



## LEGAL BRIEFING

### *Peterborough City Council v Enterprise Managed Services Ltd*

[2014] EWCA 3193 (TCC), Mr Justice Edwards-Stuart

#### *The Facts*

By a contract dated 7 July 2011 ('the Contract') Peterborough City Council ('the Council') engaged Enterprise Managed Services Ltd ('EMS') to design and install a 1.5 MW solar energy plant. The Contract was made on the FIDIC General Conditions of Contract for EPC/Turnkey Projects (the Silver Book) and provided that if the plant did not generate 55 kW of power by 31 July 2011 then EMS would be liable to pay liquidated damages of £1.3m to the Council ('the Price Reduction').

Sub-clauses 20.2 – 20.7 in the Contract set out the procedure for dispute resolution by a Dispute Adjudication Board ('DAB') to be appointed *ad hoc* after any dispute had arisen. Sub-clause 20.8 provided that if at the time a dispute arose there was no DAB in place "... *whether by reason of the expiry of the DAB's appointment or otherwise*" then either party could go to court.

Following completion, the Council alleged that the plant had failed to achieve the required power output and claimed the Price Reduction. On 6 January 2014, the Council issued a letter of claim under the Pre-action Protocol. EMS responded that in accordance with the Contract terms the dispute ought to be referred to a DAB.

During July 2014, EMS gave notice of its intention to refer the dispute to a DAB and since no DAB had by then been established, on 26 August 2014, EMS applied for the appointment of a DAB adjudicator. The Council issued court proceedings on 11 August 2014 and on 27 August EMS issued an application for an order to stay these proceedings.

#### *The Issues*

There were two main issues on EMS's application:

- (i) Did the Contract require a dispute to be referred to adjudication by a DAB as a precondition to any court action?
- (ii) If so, should the court exercise its discretion and order that the Council's proceedings be stayed?

The Council contended that clause 20.8 provided an opt-out from DAB adjudication but that if reference of a dispute to a DAB was mandatory, the court proceedings should be allowed to continue on the grounds:

- (i) that what was a complex dispute was unsuitable for a "rough and ready" DAB adjudication procedure; and,
- (ii) that any DAB adjudication would be an expensive waste of time as it was inevitable that the losing party would go to court.

#### *The Decision*

On the first issue the Judge decided that upon a proper interpretation of the Contract, sub-clause 20.8 would only apply to give the Council a unilateral right to opt out of DAB adjudication if the parties had agreed to appoint a standing DAB at the outset. Accordingly, given that sub-clause 20.2 provided for *ad hoc* DAB appointments, the Judge accepted EMS' argument that the Contract required the determination of the dispute through DAB adjudication prior to any litigation.

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As to the second issue, whilst the Judge acknowledged that DAB adjudication might well be “rough and ready” he observed that the parties had agreed to incorporate the FIDIC DAB machinery into their contract when it would have been foreseeable that this machinery could be called upon to embrace complex disputes.

In circumstances that the parties had not yet invested time or money in the DAB adjudication, the Judge was sympathetic to the Council’s case that the court proceedings should not be supplanted by adjudication but equally, the legal authorities clearly showed a presumption in favour of leaving parties to resolve their disputes in the manner they had agreed to in their contract.

Accordingly, the Judge ordered that the court proceedings were to be stayed.

***Comment***

Any confusion that the wording of sub-clause 20.8 gave rise to was resolved by the Judge’s approach in distinguishing between contracts that provided for a permanent DAB to be established at the outset and contracts that, as in this case, allowed for *ad hoc* appointments. Given that on the Council’s submission, sub-clauses 20.2 – 20.7 would have been rendered meaningless this was a rational and commercially sensible approach to adopt.

Albeit there were practical reasons for sidestepping the DAB procedure and allowing the court proceedings to continue, the presumption in favour of leaving the parties to resolve their dispute in the manner provided for in the Contract was compelling. The Council had not done enough to rebut this presumption and in these circumstances, notwithstanding the Judge’s clear sympathy for the Council’s position, a stay was ordered.

James Mullen  
October 2014

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