FENWICK ELLIOTT

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

The construction & energy law specialists

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Dispatch

Contract formation

Tyson International Company Ltd v Partner Reinsurance Europe SE

[2024] EWCA Civ 363

On 1 July 2021, the parties entered into a contract of reinsurance (the Market Reform Contract or "**MRC**") containing an English law and exclusive jurisdiction clause. Eight days later, on 8 July 2021, at the request of Tyson, the respondent reinsurer ("**Partner Re**") issued what looked like another contract of reinsurance (Market Uniform Reinsurance Agreement or "**MURA**") covering the same risks, but containing clauses providing for New York law and arbitration. The principal issue in dispute before the CA in London was whether this Partner Re document was intended to replace the previous contract or whether, as Tyson argued, it was merely an administrative document of no contractual effect.

At first instance, the judge held that the Partner Re document was intended to replace the previous contract and that the arbitration clause which it contained was valid and binding. Accordingly, the judge granted a stay of the action begun by Tyson in the Commercial Court pursuant to section 9 of the Arbitration Act 1996.

The dispute between the parties had arisen as a result of a claim by Tyson following a fire at a facility belonging to Tyson Foods. Tyson had accepted liability under the direct policy. The loss, comprising damage to property and resulting in business interruption, was likely to exhaust the reinsurance tower which provided cover up to US$500 million. Discovering that certain statements of value had been "*significantly understated*", Partner Re avoided the contract of reinsurance.

This led to Tyson issuing a claim form in the Commercial Court on 3 May 2023, while Partner Re commenced arbitration in New York the next day. Partner Re issued its application for a stay pursuant to section 9 of the Arbitration Act 1996 on 24 May 2023, but the tribunal in New York rejected a request from Tyson, and it was the application for a stay that came before the judge on 13 December 2023, together with an application by Tyson for an anti-arbitration injunction issued on 3 November 2023.

The judge, at first instance, recognised that both policies covered precisely the same risk, period and parties, and that each of them could or would be a self-standing and self-sufficient contract if viewed in isolation from the other. The question was whether the later contract varied or superseded the earlier contract. The judge held that it did, saying it was expressly contemplated by the parties through their brokers at the time of execution of the former contract. It was proffered for consideration and agreement, and separately signed and agreed on both sides. It contained all the operative terms to be a contract of reinsurance, albeit one governed by New York law.

There was no doubt in the mind of Males LJ that the MRC was a valid and binding contract of reinsurance, governed by English law and subject to the exclusive jurisdiction of the English court. The issue was whether the parties intended for that contract to be superseded by the MURA. This required an objective assessment of what the parties said and did. The parties' subjective intentions were irrelevant, though it appeared fairly clear from the evidence before the judge that Tyson intended and understood subjectively that the MRC would continue to govern the parties' relationship, while Partner Re intended and understood that the MRC would be superseded by the MURA. The question for the CA was whether the MRC was varied or was it superseded by the MURA.

Viewing the matter objectively, several points were clear to the CA. First, from the outset of their negotiations for the 2021 policy, the parties contemplated that what were described as "*reinsurance certificates and the updated policy form*" would be provided. This was a reference to the MURA.

Second, the parties were, or must be taken to have been, familiar with the nature and terms of the MURA, a widely used form of reinsurance contract in the US market which, on its face, makes it abundantly clear what the document is for. This included that it was governed by New York law and subject to New York arbitration. Therefore, the parties must have understood that the MURA was an inappropriate, indeed misleading, document to use if the parties intended their relationship to be governed by an MRC subject to English law and jurisdiction.

Third, there was no indication that the issue of the MURA was merely part of some administrative process. It was expressly sent out "*for agreement*". That was, according to Males LJ, the language of contract formation.

The MURA was signed and stamped on every page. The obvious inference was that Partner Re agreed the terms of the document and accepted it for what it said it was, the contract of reinsurance for the 2021 policy year.

There was also an entire agreement clause in the MURA, which stated expressly that the MURA: "*shall supersede all contemporaneous or prior agreements and understandings, both written and oral*". This was "*highly relevant*". The entire agreement clause stated in clear terms that all prior agreements were superseded. In the view of Males LJ, this all suggested that the 2021 MURA was intended to be the final contract of reinsurance for the 2021 policy year:

> "*Certainly, it looks like a contract and contains everything needed to be a valid and binding contract of reinsurance. It resembles the proverbial duck.*"

Finally, there was nothing in the MRC to prevent the parties from agreeing, either expressly or by necessary implication, that the MRC should be superseded by a later contract on different terms. That was what they did and did so "*expressly*", in view of the terms of the entire agreement clause in the MURA.

Therefore, although the MRC contract dated 30 June 2021 was a valid contract of reinsurance providing for English law and the exclusive jurisdiction of the English courts, it was superseded by the MURA dated 8 July 2021, which provided for New York law and arbitration. In the words of Lewis LJ, "*the parties began by playing cricket but then switched to baseball*".

Adjudication: payment schedules

Morganstone Ltd v Birkemp Ltd

[2024] EWHC 933 (TCC)

On 23 February 2024, an adjudicator decided that £207k was due to Birkemp following their interim payment application dated 31 August 2023. On 4 March 2024, Morganstone issued a Part 8 claim seeking a declaration that Birkemp had no contractual right to make the August application or any interim payment application after March 2023 and that, inasmuch as the adjudicator's decision determined that Birkemp was entitled to make or be paid for the August application, the decision was wrong in law and unenforceable. The next day, Birkemp issued an application seeking summary enforcement of the decision.

The parties had agreed a monthly payment schedule which was updated in 2022. The updated schedule was the same as that of the original. The due date was the 14th day of the month. The date for the payment notice was the 19th day of the month, subject to the adjustment where that was a Saturday or a Sunday. The final date for payment in each month was the second Friday of the month, and the date for the pay less notice was the Wednesday two days before.

On 24 March 2023, shortly before the final date in the 2022 payment schedule, Morganstone sent to Birkemp by email a further monthly payment schedule running for an additional twelve months. There was one difference from the previous schedules, in that the final date for payment in each month was the third, not the second, Friday.

On 30 March 2023, Birkemp complained that the 2023 payment schedule was incorrect as the specified dates for pay less notices and for payments were one week late. Birkemp asked that the schedule be amended and reissued. Morganstone maintained that the dates were correct.

The parties never reached an agreement. Birkemp made payment applications in accordance with the 2023 payment schedule, as it took no issue with the due date in that document, but Morganstone consistently issued pay less notices by reference to the dates in the 2023 payment schedule. It was accepted that Birkemp never agreed to be bound by the 2023 payment schedule and that Morganstone never agreed to revise it so as to make the final date for payment the second Friday in each month.

On 8 September 2023, Morganstone issued a pay less notice against the August application, making a number of deductions. However, it did so expressly without prejudice to its primary position that Birkemp had no entitlement to apply for any interim payments essentially because the 2023 payment schedule had not been agreed. Birkemp contested many of the deductions which lead to the dispute referred to adjudication.

Morganstone relied on the CA case of *Balfour Beatty Regional Construction Ltd v Grove Developments Ltd*, (see *Dispatch*, Issue 197). Grove had asserted that Balfour Beatty had no entitlement to receive interim payments beyond the final date in the payment schedule. The CA, by a majority, agreed. Jackson LJ held that there was no "*fresh*" contract for monthly interim payments after the payment schedule expired. The parties had never agreed the terms upon which interim payments would be made.

Morganstone said that the parties agreed to the 2022 payment schedule, which therefore had contractual effect. But the parties never agreed a payment schedule for the period after March 2023; therefore, as shown by Balfour Beatty, there was no ongoing right to interim payments. Any lack of "commercial common-sense" in the resulting position was simply the consequence of Birkemp failing to make an agreement.

Birkemp relied on an express provision in the contract for interim monthly payments during the progress of the subcontract works. In Grove, the parties were bound by the terms of their agreement. Here, unlike in *Grove*, the parties could fall back on the contract.

HHJ Keyser agreed with Birkemp. *Grove* was a case that turned on the precise terms of the parties' agreement. The parties there may have envisaged and intended that further interim payments would be made but they had not actually reached agreement on essential matters The case did not establish any significant wider propositions of law. Here, the parties doubtlessly envisaged and intended that payment schedules would continue to be agreed for all periods during the currency of the development. However, they failed to agree a schedule for the period after March 2023. The question then became whether or not they had any applicable contractual agreement for that period. Morganstone said that they had not. The judge disagreed.

Once any further agreed schedule ended, there was nothing to displace the original contractual timetable. If the parties did not mutually adopt a new payment schedule, the original timetable in clause 10 would be operative, because there would be nothing to which it would cede precedence. Therefore, the Part 8 claim failed.

However, when it came to the summary enforcement, the judge noted that the adjudicator did not address the substance of the cross-claims raised by Morganstone, because the adjudicator had made the preliminary decision that their consideration fell outside the scope of their jurisdiction.

The judge noted that Birkemp was not merely seeking a ruling on the appropriate of specific deductions in the pay less notice. It was seeking, and it obtained, an award of payment. Birkemp's manner of drafting the notice of adjudication and its subsequent reliance on the confines of that drafting clearly sought to "*put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim*" – that is, the claim for payment. Further: "*Birkemp's tactic amounted to the use of a fallacious argument that, once the validity of the deductions in the pay less notice had been determined, it was entitled to payment of the resulting amount*".

Morganstone was not seeking to widen the scope of the adjudication by raising other, freestanding disputes. It was engaging with and responding to the issues in the adjudication by raising cross-claims as a defence of set-off to Birkemp's claim for payment. As Lord Briggs JSC stated in *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25:

> "*However narrowly the referring party chooses to confine the reference, a claim submitted to adjudication will nonetheless confer jurisdiction to determine everything which may be advanced against it by way of defence, and this will necessarily include every cross-claim which amounts to (or is pleaded as) a set-off.*"

Therefore, here, the adjudicator took an erroneously restrictive view of their jurisdiction. As a result, the adjudicator's failure was deliberate rather than inadvertent, in that they specifically addressed their mind to the question whether the cross-claims could be raised on the adjudication and decided that cross-claims could not be raised as they fell outside the scope of the adjudication. The error was material, in that the they would, if upheld, have had a very significant effect on the overall result of the adjudication. Moreover, the error was brought about by Birkemp's deliberate attempt to achieve a tactical advantage by confining the scope of the adjudication in such a manner as to exclude potentially relevant defences to the claim for payment. The adjudicator's decision was, therefore, unenforceable.

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.

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