Fenwick Elliott
The construction law specialists

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Dispatch

Dispatch highlights a selection of the important legal developments during the last month.

Bonds and guarantees

Kookmin Bank v Rainy Sky SA & Others
[2010] EWCA Civ 582

The 7th claimant sought summary judgment against a defendant bank for a total of US$46.6million plus interest under the terms of six materially identical on demand advance payment bonds. These bonds secured certain obligations assumed by a Korean shipbuilder under six materially identical shipbuilding contracts. Each shipbuilding contract entitled the buyer to require the ship-builder to refund the full amount of all advance payments made in the event of the shipbuilder's insolvency. The issue before the Court was whether this obligation was covered by the bonds. After certain instalments due under the contracts had been paid, the shipbuilder experienced financial difficulties and entered into or became subject to a "debt work out procedure." The claimants gave written notice that this procedure triggered an article in the contract which required immediate refunding of the instalments plus interest. The shipbuilder failed to do this and so a demand was made on the bonds. The key clauses of the Bond were these:

"(2) Pursuant to the terms of the Contract, you are entitled, upon your rejection of the Vessel in accordance with the terms of the Contract, your termination, cancellation or rescission of the Contract ...to repayment of the pre-delivery instalments of the Contract Price paid by you prior to such termination ... together with interest thereon ...

(3) In consideration of your agreement to make the pre-delivery instalments under the Contract ...we hereby, as primary obligor, irrevocably and unconditionally undertake to pay to you, your successors and assigns, on your first written demand, all such sums due to you under the Contract (or such sums which would have been due to you but for any irregularity, illegality, invalidity or unenforceability in whole or in part of the Contract)" .

At first instance the Judge held that the Bank's obligation to pay arose specifically as a consequence of the use of the words *"all such sums due under the Contract."* These words were clear and unqualified. He also noted that finding to the contrary would have what he termed the *"surprising and uncommercial result"* that the Buyers would not be able to call on the Bond on the happening of the event which would most typically require security - insolvency. Before the CA, the question to be resolved was did the words "*all such sums due to you under the Contract*" in the Bond refer back to "the pre-delivery instalments" at the beginning of paragraph (3), or to the repayments or payments referred to in paragraph (2)? There was no dispute about the principles of construction to be applied in order to answer this question. A court must first look at the words which the parties have used in the Bond itself. Whilst, the shipbuilding contract provided the context and cause for the bond, it was still a separate contract between different parties. This meant that if the language of the Bond led clearly to a conclusion that one or other of the constructions contended for is the correct one, the court must give effect to it, however surprising or unreasonable the result might be.

The circumstances in which the Court can confidently declare that a possible meaning of the words used is uncommercial must be defined with some care. The parties to a contract choose to define the limits of their obligations by the language they use. The purpose of the contract is to provide an objective record of what has been agreed so as to regulate the legal relationship between them. When a dispute arises as to the meaning and scope, the Court can only resolve it by construing the words used in a way which gives them the meaning which the document would convey to a reasonable person knowing all the background knowledge which would have been available to the parties in the situation they were in at the time of the contract. Here, the Court (as in most cases) was not party to the negotiations or to any other commercial and other pressures which the parties may have been subject to. Unless the most natural meaning of the words produces a result which is so extreme as to suggest that it was unintended, the Court has no alternative but to give effect it its terms.

This all meant that in construing the words "*all such sums due to you under the contract*", the word "such" could not be ignored. The draftsman intended the content of the phrase to be supplied by the sums to which it referred. The issue was therefore to identify what the word "such" referred to. It was clear that "sums" had to refer to the pre-delivery instalments paid under the shipbuilding contract, because the purpose of the Bond was to guarantee their repayment and nothing else. As it was, the obvious purpose of that paragraph was to give the buyer a clear statement of the shipbuilder's obligations under the contract covered by the guarantee. There was no reference to insolvency.

Whilst the Judge at first instance had referred to the uncommerciality of the Bank's construction of the Bond, Patten LJ thought that one could not speculate on the reasons for omitting repayments in the event of insolvency from the Bond. Whilst cover for such event was, objectively speaking, desirable, that is not sufficient in itself to justify a departure from what would otherwise be the natural and obvious construction of the Bond. Hence the words "*all such sums due to you under the contract*" were to be construed as limiting the extent of the guarantee provided by it and it was not open to the Court to construe the terms of the Bond more widely simply because no credible commercial reason had been advanced for its having a limited scope.

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Public procurement

Apcoa v The London Borough of Westminster
[2010] EWHC 943 (QB)

Apcoa sought an interim injunction to restrain Westminster from awarding any contract in respect of parking enforcement or street management services. Apcoa was one of the bidders for the award of contracts for the provision of on-street parking and other services (which had apparently an anticipated value of approximately £50m). Like the other bidders it committed very substantial resources and time to working its way through the prescribed stages. It said that Westminster acted unlawfully and in a way that was unfair in the course of its procurement process. In fact, towards the end of the process, on receipt of complaints, Westminster accepted that it had indeed behaved unlawfully and decided to start again. In particular its assessment had been made to criteria which were unpublished and unannounced.

However, Apcoa said that Westminster had now "compounded the unfairness" as it was now precluded from competing in the second process because Westminster had raised the qualifying bar in relation to the turnover requirements for prospective bidders to a level above that which Apcoa could achieve. Apcoa argued that:

"Having failed to provide a level playing field in the first place (thereby denying the Claimant of the contracts that it would have won had the Defendant conducted the process lawfully), the Defendant has now excluded the Claimant from the game."

Apcoa sought an interim order that Westminster should not award any contracts under its second and current procurement process. Under English law, the court will apply a two-stage test. Is there a serious issue to be tried and where does the balance of convenience lie between the parties. The second part often comes down to the question of whether or not damages would be an adequate remedy for the claiming party. In reality it appeared that Apcoa were seeking to compel Westminster to backtrack and to pick up the first procurement process at some later (unidentified) stage. In the interim, the practical result of this was that Westminster had to arrange a six-month extension of its existing contractual arrangements.

Apcoa sought the abandonment of the first procurement exercise and an order that Westminster should "amend its decisions in relation to the original procurement exercise so as to provide for assessment of the Claimant's tenders in accordance with the published criteria alone". The difficulty here was the question as to whether Westminster was entitled to abandon the first procurement process or to start the second. If that was right there was no relevant issue to be tried. In short Westminster said that the process had come to an end and was incapable of being reinstated.

Apcoa suggested that if the original published criteria had been properly applied, this would inexorably have led to it being awarded the contracts. Westminster disagreed. However, in the view of Mr Justice Eady if Westminster were entitled to abandon the first procurement process and to launch a second, then it became unnecessary to rehearse at any length what did and what should have happened during the course of the first process.

The Judge held that Westminster was expressly entitled to terminate the process. This was both a contractual and statutory right. It was provided for in the Invitation to Submit a Final Tender that Westminster expressly reserved the right to "*not award a Contract or any Contracts to the Bidder selected as Preferred Bidder or at all.*" Further as a matter of procurement law, Regulation 32(11) of the 2006 Regulations recognised that there was a right to abandon a procurement procedure. Examples of why such a step might be taken include where it has become apparent that a new procedure is likely to yield a better result and where there has been a mistake in carrying out the first procedure. As such, there was therefore no legal basis to overturn or quash Westminster's decision to terminate the first procurement process.

Further Westminster argued that Apcoa had failed to demonstrate that damages were an inadequate remedy - a further necessary hurdle any party seeking an injunction must overcome. The problem here was that Apcoa was deprived of a flagship contract and the reputational kudos that would have been attached. This was not something that could be reflected in an award of damages. Indeed, further the Judge thought it difficult to envisage a form of injunctive relief that could do any better. In contrast Westminster argued that in view of its procurement needs, which had become urgent, it would not be adequately protected by any cross-undertaking in damages. Nor would it protect other bidders, whose interests should not be forgotten simply because they are not parties to this particular claim.

Mr Justice Eady quoted with approval the words of Mr Justice Akenhead in the case of *European Dynamics SA v HM Treasury :*

"… One has to bear in mind that, if any procurement could be stopped by injunction because there was merely a serious issue to be tried about the procurement, without more, the public authorities would be invariably targeted by unsuccessful tenderers and public procurements would or could grind to a halt."

Here, in short, balance of convenience lay clearly in favour of not imposing further delays on Westminster or further obstruction to its procurement process in relation to its parking and street management services.

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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