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Welcome to the spring issue of Construct, our specialist newsletter for the construction industry. We hope you will find this edition's articles useful. If you have any further questions about anything you read here or require advice please contact the named lawyer on the article.

Development agreements and EU Procurement law

The European Court of Justice (ECJ) case of *Jean Auroux and others v Commune de Roanne* gave rise to significant concern amongst public bodies and their procurement advisors back in 2007. In that case, the ECJ held that a city council engaging a semi-public company to design and construct a development (part of which was to be owned by the public body and part of which would be sold on by the private developer to third parties) should have complied with the EU Procurement regime in selecting the developer.

Not only was this regeneration project held to be a public works contract for the purpose of the EU Directive, but it was also held that the entire value of the development should be taken into account when considering whether the works fell above the monetary threshold set out in the Directive (as opposed to the public element only). Even the fact that the developer company would itself require to comply with the Directive in procuring the works did not let the contracting authority off the hook.

This decision threatened many arrangements which public bodies had presumed would fall outwith the scope of the Regulations.

It was hoped, and perhaps presumed, that guidance would subsequently be issued to limit the scope of the Roanne ruling to some extent, to clarify that it applied only to the particular facts and circumstances of that case, and to allow other arrangements to be distinguished in some way. The British Property Federation (BPF) called for such action, expressing concern at the number of schemes being delayed due to nervousness following the case.



However, when guidance was finally issued by the Office of Government Commerce (OGC) in October 2009, it provided little in the way of consolation.

Basically, the OGC stated that where:

- works are required/specified by a contracting authority; and
- there is an enforceable obligation in writing upon the contracting party to carry out the works for a pecuniary interest (not necessarily monetary);

the likelihood is that the arrangement will be subject to the EU Procurement rules.

The OGC clarified that where the developer partner had autonomy in terms of the development (i.e. were not bound to comply with the authority's requirements), then this might not constitute a public works contract. In addition, arrangements merely "ancillary" to the sale/lease of land would not be covered. However, there is a grey area in terms of what level of specification constitutes building to the requirements of the contracting authority, and in particular in respect of Section 106/75 Agreements ("agreements regulating the development or use of land" under the Town and Country Planning Acts).

Given the policy frameworks within which housing associations and other public bodies work, buying "off the shelf" is not generally going to be a viable option for them. It is perhaps even less likely that private developers (or their funders) will be willing to undertake projects on behalf of the public sector without having any form of contractual commitment from them.

Unless the European Commission issues further guidance carving out particular arrangements from the scope of the rules, it seems that public bodies will simply have to rethink their procurement strategies if they wish to avoid challenge. Policies and objectives in respect of prospective developments will require to be defined and advertised at an early stage, rather than discussing opportunities with site owners/developers as and when they arise.

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Remedies Directive – are you properly covered?

The new Remedies Directive came into force on 20 December 2009 and applies to all public procurement beginning on or after that date. For procurements where there is a formal advertisement, this point is easy to determine. For those where no formal advertisement takes place, then it will probably be the authority seeking offers of interest or responding to offers received.

One of the remedies for not following the proper procedure is that a rejected contractor may be able to seek a declaration of ineffectiveness in relation to the awarded contract. The word "ineffective" was chosen specifically in the Directive as it has no particular legal meaning in any of the EU member states. This leaves it open to some interpretation as to what the effect will be. In the UK it is clear from the enabling Regulations that any ineffectiveness will not be retrospective, but only affect the awarded contract from the date of the court order going forwards in time. A consequence is that the parties to the contract (the contracting authority and the contractor) both need to consider and address the issue of unwinding the awarded contract if a declaration of ineffectiveness is made, and also what, if anything, happens whilst a challenge to the awarded contract is mounted.

For example, it might be agreed that early capital expenditure might be delayed pending the outcome of the court case, but then the effect of this on the contract in terms of delivery by the contractor will need to be taken account of. Timescales may need to be adjusted as a result with a whole series of consequential adjustments. Also if a declaration of ineffectiveness is made after contract award, then some repayment of any capital expenditure already made may be required.

Areas that may need to be addressed would include unwinding costs, treatment of costs already incurred, capital expenditure, licences and consents, plant and equipment, rights to audit and remove embedded software, TUPE transfers and employment liabilities, lost profit and lost opportunity. Whilst the prime fault for any exposure to the risk of a declaration of ineffectiveness will lie with the contracting authority, they will be keen to pass as much of the risk as they can on to the contractor.

The key message is that any protections which will need to be implemented after the awarded contract becomes ineffective should not be contained in the awarded contract itself. The parties should negotiate a collateral and separate unwinding agreement. Otherwise, the protections could be lost entirely on a declaration of ineffectiveness if this declaration is interpreted to encompass the whole of the awarded contract going forwards from that point in time. There are provisions in the enabling Regulations which require the court not to make any order which is inconsistent with a prior agreement between the parties, as long as doing so does not cut across the intent of the remedy. But the Regulations do not actually require a court to make its order in the same terms as the contract, merely not to be inconsistent.

Therefore if the parties had agreed unwinding provisions in the main awarded contract, a court would, following the Regulations to the letter, not be able to make any order which was inconsistent with those terms, but then the unwinding terms would be covered by the declaration of ineffectiveness and cease to be effective! This leaves a “chicken and egg” type issue. Therefore unless the court chose (and it is not obliged to) to actually embrace those unwinding terms in the court order, rather than merely not make an order which is inconsistent with them, then the unwinding terms would be lost.

There is nothing in the Regulations which suggests that the court’s power to declare the awarded contract would extend to a linked but separate collateral unwinding agreement.

Whilst it may seem overly prudent, until the courts have established lines of authority on how ineffectiveness will be implemented, then it will be a substantial risk to rely on provisions in the main awarded contract to cover events after a declaration of ineffectiveness. The best way to avoid this is a collateral contract which covers this issue.

No doubt, as the approach of various contracting authorities becomes more standard, then requirements on unwinding will be included in the PQ and ITT stages so that the terms of any unwinding are dealt with in the same way as the terms of the main contract to be awarded and become one of the criteria against which the various potential contractors are assessed.

Limited protection

It is a well-established principle of law in England and Wales that an expert witness can not be sued in relation to evidence given during civil proceedings. As stated by Lord Justice Chadwick in his 2000 judgment on *Stanton vs Callaghan*, the principle was founded on the need to “avoid tension between an expert witness desire to assist the court and fear of the consequences of a departure from advice” and to ensure an expert witness owes a duty to the court only.

The question of whether expert witnesses continued to enjoy immunity from suit came before Mr Justice Blake in the High Court on 21 January 2010, in the case of *Jones vs Kaney*. The claimant was an individual who had previously launched a personal injury claim after he was in a road traffic accident. Part of the claim was for psychiatric injury, and the claimant engaged the defendant to act as his expert psychiatrist. The defendant signed an experts’ joint statement that cast doubt on the claimant’s claim for psychiatric injury, but she subsequently said the joint statement did not accurately reflect what she had agreed with the other expert and that she had signed it because she felt “under pressure”. This resulted in the claimant recovering a much lower level of damages than would have been recovered had the claim for psychiatric injury been maintained.

Subsequently, the claimant issued proceedings against the defendant for negligence. The defendant applied for the claim be struck out on the grounds that she was protected from suit following *Stanton vs Callaghan*.

But the claimant raised numerous arguments as to why expert witnesses should no longer continue to enjoy immunity from suit. He argued that the public policy justification for expert immunity was disproportionate, and that it would be unjust if the law remained such that an injured party was left with no remedy for losses suffered as a result of the actions of an expert witness.

The claimant argued that *Stanton vs Callaghan* preceded the Human Rights Act 1996, section six of which provides that public authorities are obliged to act in a manner compatible with the European Convention on Human Rights. Article six of the convention gives a right to a fair trial, and the claimant argued a blanket immunity from suit contradicted this.

He argued that since an expert witness who gave negligent advice would be subject to sanctions from his or her professional body and this was “likely to have a considerably more chilling effect than the insurable risk of civil proceedings for negligent advice in civil proceedings”, there was no good reason to maintain immunity from suit on public policy grounds.

Finally, the claimant also argued it made no sense that a duty of care, which an expert witness owed his client before proceedings were issued, should evaporate once proceedings were issued and had become sufficiently well advanced.

The court said it was bound by the decision in *Stanton vs Callaghan*, and struck out the claim on the grounds that the defendant was immune from suit. However, it expressed sympathy with the claimant, and concluded that “there is a substantial likelihood that on re-examination by a superior court with the power to do so, it will emerge that the public policy justification for the rule cannot support it”.

The court, therefore, granted the claimant leave to “leapfrog” the Court of Appeal and to launch an appeal in the Supreme Court to challenge the position in *Stanton vs Callaghan*. Expert witnesses will await the Supreme Court’s decision with interest. Any erosion of the doctrine of expert immunity could have wide implications in the building industry, and may result in engineers, architects, surveyors and other consultants carefully considering whether to act as expert witnesses.

Those who continue to accept such instructions may find themselves performing a balancing act in complying with their duty not to mislead the court and not exposing themselves to a claim in negligence from the party instructing them.

Expert witnesses may also find any change to the law that erodes the doctrine of immunity from suit would result in a rise in their professional indemnity insurance premiums.

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When adjudication won’t do: *Enterprise vs Tony McFadden*

When a water contractor went into liquidation, it left behind a complicated set of debts and contracts, and a continuing legal struggle. . . .

The recent decision in the case of *Enterprise Managed Services vs Tony McFadden Utilities* will have significant implications for large-scale construction disputes. Here’s what happened.

Tony McFadden Ltd entered into two framework contracts for the repair and maintenance of water mains in London, as well as two smaller contracts, with Enterprise. McFadden was liquidated in 2007. It was common ground that Enterprise owed McFadden money under one contract (A), although the amount was in dispute. However, each party considered it was owed several million pounds under a second contract (B).

In June 2009 the liquidator assigned the sums due to McFadden from Enterprise under the contracts to Tony McFadden Utilities. In September 2009, McFadden Utilities commenced an adjudication against Enterprise, seeking payment of about £2.5m, based on contract A.

Enterprise argued, first, that because it had been unaware of the assignment until the adjudication was commenced, no dispute between the defendant and Enterprise could have crystallised. Second, it cited rule 4.9 of the Insolvency Rules 1986, which says that in a liquidation a party is entitled to set-off all contracts it has with the insolvent company and arrive at a net balance, which it could not do in an adjudication. Third, Enterprise argued that owing to the substantial amount of documentation produced by the defendant with its referral, the dispute was unsuitable for adjudication. It therefore asked the adjudicator to resign.

The adjudicator refused to resign on the basis that he did not have jurisdiction to decide his own jurisdiction. Enterprise therefore issued proceedings in the Technology and Construction Court.

Judge Coulson said the effect of 4.9 was that, on liquidation, the contracts between McFadden and Enterprise had ceased to exist. Therefore, an account must be taken of the dealings between the parties to

ascertain the net balance payable to or by the insolvent company. It was not possible for the liquidator to assign the individual contracts, only the net balance.

However, it was not appropriate for the value of the net balance to be determined by adjudication. It is only possible for a dispute under one contract to be referred to adjudication, and to ascertain the net balance it would almost certainly be necessary to consider multiple contracts.

Furthermore, the judge identified a clash between the certainty envisaged under rule 4.90 and the quick and temporary fix of adjudication. Rule 4.90 envisages that the net balance will be ascertained in one, final set of proceedings. Adjudication is not suitable for this as it can neither deal with all contracts in one set of proceedings nor be finally binding. And it is not appropriate to undertake a piecemeal approach where each underlying contract is the subject of a separate adjudication. Adjudication cannot, therefore, be used to ascertain a net balance in any liquidation. As a result, the adjudication was abandoned.

The decision and reasoning in this case will apply equally where there is no assignment. Once a company goes into liquidation, if there are multiple contracts between the insolvent company and a third party, it will no longer be possible to refer either those individual contracts or indeed the net balance to adjudication – the liquidator will have to commence court or arbitration proceedings.

The judge was critical of the adjudicator's decision to side-step Enterprise's jurisdictional challenges. The judge made it clear that if any such challenges are raised, an adjudicator should consider them and express a view at an early stage. Had the adjudicator done so in this case, he may have saved both parties a lot of money.

The judge also commented on the unsuitability of adjudication for large-scale disputes and was critical of the way this adjudication had been extended on a piecemeal basis. Parliament had not intended that adjudications should last months. At the outset of an adjudication the adjudicator must decide if they can reach a fair and reasonable decision within the statutory period. If not, they must conclude that the dispute is not suitable for adjudication and resign.

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Snow problem

Building a snowman may be the stuff of dreams for some, but for those building more permanent structures, a temporary cold snap can be a nightmare. Adverse weather conditions often cause project delays which may lead to costly claims and even litigation which may prove a flurry too much for some businesses in today's economic climate.

The bad weather at the start of this year and the havoc it caused to construction projects up and down the country has been commented upon regularly over the last couple of months in the construction industry press. Many contractors are now seeking relief for the delays caused by the disruptions. So what are the contractual remedies available for such delays and consequent costs?

As the remedies available will vary from contract to contract, the starting point is the contract itself. Many standard form contracts do contain provisions relating to bad weather, however, as the summaries below highlight, the approach taken differs between the various forms.

JCT forms

Contractors can claim for an extension of time under the JCT forms of contracts for "exceptionally adverse weather conditions" as these are classed as "relevant events". However, no claim is permitted for the associated loss and expense.

The contractor "shall forthwith give notice to the architect/contract administrator" of the relevant event. He must then demonstrate how the weather has caused the unavoidable delay to the project. Contractors often have difficulty calculating the effect that the bad weather has had upon the project, especially in circumstances where the project has been delayed for other reasons.

Another difficulty arises from the fact that "exceptionally adverse weather conditions" is not a defined term. Clearly many weather conditions may cause a delay but only those that are considered to be exceptional will give rise to any entitlement for an extension of time. The task of determining what will be accepted as exceptional is left to the architect/administrator.

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When making such claims, contractors are advised to provide sufficient evidence to the architect/contract administrator to demonstrate the exceptional nature of the weather causing the delay. This is often achieved by an analysis of the historical local weather records. However, in light of this year's arctic chill, will a repeat of such inclement weather be considered "exceptional" in the future?

ICE

The ICE conditions are similar to those contained in the JCT forms. The engineer must be notified of the contractor's claim to an extension of time within 28 days of the cause of the delay. He will then assess the delay and may award an extension of time, but as under the JCT forms, no loss and expense claim is permitted.

NEC3

The NEC3 adopts a more detailed approach. Under the NEC3, the contractor is entitled to claim for loss and expense and delay upon the occurrence of a "compensation event". Adverse weather will qualify as a compensation event if the weather event exceeds the four objective weather measurements set out in the contract data.

There is some debate as to when the weather event arises and if the weather event is limited to the specific days which qualify or the whole month where the weather event occurs. These issues have not yet been clarified by the courts.

A further difficulty with the NEC3 is that the compensation events are only concerned with the weather occurring in the location stated in the contract data. This will inevitably cause difficulty if the weather event occurs on the site but not in the place which is stated in the contract data. Close attention should therefore be paid to how narrowly the location is drafted in the contract data.

GC Works

Under the GC/Works/1 Edition 3 contractors are specifically excluded from claiming an extension of time for weather conditions.

Way forward

It is important to understand how the contract allocates risk associated with adverse weather conditions and the different methods by which weather-related extensions of time applications are granted. This will ensure that your expectations of your responsibilities coincide with the actual allocation of risk specified in the contract.

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