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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.

Had an ad hoc adjudication agreement been formed?

Clark Electrical Ltd v JMD Developments (UK) Ltd

[2012] EWHC 2627 (TCC)

JMD engaged Clark to carry out electrical works on a new distillery in North Yorkshire. Disputes arose and Clark served a Notice of Adjudication seeking payment of some £177k. The CIC appointed an adjudicator who sent his terms and conditions to both parties. These included at item 10, a requirement that by way of security for his fees, each party pay an appointment fee of £6,000. The adjudicator duly issued invoices for this sum.

On the same day, 7 March 2012, JMD sent an email to the adjudicator noting that they did not have representation and were not familiar with the adjudication protocols. They also sought guidance from the adjudicator on the procedures. JMD also noted that they had not yet received a copy of the Notice and supporting documents from Clark. They therefore asked for an extension of time.

On 13 March 2012, JMD paid their part of the adjudicator's invoice. On 19 March 2012, consultants acting on behalf of JMD, wrote to the adjudicator informing him that the electrical works were not "construction operations" and therefore were excluded under Section 105(2) of HGCRA. If this was correct then the dispute could not be referred to adjudication. They also stressed that the payment of the fees was not to be treated as acceptance of the adjudicator's jurisdiction. The consultants later wrote noting that:

"Our client's position remains that should you make a non-binding conclusion that you have jurisdiction then [JMD]'s further participation in the purported adjudication is fully reserved. Its position remains that you do not have jurisdiction and for the avoidance of doubt [JMD] will not accept the validity of your decision, nor will it accept liability for any of your fees and expenses, which you may determine it is liable."

The adjudicator decided that the subcontract works were not "construction operations". However, he also decided that there was an ad hoc adjudication agreement arising out of the payment of the appointment fee by both parties. Therefore the adjudicator held that the adjudication could continue.

The ad-hoc adjudication was not something which had been raised before. JMD told the adjudicator that they would take no further part in the adjudication process. The adjudicator awarded Clark £177k.

HHJ Behrens QC noted the general proposition that if two people agree to submit a dispute to a third person, then the parties agree to accept the award of that person, or, putting it another way, they confer jurisdiction on that person to determine the dispute. Whether or not this is the case is a matter of fact.

If a defendant to enforcement proceedings has submitted to the adjudicator's jurisdiction in the full sense of having agreed not only that the adjudicator should rule on the issue of jurisdiction but also that he would then be bound by that ruling, then he is liable to enforcement in the short term, even if the adjudicator was plainly wrong on the issue. Even if a defendant has not submitted to the adjudicator's jurisdiction then he may still be liable if the adjudicator's ruling on the jurisdictional issue was plainly right.

Clark relied on the payment of the £6,000 as evidence of an adjudication agreement between the parties. The protests made by JMD's representatives were too late. By asking for guidance and for further time, JMD had already become bound into the proceedings.

JMD said that it was "fanciful to suggest" that there had been a "clear and unequivocal submission" to the jurisdiction. All JMD were doing was explaining that they had not received the relevant documents, that they were unrepresented and unfamiliar with the process and that they needed more time and guidance on the process.

Adopting the usual test for the interpretation of documents, HHJ Behrens QC considered what the 7 March email would have meant to the "reasonable adjudicator." The "reasonable adjudicator", it transpired, would have agreed with JMD.

It was significant that JMD had not received the relevant documentation, that it was unrepresented and unfamiliar with the adjudication process. There was no reference to the adjudicator's decision or jurisdiction at all. Indeed the Judge noted that adjudicator did not interpret the email as a submission to jurisdiction in the full sense. His jurisdiction decision was itself headed "non-binding". Further, the payment of the appointment fee by JMD did not amount to a submission to the jurisdiction in the full sense. There can still be liability for the adjudicator's fee where there is a legitimate challenge to the jurisdiction. HHJ Behrens QC duly dismissed the application for summary judgment:

"...the decision of the adjudicator on jurisdiction based on an ad hoc agreement was in my judgment not plainly right. In my judgment it was, with respect, plainly wrong".

Expert evidence and public procurement challenges

BY Development Ltd & Others v Covent Garden Market Authority

[2012] EWHC 2546 (TCC)

As part of a challenge to the procurement process for a development contract for New Covent Garden Market, BY sought leave to rely on expert evidence in relation to both planning and finance matters. BY said that the evaluation of the tenders contained a number of manifest errors and that the decision was unfair and/or arose as a result of the unequal treatment of their bid. The question for Mr Justice Coulson was whether the expert evidence was either admissible or relevant.

Under the 2006 Regulations as amended, the principal way in which an unsuccessful bidder can challenge the proposed award of a contract to another bidder is to show that the public body's evaluation of the rival bids either involved a manifest error, or was in some way unfair, or arose out of unequal treatment. The Judge said that this means that the court's role is a limited one. The court will not be tasked with undertaking a comprehensive review of the tender evaluation process nor is it to substitute its own view as to the merits or otherwise of the rival bids for that already reached by the public body.

The Judge considered that the correct approach to the test of "manifest error" in public procurement cases is that the court must carry out its review with an appropriate degree of scrutiny to ensure that the basic principles for public procurement have been complied with, that the facts relied upon by the contracting authority are correct and that there is no manifest error of assessment or misuse of power.

If the contracting authority has not complied with its obligations as to equality, transparency or objectivity, then there is no scope for it to have a "margin of appreciation" as to the extent to which it did, or did not, comply with its obligations. The court will not carry out a re-marking exercise, in order to substitute its own view for that of the local authority. The task for the court is to ascertain if there is a manifest error, something which is not established merely because a different mark might have been awarded. That said, there have been procurement cases where expert evidence has been allowed. See for example, the *Henry Brothers* case we reported in Issues 96 and 101. Mr Justice Coulson considered that:

"where the issues are concerned with manifest error or unfairness, expert evidence will not generally be admissible or relevant in judicial review or procurement cases. That is in part because the court is carrying out a limited review of the decision reached by the relevant public body and is not substituting its own view for that previously reached; in part because the public body is likely either to be made up of experts or will have taken expert advice itself in reaching the decision; and in part because such evidence may usurp the court's function."

This does not mean that expert evidence can never be admissible in public procurement cases concerned with manifest error. For example, sometimes technical explanatory evidence is required. Is the claim one where the technical background is so complex that explanatory expert evidence is required, and/or the claim an unusual case where expert evidence on some or all aspects of the tender evaluation process is required in order to allow the court to reach a proper view on the issues of manifest error or unfairness? In the case here, all the issues went to elements of the evaluation itself. In these circumstances, the need for such evidence to explain background technical matters was not made out.

The Judge recognised that in these cases, claimants who are almost invariably the party whose bid has been unsuccessful, can often be at something of a disadvantage in mounting a challenge to the decision. That claimant has had no involvement in the detailed evaluation, so does not know precisely why its bid was unsuccessful. In the first instance, it is entirely dependent on the information which it is given by the defendant. Even once the proceedings have commenced, and further information has been provided (usually with a greater or lesser degree of reluctance) the claimant often remains unclear as to precisely what happened during the evaluation exercise. However, whilst against that background, the Judge could see that the possibility of being able to rely on a detailed expert's report dealing with all aspects of the evaluation, and out of which a case as to manifest error or unfairness might emerge would be at least superficially attractive to a claimant, he reconfirmed that:

"I consider that such an approach is wrong. Given the limited nature of the court's review function, such expert evidence will not generally be admissible unless there are particular reasons why, on the facts of the case in question, the costs, time and effort required to present such opinion evidence could be justified."

Here the Judge was concerned that the instruction of the expert would lead to a complete re-run of the evaluation process, with the experts commenting on each element of the tenders and their evaluation, and seeking to substitute their views for those held, and the decisions taken at the time. To do this would be to ignore the limited review task for the court at trial, and erroneously assume that a complete replay of the whole evaluation process will be allowed. Further, there was a danger that the experts were also being asked to usurp the function of the court. The experts were being asked not only whether it was their view that, for example, the claimant's bid did not represent an unreasonable planning risk but also whether, in reaching the contrary conclusion, they were of the opinion that the authority's evaluation was manifestly wrong.

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Edited by Jeremy Glover, Partner, Fenwick Elliott LLP
jglover@fenwickelliott.com
Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN

www.fenwickelliott.com