaced in favour of the adjudication provisions of the Scheme".

Disclosure and WhatsApp messages

Pipia v BGEO Group Ltd

[2021] EWHC 86 (Comm)

This application was for further Extended Disclosure under the Disclosure Pilot. The focus of the application was email correspondence and the contents of the mobile phones of two key witnesses. At its heart, the key issue was whether the phones were within the control of BGEO. However, Mrs Justice Cockerill made some interesting observations about the type of information that could be available:

"It is submitted, and I accept, that his WhatsApp, Viber and SMS messages will likely give the Court an unguarded picture of some of his actions and this may assist as to his intentions. I also accept that that picture may very well be significant, in a case which raises major issues concerning [...] good or bad faith at relevant times and where it appears that the documentary record is not as full as it is in some cases and where there may be issues about the accuracy of some of the documentary record (for example there is at least one issue about the dating of a document)."

This meant that if the messages were in the control of BGEO, it would be right to make an order for disclosure. However, the Judge also noted that the fact the documents "*would doubtless be interesting*" did not mean that the documents were necessarily disclosable. In the end the question was one of necessity for the just disposal of proceedings. Given (i) the picture which emerged of a business environment where the email and documentary record may not be of the most assistance; (ii) the immediacy of mobile phone communications via WhatsApp and similar means and (iii) the nature of the issues, and in particular the apparently broad view taken of bad faith under Georgian law, the Judge was just persuaded that this hurdle was met.

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

www.fenwickelliott.com