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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.

Arbitration: was there a binding agreement to arbitrate?

Emirates Trading Agency Plc v Prime Mineral Exports Private Ltd

[2014] EWHC 2014 (Comm)

Clause 11 of the contract between the parties provided the following procedure for resolving disputes:

"In case of any dispute or claim arising out of or in connection with or under this LTC...,the Parties shall first seek to resolve the dispute or claim by friendly discussion. Any party may notify the other Party of its desire to enter into consuLTCtion to resolve a dispute or claim. If no solution can be arrived at in between the Parties for a continuous period of 4 (four) weeks then the non-defaulting party can invoke the arbitration clause and refer the disputes to arbitration."

ETA said that this amounted to a condition precedent which had to be satisfied before the arbitrators would have jurisdiction to hear the claim and if it was not satisfied this would mean that the tribunal lacked jurisdiction. Prime argued (as did the arbitrators) that the clause was unenforceable as it was merely an agreement to negotiate and in any event, it had been satisfied.

Teare J accepted that the first part of clause 11.1 provided that before a party can refer a claim to arbitration there must be friendly discussions to resolve the claim. Such friendly discussions were a condition precedent to the right to refer a claim to arbitration. However, the Judge doubted that the second part of the clause required the friendly discussions to continue for four weeks.

The clause provided that "if no solution" could be found "for a continuous period of 4 (four) weeks" then arbitration could be invoked. The discussions may last for a period of four weeks but if no solution is achieved a party may commence arbitration. Or the discussions may last for less than four weeks in which case a party must wait for a period of four continuous weeks to elapse before he may commence arbitration. The reference to a period of four continuous weeks ensured both that a defaulting party could not postpone the commencement of arbitration indefinitely by continuing to discuss the claim and that a claimant who is eager to commence arbitration must have the opportunity to consider such proposals as might emerge from a discussion of his claim for a period of at least four continuous weeks before he may commence arbitration.

Teare J dismissed Emirates Trading's application and held that the arbitrators had jurisdiction over the dispute as the clause was enforceable and on the facts of the case had been satisfied.

Public procurement: the "normal average tenderer"

Healthcare at Home Ltd v The Common Services Agency

[2014] UKSC 49

Typically in a procurement challenge, a court has to determine whether the invitation to tender is sufficiently clear to enable tenderers to interpret it in the same way, so ensuring equality of treatment. The application of this standard involves the making of a factual assessment, taking account of all the circumstances of the particular case. In the Irish case of *SIAC Construction Ltd v Mayo*, where there was a disagreement the court noted that:

"...the principle of equal treatment implies an obligation of transparency...More specifically, this means that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way."

Here the Supreme Court had to consider a tendering process in respect of the provision of medical services to health authorities. HaH was the existing supplier of the services, but was unsuccessful in a tender for a replacement contract. HaH challenged that decision, saying that the criteria in the invitation to tender were insufficiently clear, and that the reasons given to it for the rejection of its tender were unclear and lacking in detail. HaH said that the evidence of witnesses from an actual tenderer as to their understanding of the tender criteria, far from being irrelevant, helped to establish what the reasonable tenderers would actually have understood, unless it were shown that the witnesses were not reasonably themselves well-informed or normally diligent.

The Supreme Court disagreed. It was unrealistic to require a contracting authority to frame its invitation to tender in such detail that two reasonable people could not reach different views on its interpretation. It was of considerable importance that decisions of the courts on the validity of a tendering process were taken promptly, so that the parties could know, without delay, whether or not the contract was going to proceed. Unless there was a strong reason to suppose that it would cause injustice, such decisions ought to be capable of being taken without oral evidence.
A court should approach such cases by placing itself in the position of the reasonably informed tenderer, looking at the matter objectively, not through hearing evidence of what such a hypothetical tenderer might think. The question of what a reasonably well-informed and normally diligent tenderer might anticipate requires an objective answer. Evidence as to what the tenderers themselves thought the criteria required is, essentially, irrelevant.

Adjudication: breaches of natural justice

Bouygues E&S Contracting UK Ltd v Vital Energi Utilities Ltd

[2014] CSOH 115

Bouygues sought to challenge an adjudicator's decision that they should pay some £1.6 million to Vital. They raised a number of familiar arguments. First Bouygues said that before any payment order could be made, the adjudicator was required to decide whether and to what extent the works they carried out were defective. This the adjudicator had failed to do which prevented him from addressing an important part of the defence, namely that Vital had not proved that there was any defective workmanship. Vital said that the adjudicator was asked to quantify the costs of completion of the subcontract. This was what he did. It was immaterial whether the costs related to defective or incomplete work. The adjudicator decided that all of the awarded costs fell into one or other of those categories, and were supported by invoices. Lord Malcolm agreed. In essence, Bouygues was asking the court to hold that the adjudicator had reached the wrong answer to their line of defence. It was not a breach of the rules of natural justice.

Bouygues then referred to advice the adjudicator sought and received from a consultant engineer who was asked to assess whether, on their face, the invoices, of which there were a large number, related to matters which needed to be carried out for the completion or rectification of the subcontract works. Based on a sample of 10% of the invoices, the assessor said yes. The adjudicator accepted this advice. However, Bouygues said that they had not been given an opportunity to respond to this view. The adjudicator should have found out which invoices were considered by the assessor; the criteria adopted to select the 10%; and the basis on which it was thought that this sample was representative of the whole. This all went to "*the heart of the adjudicator's decision*". Vital noted that the assessor reviewed the same invoices which their expert relied upon. These had been provided to Bouygues and to their expert. This was not a case where the adjudicator considered evidence of which the parties were unaware.

The Judge agreed. There was no unfairness in the adjudicator taking into account the assessor's advice based on a sample of the invoices. He did not have to seek additional information, nor give the parties an opportunity for further comment. He had Bouygues' views on the assessor's sampling exercise in their response to the draft determination. He was entitled to proceed as he saw fit. This was another complaint as to the merits of the adjudicator's decision. Particularly given that the assessor was an expert, the adjudicator was entitled to accept his advice without seeking more information. While Bouygues might disagree with his decision to rely on the assessor's advice, there was nothing manifestly unfair in the way he went about his task.

Finally, Bouygues submitted that the parties should have had an opportunity to comment on the adjudicator's intention to rely upon his own experience. Again, the Judge disagreed. It was common for a decision-maker to draw on his own experience without giving advance notice of this to the parties for their comment. There is nothing particularly unusual in this decision, but it does reinforce the robust approach the courts will take to adjudication enforcement decisions.

Case update: certificates

Hunt & Others v Optima (Cambridge) Ltd

[2014] EWCA Civ 714

We first reported on this case in Issue 156. Optima were the developers for a residential block. S&P were architects in contract with Optima who had to carry out periodic inspections and produce certificates confirming that the flats were free from defects. S&P were aware that certificates would be for the benefit of the potential purchasers. However there was no contract or collateral warranty with the potential purchasers. The flats were far from defect free and the Judge held that as S&P were aware that the certificates were going to be used by the purchasers, it was clear that S&P owed them a duty in tort and that S&P were liable for negligent misstatement. The certificates said that the appropriate inspections had been carried out and that the flats were free from defects.

The CA has overturned the decision. The problem for the purchasers was this: the negligent statements relied on were the statements contained in the signed certificate eventually provided to the relevant purchaser. However, the purchasers could not have relied on such statements in committing themselves to the agreements to purchase their flats because those statements were not then in existence. The CA noted that:

"...reliance must follow representation and cannot be retrospective. If the representation is the signed Certificate it cannot be relied on before it comes into existence. A cause cannot postdate its consequence."

There was no certificate already in place and it could not be said that the purchasers would receive a certificate on or after completion. At its highest, the purchasers, via their solicitors, received prior to purchase, an indication of the form that the certificate issued by S&P would take, not a completed certificate confirming the position relating to defects.

Further, the CA did not agree with the trial judge that it was possible to construe the certificate as a form of warranty. For example, it was described as a certificate, not as a promise, warranty or guarantee and did not contain any reference to any consideration.

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