Fenwick Elliott
The construction law specialists

Issue 144 June 2012

Dispatch

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

Adjudication: set off against an adjudicator's decision

R&C Electrical Engineers Ltd v Shaylor Construction Ltd
[2012] EWHC 1254 (TCC)

R&C was engaged as sub-sub-contractor by Shaylor to undertake M&E works in respect of a LIFT (NHS Local Investment Finance Trust) project in Walsall (the "Subcontract"). In November 2011, a dispute arose between the parties concerning R&C's financial entitlements under the Subcontract. On 15 November 2011 R&C referred the dispute to adjudication. During the adjudication R&C claimed time was at large and sought damages for delay together with determination of its final account. Shaylor's position was that R&C had failed to complete by the date for completion and sought to recover damages by way of a counterclaim for delay.

The Adjudicator determined that time was at large and that the 39 weeks taken by R&C to complete the works was not a reasonable time, as R&C were responsible for at least 4 weeks of delay. Shaylor's cross claim for delay was based on the provisions in the Subcontract for delay, rather than as if time was at large. Therefore the Adjudicator found that Shaylor had failed to demonstrate any identifiable loss attributable to the 4 week delay for which R&C was responsible. The final Subcontract sum was £1,495,034, leaving a final payment due to R&C of £196,963 (plus VAT).

In essence the Adjudicator found that R&C had an entitlement to £196,963 and that this sum, although not payable immediately, was payable in accordance with clause 21.8(b) of the Subcontract, clause 21.8 being a "pay when certified" provision. By way of a Part 8 application, R&C sought a declaration for immediate payment of the sum found due by the Adjudicator despite the fact that the Adjudicator had directed that it was not to be paid forthwith. R&C contended that the contractual machinery relating to certification in the Main Contract had broken down so that it was no longer possible for the Contractor, Ashley House, to issue a final certificate. Under the terms of the Main Contract the issue of a final certificate was a pre-condition of R&C's right to payment. However, R&C submitted that since the pre-condition was a nullity it was entitled to immediate payment of the sum found due by the Adjudicator.

A number of issues arose before Mr Justice Edwards-Stuart:

(i) Had the contractual machinery in relation to certification in the Main Contract broken down with the result that it was no longer possible to issue a final certificate?
(ii) If so, were R&C entitled to immediate payment of the final certificate as determined by the adjudicator?
(iii) If the contractual machinery had not broken down, was R&C entitled to final payment without any deduction or set of?

The Judge held that in the absence of evidence regarding the position between Shaylor and the Contractor, it could not be inferred that the contractual machinery of the Main Contract had broken down. Therefore the question of whether R&C were entitled to immediate payment of the final contract sum as determined by the Adjudicator did not arise.

Further, the Judge found that in the circumstances there was nothing to prevent Shaylor setting off against the sum found due by the Adjudicator any sum that it would have been entitled to set off under clause 21.8 of the Subcontract. Here, the Judge referred to the case of *Shimizu Europe Ltd v LBJ Fabrications Ltd* which he stated applied a similar reasoning to the current proceedings. The Adjudicator had not determined whether Shaylor had a valid claim for delay in a time at large situation as Shaylor's delay claim was not advanced on this basis. Therefore Shaylor was not seeking to exercise a right of set off or counterclaim in the enforcement proceedings. Rather it was seeking to exercise its contractual right that in the Judge's view had been expressly preserved by the Adjudicator's decision itself. This case reaffirms the principle that in limited circumstances a party may set off against an adjudicator's decision, i.e. as the final date for payment had not arrived Shaylor would be in a position to issue a withholding notice against those sums. The Judge did however make clear that this did not affect the adjudicator's decision which was binding on the parties until the dispute was finally resolved by litigation or arbitration.

Case Update: mediation

Sulamerica CIA Nacionel de Seguros SA & Ors v Enesa Engenharia SA & Ors
[2012] EWCA civ 638

We reported on this case in Issue 140. Mr Justice Cooke had had to consider whether the right to arbitrate only arose if the requirements to mediate in condition 11, which stated that *"the parties undertake that, prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation…"* had been complied with. He held that there was no binding obligation to mediate. The CA agreed even though it had little doubt that the parties intended condition 11 to be enforceable and thought they had achieved that objective. Condition 11 did not set out any defined mediation process, nor did it refer to the procedure of a specific mediation provider. It merely contained an undertaking to seek to have the dispute resolved amicably by mediation. Therefore the most that might be said was that it imposed on any party who was contemplating arbitration an obligation to invite the other to join in an ad hoc mediation, but the content of even such a limited obligation was so uncertain as to render it impossible of enforcement in the absence of some defined mediation process.

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International Arbitration: choice of law clauses

Sulamerica CIA Nacionel de Seguros SA & Ors v Enesa Engenharia SA & Ors

[2012] EWCA civ 638

This case was an appeal against the order of Cooke J continuing an anti-suit injunction restraining the appellants, Enesa from pursuing proceedings against the respondents, Sulamerica, in the Brazilian courts. The insured, Enesa, entered into two all risk insurance policies with the insurer, Sulamerica, in connection with the construction of a hydroelectric generating plant in Brazil. The policies contained a London arbitration clause, an express choice of Brazilian law as the law governing the contract and an exclusive jurisdiction clause in favour of the Brazilian courts.

On 29 November 2011, Sulamerica gave Enesa notice of arbitration. In response Enesa commenced proceedings in Brazil in order to establish that Sulamerica was not entitled to refer the dispute to arbitration and obtained an injunction from the court in Sao Paulo restraining the insurer from resorting to arbitration in order to pursue a claim for a declaration that they were not liable under the policy. Subsequently, Sulamerica made an application to the Commercial Court successfully seeking an injunction restraining Enesa from pursuing the proceedings in Brazil.

The issue before the CA therefore concerned the choice of proper law of the arbitration contract. Following a review of authorities on the subject (which the Court of Appeal commented were not entirely consistent), LJ Moore-Bick established that two propositions provided the starting point for any enquiry into the proper law of an arbitration agreement.

Firstly, even if the agreement formed part of a substantive contract (as was commonly the case), its proper law might not be the same as that of the substantive contract. Secondly, the proper law was to be determined by undertaking a three-stage enquiry into (i) express choice, (ii) implied choice, and (iii) closest and most real connection. As a matter of principle, those three stages ought to be embarked on separately and in that order, since any choice made by the parties ought to be respected, but in practice stage (ii) often merged into stage (iii), because identification of the system of law with which the agreement had its closest and most real connection was likely to be an important factor in deciding whether the parties had made an implied choice of proper law.

Deciding that the implied choice was English law, LJ Moore-Bick took account of the fact that it was Enesa's case that under Brazilian law, the arbitration agreement would only be enforceable with its consent. If correct, this would significantly undermine the arbitration agreement. Furthermore, there was nothing to indicate that the parties intended to enter into a one-sided arrangement of that kind. The possible existence of a rule of Brazilian law that would undermine the referral to arbitration of disputes suggested that the parties did not intend the arbitration agreement to be governed by that law. The choice of London as the seat assumed acceptance that the arbitration agreement would be conducted under the Arbitration Act 1996. Therefore, the supervisory jurisdiction was held to have a closer connection to the arbitration agreement in this case than the law of the insurance policy whose purpose is unrelated to that of dispute resolution.

Costs budgets

Henry v News Group Newspapers Ltd

[2012] EWHC 90218 (Costs)

This case relates to a defamation claim where it was agreed that the claimant was entitled to recover her costs on the standard basis. It was therefore subject to the Defamation Proceedings Costs Management Scheme. Both parties exceeded the budgets approved under that scheme. The question for Senior Costs Judge Hurst was whether or not there was good reason for the court to depart from the court approved costs budget. In the case of disclosure and witness statements, the approved budget had been exceeded by significant amounts. It was common ground, in accordance with paragraph 5.6 of the Practice Direction, that the court would not depart from the approved budget unless satisfied that there was "good reason" to do so, a phrase that was not defined.

It was Henry's case that NGN had maintained a robust defence up to trial. NGN re-amended its defence on more than one occasion and served ten additional lists of documents. Henry submitted that the tactics so adopted gave rise to extra work to the extent which would make it fair and proper to find good reason to depart from the costs budget. NGN noted that those representing Henry had failed to comply with the terms of the Practice Direction, so that neither the Court nor NGN were aware of the significant increase in costs such that the budget was being exceeded. NGN did advise of the costs increase on their part. Therefore the fact that both sides exceeded their budgets did not assist Henry.

The Judge noted that the provisions of the Practice Direction are in mandatory terms. Each party must prepare a costs budget or revised costs budget (paragraph 3.1), each party must update its budget (3.4), and solicitors must liaise monthly to check that the budget is not being or is likely to be exceeded (paragraph 5.5). The objective is to manage the litigation so that the costs of each party are proportionate to the value of the claim and reputational issues at stake, and so that the parties are on an equal footing (paragraph 1.3). Accordingly the Judge concluded, reluctantly, that if one party is unaware that the other party's budget has been significantly exceeded, they are no longer on an equal footing, and the purpose of the cost management scheme is lost. There was therefore no good reason to depart from the budget. Whilst this was a case heard under a special scheme for defamation hearings, it is a clear hint as to where costs management may well go in the future.

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.

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