Construction Law Update

Expert Determination Clauses: Take Care in Defining Your Dispute

In the recent case of *Empyreal Energy Ltd v Daylighting Power Ltd*, the court considered proceedings relating to a clause allowing for expert determination as a form of dispute resolution in very specific circumstances.

Background

On 19 November 2015, Empyreal Energy Limited ("**EEL**") engaged Daylighting Power Limited ("**DPL**") under a contract to carry out the design, supply, installation, testing and commissioning of a solar park in Essex (the "**Works**"). Post-completion, EEL alleged that there were defects in the Works (the "**Defects**"). DPL denied the existence of the Defects.

On 25 February 2020, EEL wrote to DPL claiming £1,713,674.60 in relation to "*a dispute with yourselves regarding defects with the works*". On 3 March 2020, DPL replied stating that it had not received all the relevant documents. The following day, EEL responded disputing DPL's position and stating "*we consider that a dispute has crystallised and we confirm that we are now instructed to proceed immediately with a referral of this dispute to expert determination. Should you wish to avoid a referral being made… Pay the sum of £1,713,674.60*". No payment was made.

EEL applied to the CIARb for the appointment of an expert. DPL wrote to EEL (copying in the CIARb) expressing concerns about the validity of EEL's reference and requesting that no further action be taken. Despite this, Mr Sliwinski was appointed and reached a decision on 5 May 2020 that DPL should pay EEL the sum claimed in full (the "**Decision**"). EEL sought to enforce the Decision in these proceedings. DPL resisted enforcement on the basis that the dispute referred to expert determination by EEL was not permitted to be referred for expert determination under the contract and/or that EEL had not served sufficient notice of its intention to refer the dispute in accordance with the contract.

The key contract terms

Clause 36 of the contract provided for expert determination of a dispute in the following circumstances: (i) the dispute referred was one which the contract expressly provided could be referred to an expert; and (ii) the referring party had served a notice "*of its intention to refer the dispute*" to expert determination.

Clause 13.7 provided that in the event that DPL did not remedy a defect in the Works, EEL could either (a) arrange for the remedial works to be carried out and recover the costs of the same as a debt; or (b) determine and agree a reasonable reimbursement of the contract price.

In the case of the Defects, EEL had not arranged for remedial works to be carried out and as such was not entitled to recover the costs of the same as a debt in accordance with clause 13.7(a). It was, however, entitled to rely upon notional costs in support of a claim for a reasonable reimbursement of the contract price in accordance with clause 13.7(b).

Clause 13.8 provided that if a reasonable reimbursement of the contract price could not be agreed, then the dispute could be referred to expert determination.

Issue 1: Was the dispute referred one which the contract permitted to be referred to expert determination in accordance with clause 36?

The wording used by EEL to describe the dispute in its correspondence to DPL, referral and submissions to Mr Sliwinski was unclear and varied. In particular, at no point did EEL make clear that Mr Sliwinski was to determine a reasonable reimbursement of the contract price in accordance with clause 13.7(b). It was held that, on an objective reading, the dispute referred to Mr Sliwinski related to the reimbursement of the costs of cure, not reimbursement of part of the contract

price for the purposes of clause 13.7(b). A dispute over the cost of cure could not be referred to expert determination and accordingly Mr Sliwinski did not have jurisdiction to decide the dispute.

Issue 2: Did EEL serve a notice on DPL of its intention to refer the dispute for expert determination in accordance with the requirements of clause 36 of the contract?

Although not critical given the court's decision relating to Issue 1, the court went on to consider whether EEL had successfully notified DPL under clause 36. The lack of clarity over the nature of the dispute being referred by EEL again proved to be problematic.

The court held that, viewed objectively, as with its submissions to Mr Sliwinski, EEL's notice was not clear enough to leave a reasonable recipient in no reasonable doubt that it was intended to be a claim for adjustment of the contract price and not reimbursement of the costs to cure the Defects. EEL's purported notice was therefore inadequate and invalid.

The court's award

In light of the above, it was held that Mr Sliwinski lacked jurisdiction to decide the dispute referred and the Decision was thereby null, void and not binding on the parties. EEL's claim to enforce the Decision was dismissed.

Analysis

This decision highlights how strictly courts will interpret clauses relating to dispute resolution procedures and the disputes referred under them. The dismissal of EEL's enforcement claim rested solely on its inconsistent and unclear definition of the dispute being referred to Mr Sliwinski in various documents. The contract provisions were very specific in relation to which disputes could be referred and the court was not convinced from the documents provided that EEL had recognised and complied with the relevant provisions.

Where a dispute resolution clause is specific as to which disputes can be referred, parties must be careful to define the dispute precisely and in line with all relevant provisions so as to avoid the risk of obtaining an unenforceable decision.

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