Fenwick Elliott
The construction & energy law specialists

Issue 196 October 2016

Dispatch

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

Adjudication: follow-on adjudications and severance

Amey Wye Valley Ltd v The County of Herefordshire District Council
[2016] EWHC 2368 (TCC)

Amey entered into a contract, called a Service Delivery Agreement ("*SDA*"), for repair and maintenance works to the highways and roads in Herefordshire. Amey agreed to provide a range of services to Herefordshire District Council ("HDC"), broadly comprising highway maintenance and other construction and related works. The period for these services was to be ten years, ending on 31 August 2013. The SDA expressly incorporated Option A of the ECC (2nd edition 1995), together with Contract Data in Parts One and Two, as adjusted by the items listed in Schedule 5 ("the NEC Conditions").

During 2005, the parties fell into a dispute concerning how to calculate the price adjustment for inflation under the SDA. That dispute was resolved in a letter dated 21 July 2005. Part of that agreement related to the way in which the price increase mechanism was to apply over the life of the contract. This became known as "VOP3".

This case concerned two adjudications, and the relevant adjustment for inflation purposes of sums paid to one party by the other, for works to the highways and roads of Herefordshire over a ten-year period between 2003 and 2013. The first adjudication was conducted in 2013; the second in 2015.

Under the NEC form, if a party does not serve a notice of dissatisfaction within a set time period, the adjudication decision becomes final and binding. Neither Amey nor HDC challenged the first decision. The first adjudicator was asked to decide (amongst other things) what VOP3 actually meant; the second adjudication was concerned with putting money figures to the first decision.

The financial consequences of the second decision were that Amey was ordered to repay to HDC some £9.5 million, being the sum by which HDC were said to have overpaid Amey for works during the contract period.

It was accepted by the parties that the second adjudicator made an error in the spreadsheet he used to arrive at the final figure for repayment contained in his decision. However, there was no agreement about the effect of that error. Amey said it was £2.5 million, HDC £1.9 million. Mr Justice Fraser was clear that no criticism could be levelled at the second adjudicator. Adjudicators work under very considerable time pressure:

"Errors of fine detail are part of the process effectively accepted by Parliament as a consequence of the process of adjudication. The 'right' answer is secondary to the parties having a rapid answer."

That was especially the case here, where both parties made admitted errors themselves in the material and calculations that they submitted. The Judge also noted that the second adjudicator correctly found that the findings in the first adjudication were binding on HDC and Amey and that he was required to consider the parties' respective calculations and positions in relation to the issues between them in the context that those findings were binding.

Amey's position was that the second adjudicator did not follow those findings and so acted without jurisdiction. In doing so, Amey to some degree raised the "same dispute" issue, namely the principle that an adjudicator's decision will not be enforceable to the extent that they purport to decide again that which has already been decided. That was not what had happened here.

Further, the Judge made it clear that the court would not embark upon a detailed analysis of how any adjudicator has made detailed calculations or findings of fact leading to their ultimate decision. Such an exercise is not the function of the court on enforcement proceedings. Here, the way in which the adjudicator performed his calculations was not immediately determinative of whether he had jurisdiction to perform those calculations. Providing that the adjudicator was resolving the dispute referred to him, and not re-deciding something that was not before him, then he had jurisdiction to determine that dispute, whether he made mistakes in doing so or otherwise.

The first adjudicator decided to what extent, and how, VOP3 was to be considered (including whether it was to be binding); the second adjudicator decided the financial consequences of that. His decision was enforceable.. In coming to a decision, it is necessary for the court to consider the terms, scope and extent of the dispute previously referred, and the terms, scope and extent of the earlier decision, not the accuracy of an adjudicator's arithmetic.

As to severance, Amey said that the decision should not be enforced in the full amount because part of the amount of repayment calculated involved an error in one part of the spreadsheet. Mr Justice Fraser said that such an approach would be contrary to the law regarding enforcement of decisions by adjudicators. It would amount to a correction of an error of fact on the face of the decision to arrive at a different outcome. A decision on a single dispute is either valid and enforceable, or invalid and unenforceable. This was a single dispute, namely what was the financial effect of the inflation adjustment necessary as a result of VOP3. The error made in one part of the calculation of that total cannot be severed. This would, in the Judge's view, amount to a correction of a single mistake of fact. The Judge concluded:

"An error in the arithmetic does not render the decision unenforceable."

CDM Regulations and implied terms

Acotec UK Ltd v McLaughlin & Harvey Ltd

[2016] CSOH 134

This was a Scottish case where Acotec raised an action against McLaughlin & Harvey ("*M&H*"), seeking payment of the balance of hire charges and the cost of repairs to a cofferdam. Acotec was a specialist contractor in marine works which had leased a cofferdam to M&H to carry out construction work at Hatson Pier, near Kirwall, for Orkney Islands Council. When M&H first used the cofferdam, after its assembly and testing, the seal failed and it filled with water. As a result of problems with the cofferdam, the hire period became extended. M&H counterclaimed against Acotec, seeking recovery of overpaid hire charges. M&H also sought damages in respect of loss and damage said to have arisen through Acotec's breaches of its obligations under the hire contract.

Despite Acotec agreeing to provide temporary works design calculations and a temporary works design certificate to show that the cofferdam would meet all the necessary health and safety requirements, this information or its equivalent was not provided to M&H prior to the commencement of the cofferdam hire. Lord Doherty held that there was an implied term that design information was to be provided by Acotec to M&H to comply with its obligations under the Construction (Design and Management) Regulations 2007 (SI 2007/320). This information had to be provided a sufficient period in advance of the commencement of the project to enable M&H to comply with its obligations under the Regulations. The Judge went further and outlined that:

"Without the information the defender's use of the cofferdam would be illegal. I am satisfied that such a term was necessary in order to give the contract business efficacy. I am also satisfied that reasonable hypothetical contractors in the position of the parties at the time of contracting would have regarded it as being so obvious that it went without saying."

Alongside the 2007 Regulations, M&H had also referred to section 9 of BS 5975:2008+A1:2011, "*Code of practice for temporary works procedures and the permissible stress design of falsework*", which also referred to the provision of design information. The Court acknowledged that the information needed to comply with the 2007 Regulations was the same, or substantially the same, as the information which M&H needed in order to comply with the guidance in section 9. However, the requirement under the British Standard was non-mandatory and no similar term could be implied.

M&H had, however, established breach of contract on the part of Acotec and was entitled to damages to recover overpayment of some of the hire charges. M&H had argued that Acotec had been required to supply a fully operational cofferdam in "*all conditions*". The Court disagreed. Acotec did not undertake that it could be used in all weather conditions. Given what was said to be the unusual nature of the proposed term, the Court considered that it was the type of clause that the parties would have been careful to specify in writing. Further, when calculating the total hire charge to which Acotec was entitled, even though it had spelt out details of the damages due for breach of contract, M&H had not treated Acotec as being in breach on days when the cofferdam could not be operated due to bad weather.

The emergency arbitrator

Gerald Metals S.A. v Timis & Ors

2016 EWHC 2327 (Ch)

Section 44 of the 1996 Arbitration Act gives the court powers to make orders in support of arbitral proceedings including the granting of an interim injunction. However, subsection 3 provides that the court can act only if or to the extent that the arbitral tribunal has no power or is unable for the time being to act effectively.

Here Gerald Metals ("*GM*") had applied to the LCIA for the appointment of an emergency arbitrator, with a view to seeking emergency relief, including an order to prevent the disposal of trust assets. The response to that application included the giving of certain undertakings. After these had been given, the LCIA rejected GM's application. GM duly applied to the court under section 44.

Under Article 9 of the LCIA rules, in a case of exceptional urgency, any party may apply to the LCIA court for the expedited formation of an arbitral tribunal or, in the case of emergency, any party may apply to the LCIA court for the immediate appointment of a temporary sole arbitrator to conduct emergency proceedings pending that formation. GM submitted that there was a gap in the LCIA rules in respect of cases which are not of such exceptional urgency as to justify the expedited formation of the tribunal but which nevertheless are cases of urgency within the meaning of section 44(3) of the Arbitration Act.

Mr Justice Leggett considered that it would be "*uncommercial and unreasonable*" to interpret the LCIA rules as creating such a gap. The obvious purpose of Article 9 was to reduce the need to seek the help of the court in cases of urgency by enabling an arbitral tribunal to act quickly in an appropriate case. In other words, the test of exceptional urgency must be whether effective relief could not otherwise be granted within the relevant timescale, namely the time which it would otherwise take to form an arbitral tribunal.

The Judge also noted that when assessing the urgency of the matter the LCIA must have had in mind the undertakings given in response to GM's application. Thus, the only inference that could be drawn from the refusal of GM's application was that the LCIA was not persuaded that the application was so urgent that it needed to be decided before the arbitral tribunal was set up.

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