



## LEGAL BRIEFING

### *The Secretary of State for Defence v Turner Estate Solutions Ltd*

[2014] EWHC 244 (TCC), Mr Justice Akenhead

#### *The Facts*

Under a Contract dated 31 March 2003, the Secretary of State for Defence ('the MOD') engaged Turner Estate Solutions Limited ('Turner') to carry out the design and construction of a large regeneration project within the UK. The Contract provided for a Maximum Price Target Cost ('MPTC') and for disputes to be decided by a Dispute Review Board ('DRB') and then finally settled by arbitration with the DRB forming the Tribunal. Paragraph 5.2 of the DRB procedure provided that the Tribunal would have power to decide all procedural and evidential matters.

Turner commenced adjudication in April 2009 contending that the MPTC did not act as a cap on interim payments. The Adjudicator agreed and awarded Turner a substantial sum.

During June 2009, the MOD initiated the DRB procedure challenging the Adjudicator's Decision. The MOD sought recovery of over-payments to Turner, alternatively for repayment of all costs not properly incurred under valid Change Proposals ('CPs'). During February 2010 Turner notified the DRB of an alternative claim that the MPTC should be increased to reflect the value of the 480 CPs applied for by Turner during the course of the works. This alternative claim was not specifically pleaded by Turner in the arbitration that commenced during 2010.

During an arbitration hearing in January 2012, the Tribunal asked the parties whether it should deal with the CPs in a Partial Award. Turner's reserved position was that the CPs only needed to be looked at if its primary claim – that the MPTC did not act as a cap on interim payments – failed. However, on 23 January 2012 the parties' Counsel agreed that a partial award could be made and that the CPs ought to be dealt with at a later stage.

Under a First Part Award dated 31 May 2012, the Tribunal found that in principle Turner could recover more than the MPTC in interim payments.

Turner suggested that in the light of the First Part Award, there was no need for the Tribunal to consider its alternative claim. The MOD disagreed, contending that on 23 January 2012 the parties had given the Tribunal *ad hoc* jurisdiction to determine the question of liability for the CPs, alternatively that the 23 January 2012 agreement obliged the Tribunal to determine liability for the CPs.

In a Second Part Award dated 21 July 2013, the Tribunal stated that if the CPs were not required to resolve the issues in dispute as set out in the parties' pleadings, then it should consider very carefully whether the procedure agreed on 23 January 2012 should be followed. The Tribunal concluded that it should not proceed to determine liability for the CPs until it had made a decision on the relevancy of the CPs to Turner's entitlement to interim payment.

On 23 August 2013 the MOD issued an application in the TCC under s 68 of the Arbitration Act 1996 ('the Act') contending that there had been a serious irregularity by which it had lost the unlimited right to have liability for the CPs determined. The MOD argued that contrary to s 68(2)(c), the Tribunal had failed to conduct the proceedings in accordance with the procedure agreed by the parties.

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### ***The Issues***

- (i) Did the approach taken by the Tribunal in the Second Part Award amount to a serious irregularity under s 68 of the Act?
- (ii) What was the effect of the agreement made by the parties' Counsel on 23 January 2012?

### ***The Decision***

In the Second Part Award the Tribunal had decided that it was not bound by the 23 January 2012 agreement because there had been a change in circumstances and because the agreement did not override the Tribunal's discretion to decide matters of procedure. The Tribunal's determination of the effect of the 23 January agreement was thus within the scope of the issues to be considered in the Second Part Award and as there could be no appeal on fact and there had been no appeal on law, there had been no serious irregularity.

The parties' agreement that the Tribunal "*ought to*" deal with the CPs was not equivalent to a binding procedural agreement. Furthermore, where the parties had agreed in the Contract that the Tribunal would have the power to decide all evidential and procedural matters, the Tribunal retained a discretion to determine Turner's alternative case and remained entitled to exercise that discretion when finding that it was no longer appropriate to determine the CPs without first establishing their relevance to the interim payments.

### ***Commentary***

In long running arbitrations, Arbitrators will often explore the possibilities for procedural consensus in order to save time and costs but any agreement reached may not always be set out in a formal award. In this case, the 23 January 2012 agreement was verbal and recorded only on the hearing transcript. Thus, in the Second Part Award the Tribunal found it necessary to consider what had been said by Counsel on 23 January 2012 and the Judge was also required to scrutinise these exchanges and the Tribunal's interpretation of same.

These court proceedings will have comprised an expensive and time consuming distraction to what was already a long running and costly arbitration. Albeit with the benefit of hindsight, all this could have been avoided if the agreement made on 23 January 2012 had been recorded in clear terms.

Sana Mahmud  
April 2014

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