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The construction & energy law specialists

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Dispatch

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

Adjudication: costs

WES Futures Ltd v Allen Wilson Construction Ltd
[2016] EWHC 2863 (TCC)

There were a series of disputes (including adjudication) between the parties. In February 2016, WES made a Part 36 offer, which included the statement that if:

"… this offer is accepted at a point which is more than 21 days from the date of this offer, you will be liable for all our client's legal costs incurred in this case".

As Mr Justice Coulson said, "out of the blue", on 4 November 2016, that offer was accepted. Both sides expressly agreed that as a result there was a binding compromise between the parties. However, there was a dispute as to whether or not the agreement included the cost of two adjudications in 2015 and 2016. The Judge noted that the approach to disputes under Part 36 was confirmed by the CA decision in *Dutton & Others v Minards & Others* [2015] EWCA (Civ) 984, where LJ Lewison said that:

"If an offer is expressed to be a part 36 offer it should be interpreted if possible to make it effective as what it purports to be, rather than ineffective".

The key to the dispute here was whether the wording of the Part 36 offer, which included the "costs of the proceedings", included not only the cost of the court proceedings but the costs of the adjudications as well.

Mr Coulson was very clear that it did not. As a starting point, the Judge did not think it would make any difference if the offer was not a Part 36 offer. The offer referred to "all [Futures'] legal costs incurred in this case" but that, in the view of the Judge, meant the imminent court proceedings. The offer letter made no reference to the costs of adjudication proceedings, either as costs incurred in the past or to be incurred in the future - something which the Judge considered to be "unsurprising" because the offer envisaged that there would be court proceedings instead.

The Judge also referred to two wider principles which supported this point of view. The first was that in "an ordinary case", a party seeking to recover a sum awarded by an adjudicator is not entitled to (and cannot seek) the legal costs it incurred in the adjudication itself. That is because, pursuant to the Housing Grants Act, as amended, costs incurred in adjudications are not recoverable:

"… if a successful party cannot recover its costs in the adjudication itself, it cannot recover them in enforcement proceedings either".

Second, adjudication is similar to mediation. The Judge referred to the case of *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* (*Dispatch* Issue 94), where it was held that the costs of a pre-action mediation could not subsequently be recovered as costs of the proceedings because the parties had agreed that they would each bear their own costs of that mediation. That was "effectively achieving", by an agreement to mediate what the 1996 Act requires for adjudication. The costs are the subject of a different regime and are not recoverable. Whilst the phrase "costs of proceedings" includes "recoverable pre-action costs" this will not normally include the costs of separate, stand-alone ADR proceedings. Here, the Judge included adjudication within the definition of ADR noting that similar principles should therefore apply to the costs of adjudication as they do in mediation: both parties bear their own costs. Accordingly, Futures were not entitled to recover from Wilson the costs of the adjudications

Costs and ADR

TUI UK Ltd v Tickell & Others
[2016] EWHC 2741

This was the hearing of an appeal about certain discrete costs issues arising out of claims made by some 205 Claimants who all fell sick on a cruise-liner holiday. One of the challenges made by the Defendant related to the fact that it was an ABTA bonded company. The Defendant claimed that some of the Claimants could have used the ABTA mediation process instead of the courts. The Claimants' response was that the Defendant had never invited the Claimants to do this. Further, the fact that the Defendant had denied liability throughout showed that mediation would have failed, and more costs would have been incurred. On top of this, the Claimants had offered to mediate in a letter, a letter to which there had been no response. Having reviewed a sample contract, Mrs Justice Laing DBE noted that the contract did not impose an obligation to use the ABTA scheme. It left it up to the passenger to decide whether to use the scheme or to litigate in court. The Judge concluded that:

"…if a Defendant wishes to rely, at the stage of a detailed assessment, on the availability of an industry-specific ADR scheme, which is referred to in the relevant contract, but it is not binding, and is not expressed to oust the jurisdiction of the courts, the Defendant must make that clear in its pre-action protocol response. The Defendant did not do so here. The Defendant did not admit liability. The claims were robustly contested. Moreover, the Defendant did not respond to the Claimants' offer of ADR. Had the Master concluded in this case that the Claimants should get no costs, or only recover the costs of using the ABTA scheme, such a conclusion, on these facts, would have been plainly wrong."

ADR: expert determination

Connect Plus (M25) Ltd v Highways England Co Ltd

[2016] EWHC 2614 (TCC)

Highways England Company ("HEC"), applied to strike out part of a claim challenging an expert's decision under a Private Finance Initiative contract. The contract was a design, build, finance and operate contract under which HEC, a government-owned company, had engaged Connect Plus ("CP") to provide various services over a 30 year period in respect of the M25 motorway around London. The contract was for some £6.2billion in total. In 2014, a dispute between the parties arose regarding the interpretation and application of a specific element of the compensation mechanism known as the "*critical incident adjustment*". The dispute resolution provisions of the contract provided for a tiered process whereby the dispute was passed to a Network Board for consideration at first instance. It was subsequently referred to an expert for expert determination pursuant to the dispute resolution provisions in the contract. The expert's determination was said to be binding on the parties unless and until it was "*revised, cancelled or varied*" by the court.

HEC said that a critical incident was an incident which was declared as such by a National Incident Liaison Officer (NILO) on behalf of HEC. Therefore, HEC had discretion to declare whether or not an incident was critical and this was only challengeable if HEC acted deliberately unfairly or in bad faith. CP asserted that the relevant definition of Critical Incident was contained in a list of incidents that were deemed to be critical - the list being within the M25 DBFO Co Service Provider Contingency Plan. Further, CP contended that the incidents on the list were to be taken to have been declared in advance as critical incidents or that HEC was obliged to declare that something was a critical incident if it was in accordance with the deemed list.

The expert favoured HEC's interpretation. A Critical Incident for the purposes of calculating the Critical Incident Adjustment meant an incident declared as critical by a NILO. If a "deemed critical incident" took place, such incident was not to be treated as declared as a critical incident for the purposes of the Critical Incident Adjustment. CP issued proceedings to challenge the expert determination. As a general principle, parties who sign detailed and specific dispute resolution provisions are usually held to be bound by them. If one party brings court proceedings which the other says are not in accordance with the dispute resolution provisions, and are therefore in breach of them, the court has the inherent jurisdiction to stay the proceedings.

CP claimed that the expert was wrong in his construction and application of the Contract. In addition, the parties had agreed previously a different approach to the Contract and HEC was estopped from departing from that approach. HEC applied to strike out the second ground of the challenge on the basis that the court had no jurisdiction to consider it, because it was not a claim that had been determined by the expert. The Contract's dispute resolution clause allowed the court to "*open up, review and revise any … determination of the Expert*", but only if the claim was the "*same or substantially the same*" as the dispute the expert had determined (as per the judgment of Mr Justice Ramsey in *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd* [2007] EWHC 144).

Mr Justice Coulson disagreed with CP. He held that the original dispute referred to the expert was the same as the dispute referred to the court. Even though CP were relying on contract clauses and documents which had not been presented to the expert, the underlying dispute was about more than just the interpretation of the words. The dispute had always included the operation of the contract provisions and the applicable procedures that were adopted in practice. In reaching this conclusion, the Judge adopted the approach to the words "*same or substantially the same*" as outlined by Lord Justice Dyson in *Quietfield Ltd v Vascroft Construction Ltd*, (*Dispatch* Issues 69 and 79) where he said:

"There is an analogy here, albeit an imperfect one, with the rules developed by the common law to prevent successive litigation over the same matter."

Even if the second ground was a new claim, it would not be right to strike it out as it would be subject to the agreed resolution procedure under the Contract. Further, with regard to the argument that HEC was estopped from putting forward its interpretation of the agreement, Mr Justice Coulson held that it did not amount to a submission that the expert had never had the jurisdiction to deal with that dispute in the first place. The argument was that the expert had reached the wrong result, not that he lacked or had exceeded his jurisdiction.

Finally, Mr Justice Coulson declined to order a stay because there had been no breach of the parties' contractual dispute resolution procedure. Further, he held that a stay would be contrary to the overriding objective as it would "*merely cause delay and increase expense*". It would simply not be possible to draw a dividing line between those parts of the case that the court could deal with and those that should be referred to the Network Board and/or expert first. In accordance with this pragmatic approach, the Judge confirmed that this would have been the case even if he had been wrong and there had been a breach of the contract's dispute resolution procedures. Further, any future decision by the expert was almost certainly going to be challenged, which would result in the court potentially having to consider two experts' determinations, with potentially different results. It was therefore: *"difficult to see any useful purpose being served by such an exercise".*

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