CONSTRUCTION LAW PERIODICAL

Editorial Committee's Note

The Construction Law Periodical provides all members of the CBA with a regular summation of judgments and dispute resolution decisions drawn from Ireland and other common law and model law jurisdictions that touch upon and/or are relevant to matters of construction law and/or the resolution of construction disputes in this jurisdiction.

The next edition of the Construction Law Periodical is due for release in October 2021. Please contact a member of the editorial team if you would like to submit a case note or article for consideration.

John McDonagh SC
Deirdre Ní Fhloinn BL
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Beattie Passive Norse Limited and NPS Property Consultants Limited v Canham Consulting Limited [2021] EWHC 1116 (TCC) 30 April 2021

Consulting engineers - professional negligence - whether a duty of care was owed to a claimant with whom there was no contract - defectively designed foundations - causation - effective cause of the damage - defective design not the effective cause of the decision to demolish.

These proceedings concern a claim in professional negligence brought by the claimants against the defendant, "Canham", a practice of consulting engineers. Both claimants alleged breach of contract and negligence on the part of Canham in the design of the foundations of two separate blocks of terraced houses, hereafter referred to as Block A and Block B.

The first named claimant "BPN" was a construction joint venture company, and the second, "NPS" was a shareholder of BPN. The main contractor was Beattie Construction, and it was contracted to BPN to perform the construction works. The foundation works were carried out by Foxdown Engineering Ltd, a groundworks sub-contractor. Foxdown was engaged by Beattie.

Canham issued two sets of revised drawings for the foundations, referred to as Revision A and Revision B. Foxdown were only issued with the earlier set, Revision A. These were issued to them either by or on behalf of BPN "for construction". The Revision B drawings were accordingly not used by Foxdown when constructing the foundations, notwithstanding that that they had been produced by Canham by the time the foundations were constructed by Foxdown.

Both Blocks A and B were subsequently demolished by Beattie prior to completion, and although it was effectively accepted by Canham that its drawings were in some respects negligent, liability was denied by it. The first line of defence was that the foundations had not been constructed with the design it had prepared (Revision B), but had been constructed by Foxdown to the earlier design drawings (Revision A), with shallower depths shown on those earlier drawings. Canham also alleged that the two blocks constructed by Beattie were woefully defective. A very long list of defects that could not have been the responsibility of Canham was relied upon by it, essentially to make good the point that the blocks would have had to be demolished in any event, regardless of the conditions of the foundations.

Notwithstanding that there were two claimants in the proceedings the reality was that only BPN had contracted directly with Canham, while NPS, although a shareholder in BPN, had not. In dealing with this issue Fraser J at [26] to [37] referred to his judgement in Multiplex v Bathgate [2021] (TCC) in which he had stated at [164] "*Although the existence of a contract is not entirely determinative, it is a highly relevant feature. The closer the situation under scrutiny is to a more conventional or habitual business-like relationship governed by contractual terms the less likely the law will be to answer the questions concerning assumption of responsibility and fairness, justness and reasonableness, in favour of a claimant such as Multiplex who has no contractual relationship with an allegedly liable party".*

He considered that the same analysis applied in these proceedings regarding the claim by NPS, a shareholder of BPN, that Canham owed it a direct duty of care. He found that Canham did not owe NPS any direct duty of care. Its contract was with BPN. This was an entirely conventional contractual arrangement for a construction project in which BPN was the main contractor. There was no just reason to extend the scope of Canham's responsibility wider than this, to include a separate duty directly owed to BPN's shareholders. NPS had no separate claim of its own against Canham either in contract or in tort, and therefore its claim against Canham was dismissed.

At [57] the Judge states that he found as a fact that Foxdown constructed the foundations to the earlier superseded design in the Revision A drawings, and not to the design intended by Canham, which was contained in Revision B. The reason for Foxdown doing so was because Beattie and/or its architect did not forward to Foxdown the Revision B drawings, and instead issued Foxdown the Revision A versions which were stated to be "for

construction". There was nothing to suggest that Foxdown was at fault in terms of constructing to the Revision A version. Foxdown did what it was instructed to do. At [58] he found as a fact that there was a range of problems with the structures of both Blocks A and B. The overwhelming majority of these defects were structural and construction defects that could have been, and were not, the fault of Canham.

However that being said, having slated the evidence of the expert structural engineer called on behalf of the claimants as partisan and exaggerated [79] he accepted [at 86] the evidence of the structural engineer called on behalf of Canham [at 65 to 72], that there were some deficiencies in the design prepared by Canham, that there was a failure to exercise reasonable care and skill and also that in the drawings no dowels were shown connecting the pads to the ground beams. Of these failures the Judge found the third was the most serious.

At [92] he states that it was accordingly not in issue whether Canham fell below the standard required of a reasonably competent engineer in the design of the foundations. It was the legal consequences of those failures which were important.

Given that the foundations as constructed were not the foundations in the drawings which should have been used (Revision B), the extent of the defects which were not the fault of Canham, and the admitted negligence in some respects of aspects of the design by Canham, the real battleground in the case was one of factual causation. BPN had to establish, at least prima facie, that the losses it says it was entitled to recover had been caused by breaches on the part of Canham. [95 and 102].

As he states at [106] causation is a highly fact sensitive arena. He referred to the judgement of Hobhouse LJ in the Court of Appeal in County Ltd v Girozentrale Securities [1996] in which he stated that *" conduct which contains no element of fault will not without more be treated as a cause in law ……. It is often said that legal causation is a matter of fact and common sense. Causation involves taking account of recognised legal principle but, that having been done, it is a question of fact in each case".* The question which therefore had to be asked in this case was therefore: Was the breach of contract an effective cause of the loss suffered by BPN? [109]

At [112] he referred to the judgement of Coulson J in Greenwich Millenium Village v Essex Services Group [2013] in which he stated that *"A distinction should be drawn between cases where there are two concurrent independent causes of the loss, and those cases where there are two co-operating causes, that is to say situations where two causes give rise to the loss but where each, on its own, would not have done so".*

In this case he found that the cause of the loss suffered by BPN in demolishing and rebuilding Blocks A and B was the defective nature of the structure in both cases caused by Beattie and/or its subcontractors. [112] he referred also to Coulson J in McGlinn v Waltham Contractors [2007] in which he had stated that *"If [demolition] is to be justified at all, it will ordinarily be because the building is dangerous or structurally unsound".* [113]

He found as a fact that the blocks were structurally unsound, but not as a result of anything that was defective in the foundations that were designed by Canham. The two blocks were structurally unsound because of the considerable amount of defective work, unconnected with the foundations, which had been performed by Beattie. He then went on to quote from the Board of Governors of the Hospital for Sick Children v McLoughlin [1987] in which it was stated *"However reasonably the plaintiff acts, he can only recover in respect of loss actually caused by the defendant. If part of the plaintiff's claim does not arise out of the defendant's wrongdoing, but is due to some independent cause, the plaintiff cannot recover in respect of that part".* [113]

In this case the "independent cause" was the defective work of Beattie. The reason for the demolition was the work of Beattie, and not the negligent design of the foundations by Canham. [114]
As regards the decision to demolish he pointed out that a claimant carrying out either repair or reinstatement is under a duty to act reasonably, both in relation to the primary assessment of damages and in relation to the mitigation of damage. It was not by way of mitigation of any damage caused by Canham that the decision was taken by BPN to demolish each of the blocks. [115]
The evidential burden on BPN was to demonstrate both that the demolition was required as a result of the negligent design of the foundation, and also that the decision to demolish was reasonable. He found that BPN had failed to prove both of these essential points. Firstly, there was far more defective with both Blocks A and B than their foundations. Secondly, the foundations as designed by Canham were not the foundations as constructed by Foxdown, because Foxdown had been given the wrong drawings for construction. Thirdly, BPN had failed to show that the demolition was required as a result of the defective foundations on either Block A or B. Fourthly, while the lack of connections between pads and beams in the drawings constituted negligence on the part of Canham, these omissions could have been remedied by localised remedial works. Therefore the condition of the foundations in each of the blocks was not an effective cause of the decision to demolish the blocks. [116]

At [125] he points out a factual difference between Blocks A and B, in that while on neither were there any dowel connections shown in the drawings, and this omission constituted negligence, that failure in the design was operative as an effective cause of the localised repairs that were required only to Block B. The same conclusion did not apply to Block A, as that block was so hopelessly constructed in so many different respects that the decision to demolish was, effectively, inevitable. Those limited remedial works he assessed at £2,000. [133]

The overall outcome of the case was that of the total losses initially sought by the Claimants of £3,700,000 they only received an award of £2,000.

John McDonagh SC

The Republic of Kazakhstan -v- World Wide Minerals & Paul A Carroll QC [2020] EWHC 3068

Challenge to a Final Arbitral Award; Arbitration awards; Arbitrators' powers and duties; Breach of contract; Causation; Expropriation; Fairness; Loss of chance; Measure of damages; Mining leases; Serious irregularity; Termination

This case concerns a challenge to a final arbitral award on the ground that there was a serious irregularity affecting the procedure before the Tribunal for the purposes of s. 68 of the Arbitration Act 1996 ("**AA**").

The Republic of Kazakhstan contended that the Tribunal awarded damages to the defendants by reference to an argument that the defendants had not advanced

during the hearing or prior written procedure leading to the award and in respect of which it did not have any or any fair opportunity to respond. Accordingly, Kazakhstan maintained that by acting in this manner, the Tribunal breached its duty under s.33 of the AA, resulting in a serious irregularity within the meaning of s.68(2)(a) of the AA.

The background to the substantive arbitral proceedings are as follows: World Wide Minerals Limited ("**WWM**") commenced arbitral proceedings arising from alleged breaches of various provisions in the bilateral investment treaty concluded between Canada and the USSR in 1989 (the "**BIT**") and a Management Agreement as between WWM and Tselinny Gorno-Khimicheskii Kombinat ("**TGK**") concerning a uranium mining and processing facility in the north-central part of the country ("**TGK Complex**"). WWM alleged expropriation of its investment by breaches of both the BIT and the Management Agreement including alleged breaches arising out of the failure by Kazakhstan to agree to accord it access to the production of mines in the southern region of Kazakhstan, by failing or refusing to issue export licences in its favour in respect of a uranium sales contract and in relation to the conduct of TGK's bankruptcy.

The Tribunal concluded that:

(a) Kazakhstan had acted unjustly and arbitrarily in relation to WWM's application for export licenses and thereby in a manner that was not fair and equitable treatment under the BIT; and
(b) in relation to TGK's bankruptcy, the Tribunal concluded that there had been a process failure that constituted a breach of the BIT.

Having made the foregoing findings, the Tribunal assessed the quantum.

The Court observed (§13) "*…that no attempt whatsoever had been made by WWM to identify what losses were caused by each of the breaches alleged*."

The Court continued to state that (§16):

"*[a]lthough the Tribunal acknowledged that it had found breaches of FET in certain specific respects, but had dismissed WWM's claims of expropriation or breach of other articles of the BIT, it nonetheless proceeded with an analysis of quantum that appears to have had no regard to this point or to the point that the defendants had not attempted to demonstrate what loss had been caused severally by each of the alleged breaches*."

The Court determined that (§18):

"*the Tribunal appears to have approached what it had concluded amounted to the loss of a chance or opportunity on the basis that it entitled the defendants to recover the whole of its investment being the sunk costs…. It did so notwithstanding that is not what had been argued for by the defendants and ignored what its own counsel had said concerning the approach to be adopted in the event that the tribunal concluded some but not all the breaches alleged had been proved, as explained below. It is this paragraph of the Award that TRK focusses on*."

The Court continued to consider:

(a) whether there has been a serious irregularity within the meaning of AA s. 68(2) of the AA and, if there has been;
(b) Whether the serious irregularity has caused substantial injustice to Kazakhstan.

Serious Irregularity

The Court concluded that there was a serious irregularity and that (§49) "*the Tribunal decided the case on the basis of a point that [Kazakhstan] has not had a fair opportunity to deal with*."

In this regard, the Court stated that (§49) "*[i]t is not for a defendant to set up or attempt to answer an alternative claim in damages that is not being advanced by the claimant*."

Substantial Injustice

The Court stated that (§50) "*TRK must show that had it had the opportunity of addressing the assessment of damages caused by each of the breaches found proved, the Tribunal might well have reached a different conclusion from that which it reached in paragraph 587 of the Award and so produce a significantly different outcome*".

The Court observed (§51) that had Kazakhstan had the opportunity of addressing this issue:

"*it would have first submitted that it would be necessary for WWM to prove (a) what loss was caused by each of the breaches found proved and (b) to determine what compensation was appropriate for the loss and damage found to have been caused by the breaches that the Tribunal had found proved applying or at least by analogy with decisions such as Victor Pey Casado & Foundation "Presidente Allende" v. The Republic of Chile, ICSID Case No. ARB/98/2 (Resubmission Proceeding), Award, 13 September 2016*."

The Tribunal Concluded that:

"*had [Kazakhstan] been afforded an opportunity to make further submissions the Tribunal might well have reached a different conclusion concerning the amount of damages that should be ordered. This may involve a careful investigation into what profits might have been made had an export licence been granted as sought. How those profits would have impacted on the losses apparently being made would involve some complexity as would the impact of such profits on WWM's breach of the Management Agreement and TRK's ability to terminate the Management Agreement. Had TRK been given the opportunity to consider and make submissions about these points, the Tribunal might well have reached a different conclusion from that which it reached, perhaps after giving further directions for the preparation of evidence and submissions focussing on such issues*."

Conclusion

The Court determined that (§60) the relevant paragraphs of the award relating to the quantification of loss should be set aside and the determination of all issues concerning causation and the quantification of loss would be remitted to the Tribunal for determination by it.

Michael Judge BL

Millchris Developments Ltd v Waters [2020] EWHC 1320 (TCC) 2 April 2020

Adjudication - Respondent seeking injunction to restrain the holding of the adjudication until after the termination of the Covid-19 crisis - Site visit by adjudicator - No right for parties to be present at a site visit

This was an application for an interim injunction. The applicant, Millchris, was a construction company. It carried out works to the defendant's residential property. The adjudication requirements

of the 1996 UK Act did not apply, but the contract between the parties included provision for adjudication.

Facts:

On 23 March 2020 Mrs Waters commenced an adjudication in relation to alleged overcharging on the final account, being a claim for about £45,000, together with defects of about £14,000. An adjudicator was appointed and Millchris sought a prohibitory injunction prohibiting Ms Waters from continuing with the adjudication and from submitting any further reference to adjudication against the applicant in relation to the contract. It also sought a mandatory injunction compelling her to withdraw the reference to adjudication.

The appointed adjudicator set out a timetable for the submissions of the parties. Millchris's solicitor wrote to him on 26 March arguing that it would not be possible to comply with the deadlines, particularly at a time of national crisis, that because of the nature and complexity of the underlying dispute the matter was not suitable for adjudication, and that proceedings ought to be issued.

Millchris then required Mrs Waters to withdraw the reference to adjudication on the basis that it would inevitably lead to a breach of natural justice. In an email to the adjudicator Millchris's solicitor stated that Millchris sought the postponement of any adjudication proceedings until such time as the Covid-19 lockdown could be sensibly lifted. The adjudicator recognised the difficulties posed by the Covid-19 crisis,but did not consider that he should not proceed. He proposed a two week extension to the time for his decision. Mrs Waters agreed to this but Millchris did not, its position effectively being that the adjudication could not properly proceed until after the Covid-19 crisis was over.

At [18] Mrs Justice Jefford points out that the "White Book" summarises the position as being that interlocutory relief will rarely be granted to interfere with an ongoing adjudication, but the court has jurisdiction to grant such relief and will do so in unusual circumstances. At [20] she points out that in the decision at first instance in Lonsdale v Bresco [2018] Fraser J had stated that such injunctions ought only to be granted very rarely and in very clear cut cases.

In considering whether there was a serious issue to be tried as to whether the adjudication should not proceed, the Judge stated at [23] that what she was concerned with was whether there was a serious issue as to whether it would necessarily be conducted in breach of natural justice, with the inevitable result that any decision would be unenforceable for breach of natural justice. It would be wholly exceptional and unprecedented for such an injunction to be granted on that basis. It might be possible to conceive of circumstances in which the court could reach the conclusion that the adjudication would inevitably be conducted in breach of natural justice – for example if the adjudicator had made plain that he only intended to hear from one party – but that was far from the present case.

In any adjudication the issues are addressed on a short timescale: that is the nature of adjudication. Millchris however argued that the position was so exacerbated by the Covid-19 crisis, coupled with the particular circumstances of Millchris and its solicitor, that the adjudication could not be conducted fairly and in accordance with the rules of natural justice.

Among the alleged exceptional circumstances raised by Millchris were that their solicitor was self-isolating and had rarely gone into his office. As a result he could not obtain paperwork and evidence from certain essential witnesses. [25] However she points out at [26] that no thought seemed to have been given to scanning the papers or to gathering the evidence by way of remote consultations. It was also alleged that the solicitor had been unable to contact a particular witness, but as she stated that had nothing to do with the Covid-19 crisis , but was simply a function of the short timescales in adjudication which would apply in any event, and the difficulty for whatever reason in contacting a potential witness during that short period.

At [29] she states that Millchris's solicitor stated that he was very busy working for other clients remotely. As she pointed out the interrelationship between a quick adjudication and heavy workloads is often an issue for someone with a busy practice, and again had very little or nothing to do with the Covid crisis. It might have been the case that some of these matters could have been ameliorated by accepting the two week extension that had been suggested by the adjudicator and accepted by Mrs Waters, but Millchris's position had remained bluntly that no adjudication in accordance with the rules of natural justice could take place before the end of the Covid crisis.

A further issue raised by Millchris was that the adjudicator had indicated that he wished to undertake a site visit on 14 April. It was argued that this was wholly unfair as neither their solicitor, counsel nor any party representative could attend. However at [31] she stated that there was no right for the parties to be present at the site visit. The site visit and inspection could be conducted by the adjudicator perfectly properly on his own. The parties could have listed the matters they wished the adjudicator to see and he could then observe them alone. There could have been some form of remote attendance. For example the adjudicator could use his phone or other device to show the parties remotely what he was looking at.

At [32] she stated that no thought seems to have been given to these options, in that they were disregarded simply on the basis that nothing other than a site visit attended by party representatives would comply with the rules of natural justice. In her view it did not represent some principle of the fair conduct of an adjudication, and indeed flew in the face of the nature of an adjudication.

It followed that there was simply no serious issue to be tried, and that there were no exceptional circumstances that required or justified the grant of an injunction.

John McDonagh SC

Uganda v Rift Valley Railways (Uganda) Ltd [2021] EWHC 970 (Comm)

Arbitral proceedings; Arbitration awards; Judgments and orders; Liquidation; Setting aside

Summary

The Republic of Uganda's application to set aside a procedural order made by an arbitral panel was dismissed on the ground that the order was not an award as to the tribunal's substantive jurisdiction.

The Decision

The Claimant sought an order pursuant to s. 67 Arbitration Act 1996 ("**AA**") setting aside of a decision of the arbitral panel in a London-seated arbitration.

The dispute arises out of a long-term concession agreement dated 7 April 2006

under which it was agreed that the Defendant would provide freight services to Uganda.

The Concession Agreement was between Uganda, Nalukolongo Railway Workshop Ltd, a state-owned corporation, and the Defendant, a Ugandan company. It provided that the applicable law was Ugandan law and that seat of arbitration was London.

It was Uganda's case that the Defendant's performance of the Concession Agreement was inadequate, and that, in the face of the Defendant's non-performance and its declarations that it could not and would not continue performance under the existing concession terms, the Defendant had repudiated the Concession Agreement.

On 31 January 2018, the Defendant commenced an arbitration in accordance with the arbitration provision applicable to the Concession Agreement.

Following the institution of proceedings, the Defendant entered into liquidation in Uganda.

Section 97(1)(c) of the Ugandan Insolvency Act provides that at the commencement of liquidation "*proceedings, execution or other legal process shall not be commenced or continued and distress shall not be levied against the company or its property*."

It fell upon the Tribunal to consider the implications of the Defendant's liquidation proceedings in Uganda.

The Tribunal considered, *inter alia*, that (§22(3) "*as a matter of statutory interpretation, this provision prohibits the commencement or continuation or proceedings against a company in liquidation*." Therefore, "*the appointment of the Liquidator, and his ongoing consideration (without expressing a view one way or the other) of the proceedings do not automatically pose an impediment to the continuation of these proceedings*."

This decision formed part of Procedural Order No. 5.

The Legal Provisions

Section 67 of the AA provides in part as follows:

> "(*1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court –*
>
> *(a) Challenging any award of the arbitral tribunal as to its substantive jurisdiction; or*
>
> *(b) For an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.*
>
> *A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3)*."

Discussion

It fell upon the Court to consider whether there was "*an award*" for the purposes of s. 67 of the AA.

The Court observed that (§42):

> "*In considering this issue it is necessary to have regard to the provisions of AA 1996 as to the form of an award. Section 52 AA 1996 provides:*
>
> *(1) The parties are free to agree on the form of an award.*
>
> *(2) If or to the extent that there is no such agreement, the following provisions apply.*
>
> *(3) The award shall be in writing signed by all the arbitrators or all those assenting to the award.*
>
> *(4) The award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons.*
>
> *(5) The award shall state the seat of the arbitration and the date when the award is made*.'"

The Court considered that (§44) it "*does not have a general power to supervise the conduct of an arbitration prior to award*" and referred to the dicta of Steyn J in *K/S A/S Bill Biakh v Hyundai Corporation* [1988] 1 Lloyd's Rep (§§187–189):

> "*In the interests of expedition and finality of arbitration proceedings, it is of the first importance that judicial intrusion in the arbitral process should be kept to a minimum. A judicial power to correct during the course of the reference procedural rulings of an arbitrator which are within his jurisdiction is unknown in advanced arbitration systems…*".

The Court further had regard (§45) to Waller LJ in *Fletamentos Maritimos SA v Effjohn International BV (No. 2)* [1997] 2 Lloyd's Rep 302 (§306):

> "*I have always understood the position to be that there are no circumstances which could give rise to a power to review an interlocutory direction not made in the form of an award. Basically, the position is, as I understand the authorities, that the Court has never had some general power to supervise arbitration and review interlocutory decisions*."

Accordingly, the Court stated that the "*distinction between an award and a procedural ruling is therefore one of importance*".

The Court had regard to the guidance of Cockerill J in *ZCCM Investments Holdings Plc v Kansanshi Holdings Plc* [2019] EWHC 1285 (Comm) which set out certain points that assist in determining whether a ruling is or is not an award.

These are as follows:

> *"a) The Court will certainly give real weight to the question of substance and not merely to form …*
>
> *b) Thus, one factor in favour of the conclusion that a decision is an award is if the decision is final in the sense that it disposes of the matters submitted to arbitration as to render the tribunal functus officio , either entirely or in relation to that issue or claim …*
>
> *c) The nature of the issues with which the decision deals is significant. The substantive rights and liabilities of parties are likely to be dealt with in the form of an award, whereas a decision relating purely to procedural issues is more likely not to be an award …*
>
> *d) There is a role however for form. The arbitral tribunal's own description of the decision is relevant, although it will not be conclusive in determining its status …*
>
> *e) It may also be relevant to consider how a reasonable recipient of the*

tribunal's decision would have viewed it

f) A reasonable recipient is likely to consider the objective attributes of the decision relevant. These include the description of the decision by the tribunal, the formality of the language used, the level of detail in which the tribunal has expressed its reasoning …

g) While the authorities do not expressly say so I also form the view that:

i. A reasonable recipient would also consider such matters as whether the decision complies with the formal requirements for an award under any applicable rules.

ii. The focus must be on a reasonable recipient with all the information that would have been available to the parties and to the tribunal when the decision was made. It follows that the background or context in the proceedings in which the decision was made is also likely to be relevant. This may include whether the arbitral tribunal intended to make an award."

In its application, the Court concluded that (§47) Procedural Order No. 5 was "*clearly not an award*" for the following reasons:

"*(1) It is not called an award. It was called a Procedural Order. This experienced Tribunal could be expected to know and understand the difference. That it does so in fact is demonstrated by the terms of paragraph [30] of Procedural Order No. 6.*

(2) It would not have been understood by a reasonable recipient as an award. This is in part because of what it was called. But it is also because it did not comply with the formal requirements for an award stated by the AA 1996 and the UNCITRAL Rules. Specifically, it was not signed by all the arbitrators. Instead, and in conformity with what is provided for by paragraph 6.3 of Procedural Order No. 1 in relation to procedural orders, it is signed only by the President. It also does not state the seat of the arbitration. While there is a mention of this in the title, it is not stated in the body of the document, as one would expect had there been intended compliance with Article 34.4 of the UNCITRAL Rules and s. 52(5) AA 1996.

(3) More specifically, it would not have been understood by a reasonable recipient as an award as to jurisdiction. The points raised by the Republic had not been put – certainly had not been intelligibly put – as issues going to the jurisdiction of the Tribunal. There had been no request for the Tribunal to make an award on jurisdiction. Consequently, Procedural Order No. 5 does not discuss the jurisdiction of the Tribunal, nor s. 30 AA 1996. Nor does it discuss possible issues of waiver of the points which the Republic now seeks to put forward based on the date of the original winding up petition, such as points by reference to the Terms of Engagement and Procedural Order No. 1. It is quite clear that the Tribunal did not think that an issue of jurisdiction had been raised, as indeed it expressly said in paragraph [31] of Procedural Order No. 6. This was reasonable given what had been said (and not said) before and at the hearing.

(4) The Order did not finally determine any issue or dispute between the parties, including as to the Tribunal's jurisdiction. The procedural and provisional nature of the ruling is clear from paragraph [48] of Procedural Order No. 5."

Conclusion

Having determined that Procedural Order No. 5 was not an award, the s. 67 application failed.

Michael Judge BL

Davies & Davies Associates Limited v Steve Ward Services (UK) Limited [2021] EWHC 1337 (TCC) 19 May 2021

Adjudication - Resignation of Adjudicator - Whether Adjudicator entitled to payment of fees.

This case concerned an application on the part of the Claimant for summary judgement for an Adjudicator's fees for acting as Adjudicator in an Adjudication brought by the Defendant against Bhavishya Investment Ltd ("BIL"). The claim was small, £4,290 plus VAT, but it raised interesting points as to the circumstances in which an adjudicator's fees are or are not payable.

Facts:

In late 2019 – early 2020 the Defendant carried out construction operations at a restaurant called "Funky Brownz". The premises were owned and operated by BIL. Ms Patel was a director and majority shareholder in BIL. A set of contract drawings was drawn up which referred to Ms Patel as the client. At the completion of the works the Defendant claimed an unpaid balance of £36,000. There was then a dispute as to whether the works were complete, together with defects and snags. The Defendant says that all communications were on the basis that BIL was the contracting party liable for any sums due. At no stage did BIL suggest that Ms Patel was personally liable instead.

On 23 September 2020 Mr Davies was nominated by the RICS to act as Adjudicator under the Scheme for Construction Contracts Regulations (England and Wales) 1998 in relation to a dispute between the Defendant and BIL. He wrote to the parties providing directions and copies of his terms and conditions. There were no objections to the terms and conditions. He received the Response on 8 October 2020 and the Reply on 15 October 2020.
In his Skeleton Argument for the hearing Mr Davies stated that the Parties to the adjudication had entered into "the Contract" pursuant to an agreement in writing dated 21 November 2019. However the Contract relied upon by the Defendant unequivocally recorded that it was between the Defendant and Ms Patel. BIL was not a party to nor was it identified within the Contract. The Adjudicator therefore was of the opinion that he had no jurisdiction and resigned. [32]

He subsequently issued his invoice, as he described in accordance with his accepted terms and conditions. The Defendant did not pay the invoice claiming that the Adjudicator had committed a repudiatory breach of his contract of appointment. It also relied on the Court of Appeal decision of PC Harrington Contractors Ltd v Systech International Ltd [2012] relating to the recoverability of an Adjudicator's fees in a situation in which the Adjudicator's Decision was subsequently declared to be unenforceable.

The Adjudicator's terms and conditions are set out at [35] and include a paragraph that *"The Parties agree jointly*

and severally to pay the Adjudicator's fees and expenses as set out in this Schedule. Save for any act of bad faith by the Adjudicator, the Adjudicator shall also be entitled to payment of his fees and expenses in the event that the Decision is not delivered and/or proves unenforceable".

The Law:

At [44] the Deputy Judge states that in any dispute concerning whether an adjudicator is entitled to his or her fees the starting point is almost always the Court of Appeal decision in PC Harrington v Systech.

In that case the Adjudicator was found in each of three references to have reached a conclusion in breach of his duty to comply with the rules of natural justice in that he failed to decide a relevant issue raised by way of defence because he took what was later held to have been an erroneous view as to jurisdiction. The consequence was that the decisions were unenforceable. In the TCC it was held that he was entitled to his fees but the Court of Appeal took the opposite view, Dyson MR stating at [32] "*what was the bargained-for performance? In my view, it was an enforceable decision. There is nothing in the contract to indicate that the parties agreed that they would pay for an unenforceable decision or that they would pay for the services performed by an adjudicator which were preparatory to the making of an unenforceable decision. The purpose of the appointment was to produce an enforceable decision ……*".

In addition to that Davis LJ stated ay [41] that *"the key nevertheless is to consider what was the contractual bargain actually made. ……. All depends on the contract actually made.* And at [46] *"in the fifteen years or so since the scheme has been operating this particular dispute about fees seems not previously to have surfaced in the courts. In any case, if this decision does give rise to concerns on the part of Adjudicators then the solution is in the market-place: to incorporate into their Terms of Engagement a provision covering payment of their fees and expenses in the event of a decision not being delivered or proving to be unenforceable."*

At [51] to [68] it is pointed out that the Adjudicator took the view that it was clear that the underlying contract was between the Defendant and Ms Patel, and not BIL. If that was the correct view it was clear that he had no jurisdiction over the dispute. On the evidence before him he was entitled to conclude the contract was between the Defendant and Ms Patel. At [60] the Deputy Judge states that it would have been wiser for the Adjudicator not only to inquire as to the parties' position as to who were the contracting parties, but also to inquire in terms as to whether both parties accepted that he had jurisdiction. However he did not do that.

The effect of what the Adjudicator did was to deprive the parties of an answer to their differences as to what sum was payable (either by Ms Patel or by BIL) in respect of the project, and his reasoning in deciding to resign on the basis that he had no jurisdiction when that was not an issue which the parties had referred to him was erroneous. [61 and 62]

While it was submitted that what the Adjudicator did represented an abandonment of his appointment and a deliberate and impermissible refusal to provide a Decision, the Deputy Judge did not accept that this was so. The Adjudicator had acted in accordance with what he regarded as being his duty. Resignation by the Adjudicator had not been a breach of the terms of his engagement as the Scheme permitted an Adjudicator to resign at any time on giving notice to the parties. [66 and 67]

The question was whether upon resigning the Adjudicator was still entitled to his fees and this depended on the true construction of his terms and conditions. [68]

As referred to above Clause 1 provided that the parties agreed jointly and severally to pay the Adjudicator's fees, and that save for an act of bad faith on his part he would be entitled to payment of his fees in the event that the Decision was not delivered and/or proved unenforceable.

The Deputy Judge's judgement was that the clause meant that in addition to being paid for producing a Decision, the Adjudicator was entitled to be paid his fees for work done unless there had been an act of bad faith on his part, [73] and that in a situation where Adjudicator acting with diligence and honesty comes to a conclusion that the proper course is for him to right to resign is not a situation within the expression "bad faith". [79]

Accordingly on the true construction of his terms and conditions the Adjudicator was entitled to be paid for the work done by him. [80]

John McDonagh SC