

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

Dispatch

NEC3: adjudication, arbitration & “mutual trust and co-operation”

Costain Ltd v Tarmac Holdings Ltd

[2017] EWHC 319 (TCC)

This case revolved around an application by Tarmac to stay the proceedings pursuant to section 9(1) of the Arbitration Act 1996. The dispute had arisen out of a subcontract, which included the NEC3 Framework Contract (2005), as amended by the Framework Contract “Z” clauses, and the NEC3 Supply Short Contract terms and conditions, to supply concrete for the new safety barrier between junctions 28 and 31 on the M1 motorway.

There was some discussion about the dispute resolution provisions. Mr Justice Coulson made it clear that:

“Dispute resolution provisions require certainty. The parties need to know from the outset what to do and where to go if a dispute arises. On the claimant’s construction, there would be no such certainty; everything would depend on the attitudes the parties adopted in discussions, once the dispute had arisen.”

Here, there was one subcontract agreement, although it was made up of two separate sets of (amended) contract conditions. The Framework Contract conditions contained a dispute resolution provision that permitted adjudication “at any time”. The dispute resolution provision in the Supply Contract contained a restricted right to adjudicate and, if one or other party was dissatisfied with the adjudicator’s decision, a right to arbitrate. That provision would normally not permit either party to go to court, because any court proceedings would be faced – as these were – with an application to stay under section 9(1) of the 1996 Act.

The Judge noted that although there was one overall subcontract agreement between the parties, that agreement itself expressly made plain that it incorporated two separate sets of contract terms and conditions. That was a deliberate decision. The NEC3 Framework Contract conditions covered the circumstances of the offer and the acceptance, whilst the NEC3 Supply Contract conditions covered the actual supply of the concrete in accordance with the specification. This meant that there were two separate dispute resolution procedures which did not overlap but complemented each other, because they related to two separate elements of the relationship between the parties.

One of the disputes had led to an adjudicator’s decision. The adjudicator decided that the 28-day time bar to be found in clause 93 of the subcontract applied. Here, the dispute as to the scope of the remedial works arose on 19 October 2015 and therefore required to be notified by either party to the other party by 16 November 2015. This had not happened and so the dispute that had arisen could no longer be pursued.

Costain made a number of suggestions as to why the claims should not be stayed to arbitration. These included that the arbitration provisions were inoperative because they had been abandoned. This failed. There was no express or implied agreement that arbitration would not be the final means of dispute resolution. The Judge had to consider estoppel. The facts were that Costain’s lawyers:

- (i) were aware of the provision in the HGCRA that parties to a construction contract can adjudicate “at any time”;
- (ii) were not aware that the agreement between the parties, which was concerned with the supply of materials, was not a construction contract under the HGCRA;
- (iii) were aware of the time bar but because of their belief that there was a right to adjudicate at any time, they did not consider that it applied. On the contrary, clause 93.3 constituted a mandatory dispute resolution scheme for any disputes in respect of the concrete supply;
- (iv) were, however, aware that clause 93 provided for adjudication and then arbitration. As a result, any attempt to litigate the dispute in the TCC was outside the contract and would require the other side’s consent.

There was no representation, or any common understanding, that the parties would not arbitrate, or that Tarmac would not rely on its rights in relation to the time bar in clause 93.3. Further, the Judge said that:

“on any view of the defendant’s conduct, they did nothing ‘wrong’”.

The Judge also had to consider the meaning of the obligation to be found in NEC contracts that the parties must act “in mutual trust and co-operation”. He noted that in *Keating on NEC3*, a parallel is drawn between “mutual trust and cooperation” and obligations of “good faith”. *Keating on NEC3* refers to the Australian case of *Automasters Australia PTY Ltd v Bruness PTY Ltd* [2002] WASC 286, which says this:

- “(1) What is good faith will depend on the circumstances of the case and the context of the whole contract.*
- (2) Good faith obligations do not require parties to put aside self-interests; they do not make the parties fiduciary.*
- (3) Normal reasonable business behaviour is permitted but the court will consider whether a party has acted reasonably or unconscionably or capriciously and may have to consider motive.*
- (4) The duty is one ‘to have regard to the legitimate interests of both the parties in the enjoyment of the fruits of the contract as delineated by its terms.’ ”*

The Judge further noted that *Keating* also said that the term of mutual trust and co-operation suggests that:

"whilst the parties can maintain their legitimate commercial interests, they must behave so that their words and deeds are 'honest, fair and reasonable, and not attempts to improperly exploit' the other party."

The Judge did say that he was a little "uneasy" about a more general obligation to act 'fairly'. The reason for this was that he felt it could be a difficult obligation to police because it is a subjective one. However, on the facts here, Tarmac did and said nothing about clause 93 which was or could have been misleading. They participated in the pre-action protocol process, but the Judge did not consider that this could amount to an implied agreement not to pursue arbitration.

As set out at paragraphs 8 and 10 of the Practice Direction – Pre-Action Conduct and Protocols, arbitration is one of the types of ADR which the parties are obliged to consider when following the protocol process. Further, whilst the TCC pre-action protocol, which then applied required at paragraph 4.2, stated that a jurisdictional challenge should be taken within 28 days of the letter of claim it added that the failure to take any such point would not prejudice the defendant's right to take it subsequently. In fact here, Tarmac took the jurisdictional point during later correspondence as part of the protocol process. That was the opposite of any implied agreement that the right to arbitrate had been abandoned by the defendant.

Adjudication: service of notices
Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd
[2017] EWHC 15

This was an adjudication enforcement case. Amongst other issues, Kersfield said that Bray was not entitled to the £1.1 million awarded by the adjudicator because Kersfield had issued a valid a valid pay less notice. This issue raised an important point about the service of any payment notice.

Kersfield's pay less notice was served by email and post. The email was sent, on time, at 9.50 p.m. on Friday 12 August 2016. A letter was sent on the same day. Clause 1.78.3A of the contract said that a notice may be sent electronically provided a copy was also sent on the same day to the addressee by pre-paid first class post. So Kersfield complied with that. However the contract also said that any notice so served would take effect on the next business day, here 15 August 2016.

The pay less notice was due by 14 August 2016. Mrs Justice O'Farrell noted that the contract allowed the parties the convenience of service by email whilst at the same time providing certainty as to the date on which such notice takes effect. That was "reasonable and sensible". The pay less notice was therefore late.

Mediation: unreasonable delay
Car Giant Ltd & Anor v London Borough of Hammersmith
[2017] EWHC 464 (TCC)

This was a costs' judgment, where judgment had been given in favour of Car Giant in the sum of £180k. However, LBH had made a Part 36 offer of £250k in April 2014. It was common ground that Car Giant should pay LBH's costs from 7 May 2014 together with interest on those costs at 1% above base rate. However, it was also suggested that these costs should be paid on an indemnity basis. Defendants, unlike claimants, are not presumed to be entitled to indemnity costs from the date of expiry of the relevant period for their Part 36 offers. Instead, the court has a discretion to make an order for indemnity costs depending on the parties' conduct.

Here, it was suggested that there had been an unreasonable delay in agreeing to mediate or take part in some form of ADR. The delay was from 15 May 2015 until October 2016. Deputy Judge Furst QC was clear that a court should be slow to conclude that the delay was unreasonable or such as to justify an order for indemnity costs.

The Judge did not consider that it could be said here that had mediation taken place in about May 2015 it would have been or was likely to have been successful. The delay in mediating could not be shown to have caused any increased costs. In this case, the Judge said that:

"The courts should be slow to criticise a party's behaviour where decisions such as when to mediate are matters of tactical importance where different views may legitimately be held".

Car Giant had taken the view that mediation was more likely to succeed when the experts' views had been fully set out. That, on the evidence before the court, was a perfectly acceptable point of view. Here, LBH had indicated in April 2014 that it would not provide its valuation evidence, even on a without prejudice basis, and that it was without a valuer between about August 2015 and July 2016 which might have made discussions possible.

Whilst there was some delay on the part of Car Giant's solicitors in responding to letters on this topic, that delay was not so great that it justified an order of indemnity costs.

Reasonable endeavours and the implied duty of good faith
Astor Management AG & Anr v Atalaya Mining Plc & Others
[2017] EWHC 425 (Comm)

This was a case where there was discussion about whether an undertaking to use reasonable endeavours (or "all reasonable endeavours" or "best endeavours") to enter into an agreement with a third party was enforceable. It was also held that in addition to the suggestion that Atalaya was in breach of their obligation to use all reasonable endeavours to obtain a senior debt facility, they also owed implied obligations of good faith to do so. Mr Justice Leggatt disagreed. Such a requirement would be subsumed within the express obligation to use all reasonable endeavours. The Judge said that:

"A duty to act in good faith, where it exists, is a modest requirement. It does no more than reflect the expectation that a contracting party will act honestly towards the other party and will not conduct itself in a way which is calculated to frustrate the purpose of the contract or which would be regarded as commercially unacceptable by reasonable and honest people. This is a lesser duty than the positive obligation to use all reasonable endeavours to achieve a specified result which the contract in this case imposed."

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