



LEGAL BRIEFING

Imperial Chemical Industries Ltd v Merit Merrell Technology Ltd

[2015] EWHC 2915 (TCC), Mr Justice Edwards-Stuart

The Facts

During December 2012 Merit Merrell Technology Ltd (*MMT*) entered into an amended NEC3 contract with Imperial Chemical Industries Ltd (*ICI*) to conduct works at a paint processing plant in Northumberland. Option W2 in the contract set out an adjudication procedure and the Contract Data identified the Chartered Institute of Arbitrators (*CI Arb*) as the Adjudicator Nominating Body (*ANB*).

During February 2013 the parties agreed upon a Schedule of Amendments that further amended the contract and in relation to Option W2 stated:

"Delete and replace with 'The Contractor and the Employer acknowledge and agree that all Disputes shall be resolved in accordance with Appendix 2.'"

Appendix 2 provided for adjudication in accordance with the TeCSA Rules and that the ANB would be the Royal Institution of Chartered Surveyors (RICS) but the references to the RICS appeared inside square brackets.

The Schedule of Amendments was stated to supersede all other contract provisions and included the following:

"Option W2 - Add new sentence 'Notwithstanding any provisions to the contrary, this contract is deemed to be a "construction contract" within the meaning of Part II of the Housing Grants, Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009:'"

During the performance of the works, a dispute arose over the quality of the MMT's welding and the value of its works. In late 2014 MMT commenced adjudication. The Adjudicator was nominated by the CI Arb and followed the Option W2 procedure. ICI stated that TeCSA was the correct ANB but failed to challenge the Adjudicator's appointment.

In a second adjudication commenced by ICI the CI Arb nominated the same Adjudicator. In a decision dated 15 June 2015 the Adjudicator found that ICI was entitled to certain documents from MMT but made no order requiring MMT to deliver up these documents.

By way of enforcement ICI sought a declaration that it was entitled to the documents and a declaration that MMT should be required to hand them over. MMT contended that the Adjudicator had lacked jurisdiction where the contract amendments made the RICS the correct ANB with the TeCSA rules to apply. MMT further contended that the Court could not enforce an order that the Adjudicator had declined to make.

The Issue

Were there any grounds for refusing enforcement for want of jurisdiction and if not, was ICI entitled to an order for delivery of the documents?

The Decision

The Judge concluded that where the Schedule of Amendments included a sentence to be added to Option W2 this could not mean, as MMT argued, that Option W2 was to be deleted in its entirety, rather the effect was that the original Option W2 clause was restored.

In the alternative the Judge considered that if Appendix 2 did apply then the placing of the reference to the RICS inside square brackets accorded with the common practice of indicating a provisional position or something that was to be negotiated further. The reference to the RICS in square brackets would have been valid if no other ANB was specified but was overridden by the clear reference to CI Arb in the Contract Data. The Judge also concluded that even if Appendix 2 did apply, MMT had waived any right to insist upon the TeCSA rules being followed.

On the second issue the Judge concluded that the Court could not go further than the Adjudicator was prepared to go. As the Adjudicator had not ordered delivery of the documents then there had been no breach of the Decision and therefore there was nothing to enforce. The Judge also noted that where on the evidence there was some doubt over the value of the documents sought by ICI this gave rise to a triable issue that could not be properly addressed on summary judgement.

Commentary

Here the parties had, no doubt inadvertently, created uncertainty with their drafting amendments. The Judge's comments regarding the provisional nature of text within square brackets are consistent with usual practice for many kinds of agreement but it is unusual to see this practice judicially recognised and this decision should encourage tidier drafting. If the contract position is unclear then it is usually prudent for the Referring Party to set out in advance what dispute resolution procedure it intends to follow to see if some consensus can be achieved.

It must be right that under the summary enforcement procedure the Court cannot convert an Adjudicator's decision into something different. Here the Judge stated obiter that it might have been more appropriate for ICI to have sought an interim injunction requiring MMT to preserve the documents pending clarification of the information required.

Sang-Soo Oh
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