Reports from the courts

Our regular round up of recent court decisions of most interest to construction comes from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** who report on a rare example of the courts refusing enforcement of an adjudicator's decision; and another that acts as a reminder to ensure that the basis of the pricing and the payment mechanism in a contract is expressed clearly and understood from the outset to avoid later disputes.

Van Oord UK Limited v Dragados UK Limited

[2022] CSOH 30; Lord Braid

Dragados UK Limited (Dragados) appointed Van Oord UK Ltd (Van Oord) on or about 16 March 2018 to provide the dredging of silts, sands, gravel, and glacial till for the Aberdeen Harbour Expansion Project (the Sub-Contract).

On 6 March 2020, Dragados gave Van Oord notice of termination of the Sub-Contract. Various disputes have arisen following termination, including seven adjudications, of which the present was the sixth.

Van Oord claimed that it was entitled to an extension of time (EOT) and prolongation costs in respect of four compensation events, including CEN 048 – Delayed Access to Open Quay Work and CEN 055 – Late Delivery of Remaining Caissons. Van Oord also claimed method-related charges and that it was entitled to equipment costs for various weather events (the Weather Compensation Events). Van Oord argued that it was denied access to undertake the open quay excavation works by Dragados' lack of progress in undertaking the piling works and that this caused critical delay. Dragados maintained that the cause was Van Oord's failure to commence and complete revetment works.

On 14 September 2021, the adjudicator awarded Van Oord an EOT and prolongation costs for CEN 048 (but not CEN 055 or the two other compensation events) and the Weather Compensation Events and method-related charges (the Award).

Dragados resisted enforcement of the Award on the following grounds: (i) the decision in relation to CEN 048 was vitiated by a breach of natural justice; (ii) the decision in relation to the Weather Compensation Events was vitiated by a failure to address all Dragados's submissions; and (iii) the decision was not severable.

Van Oord agreed that the Weather Compensation Events could not be supported and so were dropped. Dragados also accepted that the decision was severable such that the remainder of the decision would not be required to be reduced if reached in accordance with natural justice.

In respect of CEN 048, the adjudicator selected a baseline programme which neither expert had contended for, but which both experts had given reasons for rejecting, and reached a decision based upon a critical date which was two days earlier than the date proposed by Van Oord. Dragados argued that the adjudicator was not entitled to adopt such a course without giving the parties an opportunity to address him further which was said to constitute a breach of natural justice.

Van Oord argued that the adjudicator was entitled to adopt such a course, which simply sought an intermediate position between the two parties' respective cases.

Decision

Lord Braid found in favour of Dragados and refused enforcement of the Award.

Lord Braid held that the adjudicator did not give the parties a fair opportunity to comment on his proposed adoption of an alternative baseline programme such that "an opportunity was afforded for injustice to be done".

Whilst Lord Braid observed that the line between an adjudicator going off on a frolic of their own and making legitimate use of their experience to analyse the parties' material is not always an easy one to draw, he noted that "[t]he common theme running through the propositions outlined [by the parties] […] is that the procedure adopted by the adjudicator must be fair". Lord Baird considered whether, where an adjudicator departs from the submissions made by the parties, it was fair not to seek further submissions and concluded

that fairness demanded that he give the parties an opportunity to address him further. Whether or not an argument would have succeeded is ultimately irrelevant.

Comment

This case is a rare example of the courts refusing enforcement of an adjudicator's decision. It is also a reminder of the scope and extent of adjudicators' decision-making powers and the importance of a transparent and fair decision-making process.

Alebrahim v BM Design London Limited

[2022] EWCA Civ 183; Coulson LJ

Alebrahim engaged BM Design London Ltd (BMD) as an interior designer for the extensive interior refurbishment of a flat in London pursuant to a contract dated 7 April 2017 (the Contract).

Clause 10 of the Contract provided that the BMD's fee was "based on 20% of the total cost of works", including all furniture and fittings procured by BMD for Alebrahim but confirmed that items sourced and purchased by Alebrahim separately would not be subject to BMD's design fee.

The parties ultimately fell out. It was common ground that BMD was paid a total of £774,561.92. Alebrahim brought proceedings against BMD, primarily in respect of alleged overspends and delay, in the sum of £810,650.39.

Alebrahim argued that the reference to "the total cost of works" meant the total cost of the works to BMD so would be limited to the trade discount prices that BMD obtained. BMD argued that it was a reference to the total cost of works to Alebrahim by reference to the weekly estimates that BMD prepared and Alebrahim accepted and paid.

At first instance, the court concluded that BMD's "construction of the contract is to be preferred since it fits most closely with the machinery of the contract". The court noted that clause 10 of the Contract contained a mechanism whereby Alebraham could purchase items directly and thereby avoid BMD's design fee.

Alebrahim was given permission to appeal the court's finding on the contract construction point.

Decision

Coulson LJ dismissed Alebrahim's appeal.

Coulson LJ considered the case law, including ***Rainy Sky SA v Kookmin Bank [2001] UKSC 50 AT***, which confirmed that the contract must be construed against the surrounding circumstances to ascertain what a reasonable person would have understood the parties to have meant.

It was noted that Alebrahim knew precisely what she was going to have to pay for any given item – she knew what it would cost her once the estimate was agreed. Clause 10 of the Contract expressly provided that, if Alebrahim considered that the figure was excessive, or that the item could be sourced more cheaply elsewhere, she was under no obligation to agree to that part of the estimate. Likewise, Coulson LJ observed that "[f]or understandable commercial reasons, revealing the size or nature of trade discounts with its suppliers would not be something that [BMD] would want to do, unless the contract expressly required it", which it did not.

Whilst Coulson LJ noted that "this aspect of the contract may not have been as immediately transparent as it should have been" – and could see how Alebrahim's misapprehension might have arisen – he observed that Alebrahim wrongly assumed that the weekly estimates from MBD would be based on trade prices without a mark-up. This assumption was not founded upon and was contrary to the terms of the Contract.

Coulson LJ accepted that some forms of building contract refer to costs incurred by the contractor undertaking the work. However, this was not the case here. It would have involved rewriting the contract, which the court should not do save in exceptional circumstances. Furthermore, under the terms of the Contract, BMD had been careful not to incur any actual cost – any sum due to a supplier was not paid out by BMD until it had first been paid to BMD by Alebrahim.

Comment

Whilst Coulson LJ noted the contrast between such an interior design contract and some form of cost-plus construction contract, this case is a reminder for contracting parties to ensure that the basis of the pricing and the payment mechanism is expressed clearly and understood from the outset in order to avoid disputes arising at a later date. Where any fee is a percentage of the construction cost, it should be clear how that cost is calculated and whether discounts or similar are included. **CL**