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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

Expert determination

Dandara South East Ltd v Medway Preservation Ltd & Anr

[2024] EWHC 2318 (Ch)

Medway made an application for a stay to enable the dispute (about termination and the repayment of a deposit) between the parties to be resolved by an expert determination procedure. Dandara said that the expert determination provisions did not extend to the current dispute and that, as the contract had now come to an end, the provision no longer applied as it was not separable from the contract.

Clause 28.1 of the Contract provided that: "*Any dispute or difference between the parties as to any matter under or in connection with this contract shall be submitted for the determination of an expert (the Expert) ...*".

Clause 31 provided that: "*Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this contract or its subject matter or formation (including non-contractual disputes or claims)*".

Amongst the issues in dispute were whether the alleged Practical Completion Statement was valid as well as certain geotechnical and environmental information. Dandara said that the factual questions were complex and "*plainly unsuitable*" for resolution by an expert in accordance with clause 28.

Master Brightwell first considered the question of separability. Section 7 of the 1996 Arbitration Act provides that unless otherwise agreed by the parties, an arbitration agreement which forms part of another agreement shall not be regarded as invalid or ineffective because that other agreement is invalid or has become ineffective. Medway said that this principle applied to expert determination clauses.

In *Barclays Bank plc v Nylon Capital LLP* [2012] Bus LR 542, Thomas LJ set out the key distinctions between an arbitration and an expert determination clause:

> "*It is also clear that where parties have made an agreement for a particular form of dispute resolution, then they should be held to that agreement ...*
>
> *However, although parties must adhere to the agreement which they have made, I do not consider that the approach to an expert determination clause should be the same as that which must now be taken to an arbitration clause ... [where] parties should normally be taken, as sensible businessmen, to have chosen one forum for the resolution of their disputes ...*
>
> *In contradistinction, expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the court ... as the parties have agreed to two types of dispute resolution procedure for disputes which might arise under the agreement. ... The simple question is whether the dispute which has arisen between the parties is within the jurisdiction of the expert conferred by the expert determination clause or is not within it and is therefore within the jurisdiction of the English court. It is a question of construction with no presumption either way.*"

In other words, because expert determination clauses generally anticipate some disputes being resolved by an expert and some disputes by the court, the one-stop principle applicable to arbitration clauses would not generally apply. Here, the Master looked at clause 28. It applied to: "*any dispute or difference between the parties as to any matter under or in connection with*" the Contract. This was an all-embracing provision, requiring all disputes concerning the Contract to be subject to expert determination. The natural reading of the clause was that any dispute concerning the Contract would be so subject, including any dispute as to whether the Contract had been validly terminated. The wording of clause 28.1 therefore mirrored the breadth of disputes generally subject to an arbitration clause.

This was unusual, as expert determination clauses are generally limited those matters, which are considered to be suitable for resolution by such a method. Therefore, the fact that the expert determination procedure was not carved out of the court's jurisdiction was a factor favouring a one-stop construction of clause 28. Equally, clause 31 could still apply. If a party failed to comply with a determination, the other could apply to court for an order to enforce it.

The Master concluded that whilst: "*there may be no authority holding that an expert determination clause can be separable but it must be a matter of contractual construction, so the parties' objective intentions matter. In circumstances where, as I have found it, they have created a one-stop shop in the form of clause 28, I consider there to be a presumption of separability as there is with arbitration clauses.*"

The burden was on Dandara to show why the parties would objectively have intended the courts to resolve some disputes. They had not done this. There was no reason why the expert determination clause could not be separable. The contract and the clause existed before the dispute arose. Clause 28 was the contractually agreed method for the resolution of all disputes in relation to the Contract. It was also separable from the Contract, at least for the purposes of determining a dispute as to whether it has been terminated by a supervening event.

It was further argued that the expert determination clause was unsuited to a dispute of fact. How could an expert (and, especially, if a solicitor) could determine within 30 days whether a Practical Completion Statement was properly able to be issued before certain date. Perhaps, unsurprisingly, the Master noted that:

> "*Parties to construction contracts regularly agree that disputes of fact will be resolved by an expert in a short period of time, without disclosure of the kind that would be ordered in court proceedings. The claimant's assertion that the dispute in this case would be just too complex for an expert was maintained only at a high level.*"

(Alliancing) Contracts: battle of the forms

Caledonia Water Alliance v Electrosteel Casting (UK) Ltd

[2024] CSOH 87

In June 2015, Caledonia Water entered into an alliancing agreement, based on the NEC3 Target Contract Option C, which allowed Scottish Water to engage Caledonia Water to carry out project orders. This Alliance Agreement obliged Caledonia Water, subject to certain conditions, to obtain items of plant, material and services from suppliers with whom Scottish Water had agreed contracts under an overarching framework. In February 2016, Electrosteel entered into a framework agreement with Scottish Water, the purpose of which was to allow Scottish Water (and others) to order plant and materials from them on the basis of agreed terms.

Caledonia Water ordered substantial quantities of ductile iron pipe from Electrosteel. Between June 2018 and May 2022, there were 60 orders in various quantities. In each case, the orders were made by a purchase order from Caledonia Water to Electrosteel followed by an order confirmation from the Electrosteel to Caledonia. Each order constituted a separate contract.

Caledonia Water argued that each contract was a project order, made under the terms of the Alliance Agreement, calling off work in terms of the Framework Agreement. Electrosteel said that the contracts were regulated by their terms and conditions of sale. Under Electrosteel's T&Cs, English law applied; under the Alliance Agreement, Scottish law applied.

Lord Richardson noted that the orders were placed, the materials delivered and the invoices paid. The dispute between the parties was not whether contracts were formed but rather on what terms. If Electrosteel's terms applied, then the Scottish courts did not have jurisdiction. To determine which terms applied, Lord Richardson took three propositions from previous case law:

(i) Where there would appear to be a conflict between the parties' intentions, it was all the more important to approach the question of what the parties intended objectively.

(ii) The general rule is that a traditional offer and acceptance analysis, which often results in the "*last shot*" determining the outcome, is to be applied. Such an approach has the significant benefit of providing "*a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships*".

(iii) However, it was clear that where there was express agreement between the parties or such an agreement could be inferred, it may be concluded that the parties intended to ignore the standard terms and conditions they had exchanged.

Both parties had called witness evidence. The Judge noted that all the witnesses were doing their best to recollect events accurately. In considering, objectively, what had been communicated between the parties, the first step was to consider what they knew prior to the first order being placed.

The evidence showed that Caledonia Water first became aware of Electrosteel when Scottish Water emailed a number of their alliance partners noting that they were their preferred supplier.

Caledonia Water completed a form and set up a customer account. This form referred both to Scottish Water and to a framework, albeit it erroneously gave the equivalent English reference number. Both parties understood at the outset that the supplies were to be made in the context of Scottish Water's framework. However, this was not enough. Did this common understanding extend to knowledge by both parties that their relationship was to be regulated by Scottish Water's Standard Terms? The Judge considered that it did.

There was clear evidence that both parties knew of and had access to Scottish Water's Standard Terms. Further, the Supplier Guide prepared by Electrosteel noted that its purpose was to: "*Provide a consistent standard of supplier information to the Framework Users for all Frameworks*". The Judge felt that on the basis of this document: "*it would be reasonable to infer that amongst the information to be covered by the guide would be the terms and conditions under which goods and services were to be supplied*". The Judge noted that:

> "*What matters is whether both parties shared a common understanding that their relationship was to be regulated by Scottish Water's Standard Terms not whether both parties shared a common understanding of why that should be the case.*"

Next, the Judge considered the documentation exchanged between the parties. This always included the exchange of one of the Caledonia Water's purchase orders and one of Electrosteel's order confirmation forms. So, for every one of the 60 transactions, each party sent pro-forma documents to the other referring to their own standard terms and conditions.

Both documents contained wording which apparently sought to oust the incorporation of Scottish Water's Standard Terms. Did this mean that the parties had agreed that this wording was to be ignored? No. The parties understood that their relationship was under and in terms of Scottish Water's framework. For example, the prices were generated in accordance with the framework rates. Significantly, the Judge noted that: "*at no point during the multiple emails between the parties over the course of the placing of the 60 orders which conveyed the quotations, purchase orders and order confirmations to and fro between them, is there a single reference to any intention by either party to change the basis upon which the orders were to be dealt from the Scottish Water framework to any other basis*".

This silence was striking. Certainly, neither party acted consistently with their own standard terms and conditions. On the basis of this, it was a reasonable inference that, in light of their shared understanding, their relationship was to be governed by Scottish Water's framework. Both parties simply ignored both the inclusion of their own standard terms and conditions and receipt of the other party's.

As a result the Judge concluded that "*considered objectively*", prior to any orders being placed with Electrosteel, the parties shared a common understanding that their relationship was to be governed under and in terms of the Scottish Water framework, including Scottish Water's Standard Terms. One of the primary purposes of the parties was to participate in Scottish Water's framework.

Accordingly, Scottish Water's Standard Terms (and Scottish law) applied to the parties' contracts.

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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