Reports from the courts

In our regular round up of court decisions Andrew Croft and Will Buckby of Beale and Company report on a rare example of a partnering agreement coming under court scrutiny; and on a ruling that might encourage claimants to leave starting adjudications until the last possible moment.

**TSG Building Services Plc v South Anglia Housing Ltd**

([2013] EWHC 1151 (TCC); TCC; Akenhead J)

**Background**

In July 2009 TSG Building Services Plc (TSG) entered into a contract with South Anglia Housing Ltd (SA) to provide gas servicing and other works for some of SA's properties (the contract). The contract was the ACA Standard Form of Contract for Term Partnering (TPC 2005) with bespoke amendments.

Clause 1.1 of the contract required the parties to work 'together and individually in the spirit of trust, fairness and mutual co-operation' for the benefit of the term programme and within the scope of their 'roles, expertise and responsibilities'. It also provided that they should act 'reasonably and without delay' in 'all matters governed by the Partnering Contract'. Clause 13.3 of the contract stated that SA could terminate the contract 'at any time' by giving three months' notice.

In July 2010 TSG raised concerns regarding the agreed pricing scheme and proposed another scheme. Subsequently, in August 2010, SA gave TSG notice of termination under cl 13.3. In October 2010, TSG submitted a claim for £900,000 as a result of the termination. SA rejected this claim. In November 2011, TSG referred the dispute to adjudication claiming just over £1,000,000. TSG sought compensation under three heads including recovery of additional maintenance, contract set-up and termination costs. TSG appears to have argued that cl 1.1 imposed a general duty of good faith which had been breached by SA when terminating under cl 13.3. SA denied that this was the effect of cl 1.1 and denied that TSG was entitled to compensation on termination. The adjudicator awarded TSG £384,000.

TSG applied to enforce the adjudicator's award and SA applied for declaratory relief that TSG had no entitlement. SA argued that the adjudicator did not have jurisdiction as more than one dispute was referred and therefore the adjudicator's award should not be enforced. SA also denied that cl 1.1 imposed a duty of good faith when terminating under cl 13.3.

**Held**

It was held that the adjudicator had jurisdiction but that the duty of good faith did not qualify the separate right to terminate at will. Akenhead J held that the adjudicator did not exceed his jurisdiction as there were not multiple disputes, but one dispute comprised of 'three primary strands or issues'. The court also held that cl 1.1 did not impose a duty of good faith on SA when terminating under cl 13.3. Referring to **Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)** ([2013] EWCA Civ 200), it was considered necessary to take a 'textual but also a contextual interpretation' of the contract. Termination at will was not a 'responsibility', did not give rise to a 'role' and was not dependant on any 'expertise' and therefore did not fall within the ambit of cl 1.1. Accordingly cl 1.1 did not place a restriction on SA when terminating at will. Similarly, Akenhead J held there was no implied duty of good faith. The parties were aware that there was an unqualified right to terminate the contract under cl 13.3 and it was their intention that either party could terminate the contract for no, good or bad reason at any time; the parties voluntarily took this risk.

**Significance**

This is a rare example of a partnering agreement being considered by the courts. Collaborative contracts are being increasingly adopted by the industry and this case shows that express terms which appear contrary to the underlying principles of such agreements may not be subject to any overriding obligation of collaboration. This case also highlights that the courts
will adopt a wide interpretation of ‘dispute’ for the purposes of adjudication: in many cases there will be a difference between the number of ‘claims’ and the number of ‘disputes’. Finally, this case continues the recent trend of interpreting a duty of good faith narrowly. Courts are unlikely to imply such a duty and will resist arguments that an express duty overrides another clause unless this is clearly the intention.

Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc
[2013] EWHC 1322 (TCC); TCC; Akenhead J

Background
In March 2004, Aspect Contracts (Asbestos) Ltd (Aspect) entered into a contract with Higgins Construction Plc (Higgins) to provide an asbestos survey on an estate in Hounslow which Higgins intended to develop (the contract). Aspect carried out the survey in March 2004 and was paid for its services in June 2004. In December 2004 Higgins entered into a sub-contract with Falcon Refurbishment and Demolition (Falcon) to remove the asbestos which Aspect had identified. In March 2005 Falcon notified Higgins that it had found additional asbestos which was not identified in Aspect’s report. Higgins instructed Falcon to remove the additional asbestos which was not identified in Aspect’s report. Higgins instructed Falcon to remove the additional asbestos and alleged that Aspect’s failure to identify this caused a delay of 17 weeks to the development. In June 2009 Higgins referred the dispute with Aspect to adjudication. As there were no adjudication provisions in the contract, the Scheme for Construction Contract 1998 (the Scheme) applied. Higgins claimed just over £800,000 for Aspect’s alleged breach of contract. The adjudicator awarded Higgins £658,017, which Aspect paid to Higgins in August 2009. In February 2012 (over six years after it had completed its services), Aspect commenced court proceedings against Higgins, alleging that there was an implied term that an unsuccessful party in adjudication was entitled to have the dispute finally determined by litigation and if successful, to recover monies paid. Aspect argued that it paid the award under compulsion of law, sought a negative declaration that it was not in breach of contract and claimed restitution of the sum paid.

Higgins denied the existence of the implied term, arguing that although the Scheme gives one the right to have a dispute finally determined by litigation, it does not alter/extend limitation periods and Aspect’s claim was time barred. Higgins alleged that the cause of action accrued in contract in April 2004 when Aspect delivered its asbestos report to Higgins and in tort in June 2005 when Higgins suffered loss/damage. Higgins counterclaimed for the full amount claimed in the adjudication.

Held
The claims were dismissed on the basis that they were time barred. Akenhead J considered Jim Ennis Construction Ltd v Premier Asphalt Ltd [2009] EWHC 1906 (TCC) in which the court held that that the parties’ contract included an implied term giving the right to a negative declaration and that a new cause of action arose at the date of payment of the amount awarded. However, the Jim Ennis case was distinguished on the basis that it was dealt with on written submissions and because the right to challenge the adjudicator’s decision or recover sums paid was not disputed in that case. The court also held that Aspect was protected by existing rights to have a dispute finally determined by the courts. A term giving Aspect the right to have a dispute finally determined by adjudication was not implied. Aspect’s claim was therefore time barred, as a new cause of action did not arise when Aspect complied with the adjudicator’s decision. Aspect could have sought a negative declaration at any time following the performance of the contract and did not have to wait for the adjudicator’s decision; it also had two and a half years after the decision to seek a declaration. Higgins’ counterclaim was therefore also time barred.

Significance
An adjudicator’s decision will not necessarily result in a new limitation period commencing and complying with a decision will not give an unsuccessful party additional time to seek final determination of the dispute. Those on the wrong end of an adjudicator’s decision should therefore make note of the limitation period for the original claim if they intend to resolve the dispute in litigation.

The court may have taken a different approach had the adjudication been commenced shortly before the limitation period expired, but this case could encourage claimants to commence adjudications at the last possible moment. CL