Fenwick Elliott
The construction law specialists

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Dispatch

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

EU Procurement - the 3-month rule

Uniplex (UK) Ltd v NHS Business Authority
[2009] EUECJ C-406/08

The chronology of events leading up to the proceedings was this:

(i) On 26 March 2007 NHS invited tenders, in a restricted procedure, for a framework agreement. By letter of 13 July 2007, NHS invited five bidders, including Uniplex, to submit their tenders. Uniplex submitted its tender on 18 July 2007;

(ii) On 22 November 2007 NHS wrote to Uniplex to inform it that awards had been made to three tenderers, but not to Uniplex. The letter set out the award criteria, the names of the successful tenderers, the evaluated score of Uniplex, and the range of the evaluated scores achieved by the successful tenderers. Uniplex had achieved the lowest evaluated score of the five tenderers. Uniplex was also informed of its right to challenge the award decision and to seek further information;

(iii) In reply to a separate request by Uniplex, on 13 December 2007, NHS gave details of its method of evaluation with reference to its award criteria, the characteristics, and relative advantages of the bids of the successful tenderers;

(iv) On 28 January 2008 Uniplex sent NHS a letter before action alleging various breaches of public procurement rules; and

(v) After a further exchange of correspondence between Uniplex and NHS, Uniplex commenced proceedings on 12 March 2008, for damages and not to block the contract process. This was just under 3 months from the date of the December letter.

The High Court referred the case to the ECJ, seeking clarification as to the time from which limitation periods prescribed by the Regulations start to run. Advocate General Kokott summarised the issues as follows :

(i) Whether the court may take as the point when time starts running the date of the breach of procurement law, or must take the date when the applicant knew or ought to have known of the breach;

(ii) Whether in a review procedure the court may dismiss an action as inadmissible if it has not been brought "promptly"; and

(iii) How the court should exercise its discretion with respect to a possible extension of time.

The AG's answer drew a distinction between "primary" and "secondary" legal protection. Primary legal protection relates to actions seeking a declaration that a contract award is void. Here, the AG thought it was entirely reasonable to curtail the availability of such a remedy by an absolute and comparatively short limitation period. This was justified by the potentially severe legal consequences of a contract being declared invalid. Secondary legal protection aims to compensate a disappointed bidder for a breach. Such a remedy does not affect the existence of a contract already concluded with a successful tenderer, so there is no reason to subject applications to the same strict limitation periods as applications for primary legal protection. Accordingly the AG proposed the following ruling:

(i) EU law requires that a limitation period for applications for a declaration and compensation does not start to run until the time at which the applicant knew or should have known of the alleged infringement of procurement law;

(ii) EU law precludes a national court dismissing such applications as inadmissible by reference to a requirement of "promptness"; and

(iii) The national court is obliged to do whatever lies within its jurisdiction to achieve a result compatible with the aims of EU law. If such a result cannot be achieved by applying a limitation rule in a manner consistent with the applicable directive, the national court is obliged to leave that rule unapplied.

What does this mean? First of all, it should be remembered that this is only the AG's view; it is not binding on the ECJ. However, in short, the AG has said that she considers that the English Courts could no longer dismiss an application in relation to secondary legal protection on the basis that it was not brought promptly, even though it was brought within the 3 month limitation period. The AG was of the view that "promptly" is not a separate legal requirement but a reminder of the need to take prompt or swift action to challenge a tender award. This is potentially a significant change.

Finally the AG has said in respect of an action for damages that the key time limit is the date when the claimant knew or ought to have known of the breach complained of. This ruling, again if adopted by the ECJ may serve to make it easier for "secondary" claims to be brought or at least may make it harder for claims to be struck out for being out of time.

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Personal guarantees

Beck Interiors Limited v Dr Russo
[2009] EWHC B32 (TCC)

Beck made an application for summary judgment in relation to sums under a guarantee provided by Dr Russo in relation to sums due under a contract between Beck and Dr Russo MediSpa Ltd. Specifically, Beck sought to recover £413k in relation to an adjudicator's decision. Beck had sought to recover the sums against the company, but it was in administration. Amongst other reasons, Dr Russo submitted that he had real prospects of successfully defending these proceedings on the basis that:

(i) The guarantee was discharged because the contract was varied in material respects in that Beck carried out additional work in the form of variations;

(ii) The Guarantee was conditional upon Beck returning to site at a particular date; and

(iii) The adjudicator's decision was not binding on Dr Russo in relation to his obligations under the guarantee.

The terms of the Guarantee included:

> *This letter confirms that I, Dr Mario L Russo, ... hereby personally guarantee payment of all monies that are due or will become due to Beck Interiors Limited, under the contract dated 28th October 2008 entered into between The Rejuvenation Spa Limited and Beck Interiors Limited for the aforementioned project.*

Under the principle established in the Victorian case of *Holme v Brunskill* if there is any material variation in the terms of the principal contract, that will discharge the surety unless the surety consents to it. Dr Russo relied on the fact that further "contract variations", which he said were material variations, had been instructed.

Dr Russo submitted that the further contract variations were an alteration and it was not self-evident that they were insubstantial or could not be prejudicial to him. The variations would mean that the company would be less able to discharge its obligations for payment under the contract and it could not be said that this alteration could not be prejudicial to Dr Russo.

It seemed to the Judge that in circumstances where there is a contractual provision which provides for there to be variations to the work under a contract and a guarantee is given, there would be no alteration to the terms of the contract when there was a variation to the work made under the provisions of that contract. This was not the case here and so although Dr Russo was aware that there was a system under which contract variations were given, on balance, and this was an application for summary judgment, it was arguable, though not strongly so, that there was a material alteration to the contract in the form of the further variations after the Guarantee.

However had Dr Russo been consulted and given his consent to the alterations? On the facts the Judge did not consider that it was reasonably arguable that Dr Russo was not consulted and did not consent to the alteration in payment obligations under the contract in his personal capacity as guarantor. Equally, in relation to the variations in the work, it was clear that Dr Russo had knowledge of, and consented to, additional works being carried out, as reflected in the amended schedules.

In relation to item (ii), there was a conflict of oral evidence about whether the Guarantee was conditional or not which the Judge could not, under CPR 24, resolve. Mr Justice Ramsey did, however, note that there was some support that the Guarantee was conditional and that that condition was not fulfilled.

This left the question of whether the adjudication was binding upon Dr Russo. There is a long-established principle under arbitration law that general words in a guarantee, guaranteeing the due performance of an obligations do not, of themselves, bind the surety in an arbitration between the principal debtor and the creditor. Russo said that this principle should apply to adjudication. Beck said that there was a distinction between a temporarily binding adjudication decision and an arbitration award.

The Judge agreed with Russo. The underlying rationale for that principle is that a party might neglect to defend itself properly; or might conduct the case differently from the guarantor. What is required is agreement by the guarantor to be bound by any court or arbitrative decision. Further, here Dr Russo had been a witness in the adjudication which he conducted on behalf of the company. In arbitration a third party can become bound by the award of an arbitrator by participating in an arbitration. Should similar principles apply in an adjudication? Again the Judge said that this will depend whether, on the facts, Dr Russo became bound in his personal capacity when acting in the adjudication. Again this could not be the subject of a Part 24 application.

Adjudication: some advice from the TCC

Coventry Scaffolding Company (London) Ltd v Lancsville Construction Ltd
[2009] EWHC 2995 (TCC)

In this case, Mr Justice Akenhead made some general comments about how a claimant might proceed when it becomes clear that it is likely that a defendant is not going to participate in enforcement proceedings. These comments were prompted by the fact that:

> *"during the current economic recession the number of claimants seeking to enforce adjudication decisions in this Court has run up by a very substantial amount and the TCC is anxious, if at all possible, to save costs and time for all concerned in the future"*

Mr Justice Akenhead gave guidance in two areas. First a claimant could consider obtaining judgment in default. The fact that the time for the lodging of the acknowledgment of service is abridged does not stop you obtaining judgment in default of the filing of the acknowledgment once the abridged time has elapsed. The second step is where it becomes very clear that the defendant, although it may have acknowledged service, is unlikely to participate in any hearing, then an application to the defendant can be made to bring forward the hearing and also to reduce the time needed for that hearing. In both instances costs will be reduced, court time will be saved and the claimant will get its judgment quicker

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.

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