Alliancing, and specifically the new model of procurement under the NEC4 Alliancing Contract (ALC), is steadily gaining momentum. National Grid, Network Rail and the UK’s water industry have all used alliancing successfully. Highways England recently moved to the alliance procurement model under the ALC for its £4.5bn Smart Motorways Alliance.

Alliancing, in general terms, can be described as a single agreement bringing together a collaborative and integrated team that includes the client and an extended supply chain; the team share a set of common goals that meet client requirements and work towards common incentives. An important feature of most alliance agreements is that the risks are shared, as is the commercial return. The parties to an alliance agreement are, in theory, aligned so that the interests of all participants are as equal as possible and the level of integration is high. Alliancing can take different forms. What are the key points to note from the ALC?

The client and the delivery team are required to collaborate to achieve the alliance objectives and provide the works in accordance with the scope, alliance objectives and implementation plan. This underlines that, as is typical in “pure” alliance contracts, the ALC makes the client and the delivery team responsible for achieving the key objectives and provision of the works.

The client and the delivery team are also required to act in a way that is best for the project, rather than their own interests. This emphasises the need for a real change in mindset, culture and ways of working.

The alliance board is key to the operation of the ALC. It is made up of one representative from each member of the alliance. The importance of the alliance board is shown by key aspects of its role under ALC, which include setting the strategy for achievement of objectives, allocating work, appointing and instructing the alliance.

Let’s Do This Together

Sheena Sood examines how the NEC4 Alliancing Contract approaches project risks, liabilities, insurance and disputes

FOR PERHAPS THE FIRST TIME IN A STANDARD FORM CONTRACT, THE ALC INCLUDES AN AGREEMENT THAT A SINGLE BREACH WILL NOT GIVE RISE TO AN ENFORCEABLE RIGHT, EXCEPT FOR CLIENT AND PARTNER LIABILITIES

CASE IN FOCUS: ADJUDICATION

Ted Lowery considers a case in which the adjudicator appeared to have ignored a witness statement

The case
JJ Rhatigan & Co (UK) Ltd vs Rosemary Lodge Developments Ltd [2019] EWHC 1152 (TCC)
Before Mrs Justice Jefford DBE
In the Technology and Construction Court
Judgment delivered 8 May 2019

The facts
In 2016 RLD entered into a contract with Rhatigan to construct six new homes in Wimbledon. The works were completed during 2018. On 4 June 2018 Rhatigan issued a draft variation showing a final account value of £8.6m that it said had been agreed at a meeting on 30 May. On 6 June RLD emailed to acknowledge the agreed £8.6m figure but mentioned that it would be premature and misleading for Rhatigan’s contractor’s reports to refer to the agreement until it had been finalised and executed as a variation deed.

During September 2018 Rhatigan made an application for payment based on a gross sum of £8.6m. RLD denied that this figure had been agreed and in October 2018 Rhatigan submitted a further application for payment claiming a gross sum of £12.4m. RLD then commenced adjudication in respect of the proper valuation of Rhatigan’s October payment application.

In the adjudication Rhatigan’s position that the gross valuation of £8.6m had been agreed on 30 May 2018 was supported by witness statements from two of its representatives at the meeting. In reply RLD contended that the email of 6 June made it clear that no agreement could have been reached pending the execution of a deed. RLD’s surrejoinder included three witness statements that concerned the 30 May meeting, but only one of these, by a Mr Morgan, asserted that RLD had made it clear at the meeting that it would be up to its funders to decide whether or not there could be an agreement on the final account valuation.

In a decision dated 22 November 2018 the adjudicator found that the figure of £8.6m had been agreed at the meeting on 30 May leaving a balance...
manager and resolving disputes. It is important to note that for the alliance board to make a decision, agreement of all members is required, save in limited circumstances such as termination. This is a common position in “pure” alliance agreements, but without any deadlock resolution mechanism it could create difficulties.

The ALC includes a complex liability position. The regime allocates liabilities between the partners, which are required to reimburse each other for costs incurred as a result of their liability. This is similar to an indemnity, which can increase one’s exposure to risk on a project. Both the partner and client liabilities include “an intentional act or omission to not comply” with their obligations. This appears to be trying to capture the concept of wilful default, which is a common exception to the no-claims approach of “pure” alliance contracts. However, the scope of wilful default under the ALC is much wider and less clear than would ordinarily be the case in other forms of contract.

The contract requires the usual core insurance policies, but note that it is silent on professional indemnity (PI) insurance. This is not unusual in “pure” alliance contracts, as claims in respect of design issues - one of the key areas that PI insurance is intended to cover - would be inconsistent with the no-claims culture. However, PI and other insurances such as an owner-controlled insurance programme or integrated project insurance can be included in the ALC if and when required.

One of the key differences in the ALC compared with other NEC4 forms is the approach to dispute resolution. For perhaps the first time in a standard form contract, the ALC includes an agreement that a single breach of the contract will not give rise to an enforceable right, except for client and partner liabilities (as mentioned above). If a dispute does arise, the main course of action is to refer it to the alliance board. As noted, this process could create problems since the alliance board requires unanimous agreement.

The effectiveness of the no-claims provisions has not been tested by the courts and may be found to have little effectiveness in overruling the courts’ jurisdiction. Furthermore, a common exception to the no-claims position is non-payment and/or the right to adjudicate, which cannot be excluded if the 1996 Construction Act applies, as it will to most contracts in the construction industry. Despite the laudable aspirations of this form of procurement, the ALC, like any form of contract, will require some negotiation and amendments in order to reasonably protect each alliance member’s interests, including their insurance coverage. It may, however, be more difficult to do so – trying to strong-arm the other project partners into accepting a large number of amendments may detract from the collaborative spirit these agreements are meant to encourage. Sheena Sood leads the construction, engineering and infrastructure team at Beale & Co

due of £1.7m. He did not think the absence of an executed deed of variation detracted from the binding nature of the oral agreement reached at the meeting. The decision included a statement that the adjudicator had considered all of the evidence and submissions, whether or not specifically referred to, but had confined his explanations to the essentials only. In his decision the adjudicator expressly referenced the statements provided by four of the witnesses but made no mention of Mr Morgan’s evidence.

Rhatigan commenced enforcement proceedings to recover the £1.7m awarded by the adjudicator. RLD contended that a material breach of natural justice had occurred where the adjudicator had failed to deal with the potentially determinative argument that there had been no intention to enter into legal relations and where Mr Morgan’s statement, including the references to the need for funders’ approval, had apparently been ignored.

The issue

Was Rhatigan entitled to summary enforcement?

The decision

The judge found that RLD’s submission that there had been no intention to create legal relations on 30 May was an issue the adjudicator had addressed; where the adjudicator had decided that a binding oral agreement had been created without an executed deed this indicated the adjudicator had in mind but had rejected the argument that there could have been an agreement in principle that was not binding. On RLD’s second ground, the judge considered that the adjudicator had overlooked Mr Morgan’s witness statement. She noted the adjudicator’s statement confirming consideration of all evidence and submissions could not be relied upon if the balance of the decision indicated otherwise.

However, the adjudicator’s disregard of Mr Morgan’s statement did not amount to a failure to address a key defence synonymous with a breach of natural justice. This was for three reasons: first, the question of funders’ approval mentioned by Mr Morgan was encompassed by the adjudicator’s dismissal of RLD’s submission that it had not intended to create legal relations. Second, the funders’ approval point had been mentioned only in Mr Morgan’s statement and therefore could not be considered a key issue. Third, while Mr Morgan was the only witness to say that the need for funders’ approval had been communicated to Rhatigan, in reality this added nothing to the substance of the other witnesses’ evidence.

Commentary

It is unusual for an adjudicator’s decision to make it obvious that a discrete element of the evidence has been overlooked. Even so, this in itself may not be enough to show a material breach of natural justice. The court must still consider if there is a real prospect of defending the claim to enforce the decision.

Here the adjudicator’s omission was an error but not one that would have affected the adjudicator’s outcome. Ted Lowery is a partner in Fenwick Elliott