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.

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Dispatch

Adjudication: multiple contracts

Ex Novo Limited v MPS Housing Ltd

[2020] EWHC 3804 (TCC)

MPS sought to resist enforcement of an adjudication decision in the sum of £310k. The key issue was whether there was a single contract with multiple instructions under it or multiple contracts. MPS said that the adjudicator did not have jurisdiction as it was a reference of sums due under and of disputes in relation to multiple contracts rather than a single contract.

HHJ Eyre QC considered that the proper approach to take would depend on whether the reference to the adjudicator necessarily involved the adjudicator having jurisdiction to determine jurisdiction. If that was an integral part of the reference then the decision as to jurisdiction was unchallengeable. On the other hand, if it was only being determined as a preliminary to determination of the reference proper, then the decision of an adjudicator as to jurisdiction was not unchallengeable.

Here, the adjudicator did have to make a decision as to whether there was a single contract or multiple contracts. This was for the purpose of determining whether they had jurisdiction and should proceed with the adjudication. However, the adjudicator did not have to determine that question in order to answer the substantive issue between the parties. That issue was the effect of the absence of a pay less notice. Therefore the decision of the adjudicator about their jurisdiction was potentially challengeable.

This meant that HHJ Eyre QC had to consider whether there was a single contract under which the sundry works were performed or multiple contracts, or whether, on an application for summary enforcement, there was a real prospect that MPS would defeat the argument that there was a single contract.

The Judge said that the best guide to the parties' intentions and to the effect of their dealings was the contemporary documents. Here they "*strongly*" and "*persuasively*" indicated that there was a single contract. There was no real prospect of a finding that there were multiple contracts. "*Commercial common sense*" suggested that what was happening here was that there was a single contract with the placing of orders under it, effectively a calling off of work on particular properties, with a subsequent variation reducing the discount applicable. This meant that the adjudicator was correct in that there was a reference under a single contract. Therefore, the decision was enforceable.

Expert Determination

Flowgroup Plc v Co-Operative Energy Ltd

[2021] EWHC 344 (Comm)

The claim here arose out of an Acquisition Agreement. By clause 3 of the Agreement, the purchase price was subject to a working capital adjustment, to be determined in accordance with detailed provisions contained in Schedule 9. The parties were unable to agree on the amount of the working capital adjustment and the matter was referred to expert determination. Paragraph 4.13 of Part A of Schedule 9 provided that the Expert's written decision on the matters referred to them would be final and binding in the absence of manifest error. The issue for Adrian Beltrami QC was whether there was such manifest error in the Report.

The Seller said that a "*manifest error*" was one which: (a) is obvious or easily demonstrable without extensive investigation; (b) does not, however, require the error to be demonstrated immediately and conclusively; and (c) may permit recourse to extrinsic evidence. It was a visibility test, in the sense that the error must be capable of being "*demonstrated from the face of the record*". It would not matter how complex the question was, an error would be manifest if it could be shown when set against the correct answer.

The Buyer took a more extreme view referring to "*oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion*". A manifest error must be more than just a wrong answer; it must be a "howler". The Judge referred to the textbook, *Lewison, The Interpretation of Contracts*, at paragraph 14.45: "*The expression 'manifest error' refers to 'oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion'.*"

Here, the engagement of the Expert was a broad one and included the mandate to determine issues of contractual interpretation, insofar as they were necessary to resolve the matters in dispute. The dispute was ultimately one of accounting. It was not the role of the court to second-guess the exercise by the Expert of their accounting judgement, unless it was very clear that the judgement was infected by a material mistake. Here, after review, the Judge was of the view that not only was the Expert not plainly wrong, they were plainly right.

Pleading: defects & cladding

Naylor & Ors v Roamquest Ltd

[2021] EWHC 567 (TCC)

This claim arose out of a mixed residential and commercial development, of eleven tower blocks, in Greenwich, London. The Claimants were some of the leasehold owners of one or more of the flats in six of the tower blocks. The First Defendant was the developer and freehold owner of the property. The Second Defendant carried out the design and construction of the development. The Claimants were not making a claim in respect of the cladding replacement works to the extent that they had been accepted by the NHBC. However, they sought damages in respect of their uninsured losses, including diminution in value and additional remedial works costs outside NHBC cover, alleging the NHBC repairs would be insufficient.

The first problem for the Claimants was that, as the Judge explained, "*contrary to good practice*", the allegations of defects were not based on inspections or opening up works carried out

by appropriately qualified experts and the subject of an expert report. The claim was said to be speculative as no specifics of those alleged additional defects had been provided. The pleading was based on a suspicion that the remedial works would prove to be inadequate. It did not provide particulars of specific, identified defects, or their location and extent.

In part this may have been because the Defendants had failed to disclose documents that would assist in ascertaining whether there were additional defects that would not be addressed adequately by the remedial works. However, this did not absolve the Claimants from using appropriate experts to identify defects and/or remedial work and put forward a positive case that some elements of the installation were non-compliant. The burden should not lie with the Defendants to identify whether the defects in fact existed. The Judge was, however, prepared to give the Claimants an opportunity to correct the deficiencies by amendment.

If the Claimants established the existence of defects in the tower blocks, amounting to a breach of contract and/or statutory duty by the Defendants, as a matter of principle, it would be open to them to claim substantial damages based on the diminution in value of their properties assessed as the reasonable cost of reinstatement.

Mrs Justice O'Farrell confirmed the tenants had sufficient standing to bring the claim, but that entitlement to damages would depend on whether they could demonstrate the works were reasonable and proportionate. Specifically, the ability of each of the Claimants to recover as damages the cost of carrying out any part of the remedial works would depend on whether they could show that the specific works were reasonable and proportionate to remedy the breach in question. All of which led back to the need to amend the claim and provide the detail necessary for the Defendants to understand the case being brought against them.

Correspondence with the court

Bell & Anor v Brabners LLP

[2021] EWHC 560 (QB)

Just a reminder that correspondence with any decision-making tribunal, court, arbitration or adjudication should always be copied to the other side. Mr Justice Fordham noted here that:

"it is a cardinal principle of the conduct of proceedings before the Court that, absent an identified compelling reason, a party's communications with the Court on matters of substance or procedure...must always be copied to the other parties to the proceedings. It is inappropriate, and unjust, to seek to communicate with the Court without this transparency. This cardinal principle is clearly recorded in CPR 39.8. Observance of it is important."

Nomination of arbitrators: bias

Newcastle United FCL v The Football Association Premier League Ltd
[2021] EWHC 349 (Comm)

Last year, the Supreme Court in the Halliburton case, set out a number of principles when it came to the test for arbitrator bias. HHJ Pelling QC had to apply some of those principles, in considering an application to remove an arbitrator under s.24(1) (a) of the Arbitration Act 1996. A dispute arose in relation to Section A of the PLL rules. Two weeks after the arbitrator nominated by FAPL confirmed that no circumstances existed that gave rise to justifiable doubts as to their impartiality, the FAPL lawyers said that a number of matters that had not been disclosed, namely that the arbitrator had advised PLL four times in the past, including in one instance on Section F of the PLL Rules, (although all four were more than two years before this appointment) and that FAPL's lawyers had been involved in 12 arbitrations with the same arbitrator, having appointed the arbitrator in question in three of those arbitrations (of which two were after the appointment in question).

NUFC said that the information should have been disclosed upon appointment, and invited the arbitrator to recuse themselves, an invitation which was declined. NUFC duly applied to remove the arbitrator including on the grounds that a fair-minded and informed observer would conclude that there was a real possibility the arbitrator was biased. HHJ Pelling QC made reference to the IBA Guidelines on Conflicts of Interest, confirming the comments made in the *Halliburton* case that, whilst they were not binding, they were helped to set a "*practical benchmark*" against which any potential bias could be judged.

The Judge considered that had the earlier advice on Section F been concerned with the very issue that arose in the current arbitration then it was at least probable that the reasonable bystander test would have been satisfied without further enquiry. However, here that advice was concerned with an issue that did not arise. The longer the gap between being instructed to give advice to a client and the appointment under challenge, the less likely it would be that the relationship would cause the fair-minded and informed observer, to conclude that there was a real possibility of bias. Further, the IBA Rules did not mandate the disclosure of the advice as it was provided over three years earlier on a different issue. That said, the two more recent instructions in 2018 should have been disclosed, even though they did not relate to the issues in the arbitration or show any ongoing relationship.

When it came to the arbitrator appointments, HHJ Pelling QC the Court noted that the pool of experienced and qualified sports' arbitrators was a small one. This may mean that the decision is distinguishable when it comes to construction disputes. However that said, the IBA Guidelines did not require disclosure of the prior appointments, because the arbitrator had not been appointed more than three times in the three years prior to this arbitration. Further, there was no dispute that the arbitrator was not financially dependent on work from PLL or its solicitors.

Finally, a question was also raised about a more practical issue. The arbitrator had needed to seek PLL's consent to disclose the earlier advice and could not therefore be criticised for doing so without copying-in NUFC's lawyers. The emails might have resulted in a breach of confidence. However, there was one private email asking PLL's solicitors about their client's position on whether the arbitrator should recuse themselves which the Judge described as "*an error of judgment and ought not have occurred*". However, ultimately HHJ Pelling QC decided that looking at the overall picture, including the reputation of the arbitrator (a relevant factor in itself) "*the weight of the whole does not exceed the sum of its parts*" and there was no real risk of bias in the eyes of a fair-minded and informed observer.

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