



# Dispatch

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

## **Bonds & guarantees - meaning of "on demand"** **Vossloh Aktiengesellschaft v Alpha Trains (UK) Ltd** [2010] EWHC 2443 (Ch)

Vossloh (VAG - the guarantor) is the parent company of the Vossloh Group - a group of rail infrastructure and technology companies. Its subsidiary, Vossloh Locomotives GmbH, manufactured and supplied trains to a number of companies owned by Alpha. From September 2000, both company groups entered into a series of agreements including a master purchasing agreement (MPA) under which companies in the Vossloh Group sold trains to various companies in the Alpha group.

On 15 September 2009, the guarantor provided a guarantee of Vossloh Locomotives' obligations under the MPA, to Alpha and some of its group companies. This guarantee replaced two earlier guarantees made to various companies affiliated to Alpha. Disputes then arose in relation to alleged defective engines and gearboxes and at the end of 29 January 2010, Alpha sent a pre-action protocol letter of claim and a letter of demand to the guarantor under the guarantee claiming losses of over 17 million euro. Alpha accepted that it had not yet spent any money on repair, or incurred a liability to pay anything approaching the amount demanded. It also admitted that if it was paid the €17 million and then spent it, it could not afford to pay the money back to VAG. There were a number of potential defences to the claim made under the MPA.

The issue for the Judge was the basis on which, if at all, Vossloh could be required to make payment to Alpha - the Beneficiary under the Guarantee. As Sir William Blackburne noted, parties are free to agree whatever terms they choose. There is therefore "a spectrum" of contractual possibilities ranging from the contract of guarantee, proper where the liability of the guarantor is exclusively secondary and will be discharged if, for example, there is any material variation to the underlying contract between principal and creditor, to the performance or demand bond where liability in the giver of the bond may be triggered by mere demand and without proof of default by the principal - or as the Judge said where it may be apparent that the principal is not in default.

Alpha argued that this was an on-demand bond and that their certificate as to what was payable was conclusive. Vossloh argued that the guarantee was only triggered on proof of a breach of contract by one of the guaranteed parties. The relevant clauses in the guarantee included the stipulation that if any of the guaranteed parties did not pay any "secured obligation" as and when the same was expressed to be due, then Vossloh would forthwith "on demand" pay any such sums which had not been paid at the time such demand is made. There were other references to "on demand."

As Vossloh was not a bank, this raised a strong presumption that the payment obligations undertaken by it did not constitute a demand bond. However, Alpha stressed the fact that Vossloh's contractual promises were entered into as a "principal debtor and not merely as surety, as a separate, continuing and primary obligation". This meant that all the obligations undertaken by Vossloh were primary not secondary obligations. Further, Alpha said that, by clause 6.4, Vossloh was only able to raise defences after it had honoured its payment obligations under clause 2.1.

The Judge disagreed. The guarantee did not give rise to any liability to pay against a mere assertion of breach or failure to pay money. The guarantee assumed that there had been default by the principal in performing the contract or in making payment of a sum that was due. The court agreed with Vossloh and held that the guarantee was not a performance bond. The presumption that a contract is not an on demand bond unless it is issued by a bank was not rebutted here. The wording of the key clause, 2.1, was such that Alpha had, first of all, to establish liability in respect of the sums claimed, before making a call on the bond and the guarantor. The mere use of the words "on demand" were not sufficient in themselves to establish that the guarantee was in fact "on demand".

## **Duty of the quantity surveyor** **Dhamija & Anr v Sunningdale Joineries Ltd & Others** [2010] EWHC 2396 (TCC)

During 2003, the Dhamijas engaged a contractor and architect for the design and construction of their new home. The architect recommended that a quantity surveyor be appointed "to ensure some safeguard in the administration of the Contract". The Dhamijas agreed and the architect made contact with McBains Cooper Consulting Ltd. There was, however, no record of any substantive terms being agreed either in writing or verbally between McBains and the Dhamijas.

Following completion of the building works, the Dhamijas alleged a number of defects in the design and construction of their home, and in 2009 they issued proceedings against the contractor, architect and McBains. As against McBains, the Dhamijas alleged that the works had been over valued and that McBains had acted in breach of its duty to only value work that had been properly executed by the contractor and was not obviously defective. McBains issued an application to strike out the second part of the Dhamijas claim saying that they did not as a matter of law owe the duty alleged. The QS's duty was to include in the interim certificates an amount based on the works properly executed, as advised by the architect.



The case came before Mr Justice Coulson. He agreed that there was an implied term that the quantity surveyor would act with reasonable skill and care when valuing the works properly executed by the contractor for the purposes of issuing interim certificates. This term would ordinarily (and unsurprisingly) be required in order to give it business efficacy to the agreement made between the Dhamijas and McBains.

However, he disagreed that there was an implied term that the quantity surveyor was under a duty to only value work that had been properly executed by the contractor and was not obviously defective. He held that there was no basis in fact or in law to justify this positive duty. It was the architect who had responsibility for the quality of the works and it was the architect who should have notified the quantity surveyor of any defects that may have affected the valuation of an interim certificate.

As a consequence of this, the Judge also disagreed with the suggestion that if the quantity surveyor noticed defective work when visiting site, then he was under a duty to inform the architect of this in case the architect had missed it. There was no express agreement. Indeed the Judge felt that the Dhamijas were seeking to turn the usual position on its head, to require the quantity surveyors to tell the architects about defective works (rather than the other way round), and to make the quantity surveyors liable for quality (at least to the extent that the defects were 'obviously defective') as well as quantities.

Yet despite this, on balance, the Judge felt that the claim should not be struck out. Disclosure had not yet taken place and detailed evidence had not been exchanged. Therefore it was just possible - and the Judge did note that the Dhamijas ran the risk of an indemnity costs order against them if they lost - that the Dhamijas might be able to demonstrate that McBains had fallen below the standard to be expected of an ordinarily competent quantity surveyor. That question in itself could be determined as a preliminary issue, following limited disclosure and the exchange of short statement and reports. But it was too early to consider the question at the present stage of the litigation.

## Procurement

### Azam & Co Solicitors v Legal Services Commission

[2010] EWCA 1194

This was an appeal where Azam claimed that its failure to submit a tender before the deadline was itself caused by a failure of the LSC expressly to identify that deadline by any direct communication to the firm, and that this constituted a breach of the LSC's duties of equal treatment and transparency, a breach of its enforceable Community obligation to give effect to a legitimate expectation of the firm that it would be directly notified and, more generally, breach of the LSC's enforceable Community obligation to comply with the principles of good administration. Second Azam alleged that the LSC's refusal of an extension of time constituted a breach of the LSC's enforceable Community obligation to comply with the principle of proportionality, having regard to the serious commercial damage likely to be caused to the firm by a refusal, and the absence of any prejudice which would have been occasioned by the grant of an extension.

In short what Azam was really alleging was that the reason it missed the tender deadline was itself the result of the LSC's fault, rather than its own lack of reasonable care and diligence. What had happened was this. Azam became a supplier of publicly funded immigration services in July 2003. On 30 November 2009, LSC published on its website information by way of Invitations to Tender for Immigration contracts from 2010. The deadline was 28 January 2010. By letter dated 23 December 2009, the LSC sent a standard letter to all existing providers giving information about the tender process. This referred to the ITT which had been previously published and included a reference to the website. The letter did not include a reference to the tender deadline. Azam assumed it would receive a further letter giving express details about the deadline. No letter was sent, and Azam failed to submit a tender. At the beginning of February, one week late, when Azam found this out, it immediately applied for an extension of time to submit its tender. That was refused by LSC who referred to its obligation to treat all economic operators equally. The CA agreed with the Judge at first instance who said this:

*"the immigration tender process had been published expressly on the basis that deadlines were there to be complied with, and that no extensions would be given. Secondly, the grant of an extension to the firm, occasioned by a failure to submit a tender on time which was by no means beyond its control, would run the grave risk of constituting unequal treatment of other tenderers. In particular, it would be likely to be regarded as unfair by tenderers who would have wished for longer time in which to perfect their tenders, but who nonetheless completed them on time and, in reliance on the warning that extensions would not be granted, sought no further time for themselves. Thirdly, it seems to me that the principles of transparency and good administration weigh very heavily in the balance against an applicant for an extension of time who is unable to point to reasons beyond his control by way of justification."*

The CA noted that the decision not to permit an extension was not, in the circumstances, disproportionate. The LSC had to take care that individual tenderers, or prospective tenderers, were not being given favourable treatment, and here the suggestion could be that it was an existing provider who has the advantage of earlier dealings who was given that advantage. A deadline is a necessary part of a tendering process and here the deadline was plainly stated in readily accessible documents.

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