FENWICK ELLIOTT

The construction & energy law specialists

Legal Briefing

Ted Lowery considers an application under section 69 of the Arbitration Act 1996 concerning notices under the NEC3 form

Ravestein B.V. v Trant Engineering Ltd [2023] EWHC 11 (TCC)

Before Her Honour Judge Kelly sitting as a Judge of the High Court

In the Technology and Construction Court

Judgment delivered 9 January 2023

The facts

Under a subcontract, dated 14 September 2010, based on an amended version of the NEC3 form incorporating Option A and dispute resolution Option W2, Trant engaged Ravestein to carry out certain engineering works. Clauses W2.3(11) and W2.4(2) provided that an adjudicator's decision would be final and binding unless within four weeks of the decision, one of the parties notified the other that it was dissatisfied with a matter decided by the adjudicator and that it intended to refer that matter to the tribunal.

During 2021, Trant commenced an adjudication claiming damages for defective works. In a decision dated 11 April 2021, the adjudicator (appointed by the Institution of Civil Engineers) ordered Ravestein to pay Trant some £454,083.09 plus VAT. On 12 April 2021, Ravestein issued two e-mails addressed to the adjudicator and copied to Trant. In the first e-mail, Ravestein stated that they did not accept the adjudicator's jurisdiction nor recognise the ruling. In the second e-mail, Ravestein asserted that the adjudicator was not entitled to make any rulings and stated that, if he did not withdraw the ruling, their solicitor would file a request to the ICE to reverse the ruling.

Ravestein did not make any payment but commenced arbitration proceedings on 27 October 2021 relying upon their second e-mail of 12 April 2021 as their notice of dissatisfaction.

The parties agreed that the arbitrator should first decide whether or not a valid notice of dissatisfaction had been served. In an award dated 22 March 2022, the arbitrator determined that Ravestein's second e-mail did not comply with clauses W2.3(11) and W2.4(2) on the grounds that, on a reasonable reading, the e-mail concerned only the jurisdiction of the adjudicator and did not otherwise give notice of the matter within the decision that was disputed nor state that Ravestein intended to refer this matter to arbitration. Ravestein issued a court application for permission to appeal the arbitrator's award pursuant to section 69 of the 1996 Arbitration Act.

The issue

Should Ravestein be granted permission to appeal the arbitrator's award?

The decision

The judge considered Ravestein's application by reference to the four criteria set out in section 69(3) (a) – (d). She found that the first criterion was satisfied insofar as determination of the question of the validity of the notice of dissatisfaction would substantially affect the rights of one or more of parties: if permission to appeal was not granted, then Ravestein would de denied an opportunity to dispute the adjudicator's decision, whereas if permission was granted then Trant would lose the benefit of the adjudicator's order for payment.

The second criterion was also satisfied where the question of the validity of the second e-mail as a notice of dissatisfaction had been the focus of the arbitrator's award.

As to the first limb of the third criterion, the judge decided that the arbitrator's conclusion that Ravestein's second e-mail did not comply with clauses W2.3(11) and W2.4(2) was not obviously wrong nor open to any serious doubt. The award confirmed that the arbitrator had carefully considered the parties' evidence and submissions, digested relevant case law and analysed the wording of the second e-mail leading to the conclusion that, on a reasonable reading, any dissatisfaction expressed in the e-mail concerned jurisdiction and not the substantive correctness of the adjudicator's decision.

The judge found that the second limb of the third criterion was not met: whilst the interpretation of standard form clauses could be of general public importance, Ravestein's application focussed on the construction of a purported notice served pursuant to a standard form clause.

Finally on the fourth criterion the judge considered that, in all the circumstances, it was not just and proper for the court to determine a question that the parties had agreed to refer to arbitration: it was relevant that Ravestein had consistently failed to pay the sum awarded by the adjudicator, contrary to the "pay now, argue later" objective of adjudication under the HGCRA.

Commentary

In addition to reflecting the general position that section 69 sets a high bar for applications to appeal arbitration awards, this judgment also considers the requirements for a valid notice under the NEC3 form.

The judge confirmed the rule that a notice must be construed objectively by referencing how it would have been understood by a reasonable recipient: here, the somewhat incongruous wording of Ravestein's second e-mail of 12 April 2021 could not be reasonably construed as satisfying the requirements of clauses W2.3(11) and W2.4(2) in the NEC3 form.

Ted Lowery
February 2023