INTRODUCTION

Public procurement litigation has become, largely, the preserve of the Technology and Construction Court ("TCC") and, although a significant number of the public procurement cases are initiated in or transferred to the TCC, a number of them do not, as such, relate to construction. That said, numerous public procurements involve construction and engineering or related projects and therefore from time to time the editors will report such cases. In *DHL Supply Chain Ltd v Secretary of State for Health and Social Care* Mrs Justice O'Farrell addressed the principles to be applied in considering applications to lift the automatic suspension on the placing of public contracts created by the initiation of court proceedings to challenge the procurement process. The court has to apply the *American Cyanamid* principles to determine if there is a serious triable issue, if so whether damages would be an adequate remedy and where does the "balance of convenience" lie. Ultimately, whilst there was here a serious issue to be tried and the losing tenderer claimant might well suffer loss if it did not get the project, what weighed most was the likely loss if the Department of Health could not place the Contract with its selected tenderer. It will often become a balancing exercise and, where health and hospitals are concerned, there is a distinct possibility in every case that the health authority will succeed, as it did in this case.

The TCC case of *Palmer Birch v Lloyd* is an unusual case because, although the underlying facts were entirely construction-related, the basis of claim was in tort for inducing breaches of contract, for interference with contract, conversion and for conspiracy. The contractor in that case pursued two brothers one of whom was the sole shareholder and director of the development company and the other was closely involved with its running. That company was in a "precarious financial position . . . from the outset of its short, non-trading life until it went into liquidation". The judge helpfully analysed the law relating to the applicability of these economic torts and then applied them to the facts finding that, although, for instance, failure to fund itself did not give rise to a tortious liability, one brother did procure a repudiatory breach of the contract by the development company and that both were liable for conspiracy to bringing about that repudiatory breach. As the judge said, the case reveals "the perils of contracting with an undercapitalised limited liability company with no guarantees from the individuals associated with it". Although the defendants were found liable to some extent and there may well be established some financial recovery, the route to recovery is unduly complex both factually and legally.

In *William Bond v Mackay and Others*, the TCC was concerned with an issue relating to an arbitrator's jurisdiction in which a party had proceeded initially in its pleadings on the basis of claims under specific clauses in its respective contracts but, having lost in a first award on those claims, he then sought to pursue a claim based on another clause. The arbitrator having decided that he did not have jurisdiction, the TCC had to construe the referral to arbitration to determine what the scope of the arbitrator's jurisdiction actually was. The wording was somewhat general relating to a claim for valuation and compensation associated with the sterilisation of land said to be attributable to the underground pipes of the two relevant defendants, installed originally under deeds of easement. The TCC in accordance with normal practice in these cases looked at the general wording in the context of the factual matrix or background and decided that the claim was in effect a general one for compensation for land sterilisation and that therefore the claim, based on the clause latterly put forward, was within the arbitrator's jurisdiction. The moral of this case is that, if a party wants to avoid doubt in its referral to arbitration (or indeed adjudication), it should set out clearly and definitively what is being submitted. If it wants to keep its options open, wording in the referral which is somewhat vague and general might give it greater flexibility once the arbitration is up and running in terms of presenting all its claims.

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In *Cleveland Bridge UK Ltd v Sarens (UK) Ltd*, the TCC was concerned with the trial of the substantive issue, already decided in adjudication, relating to what the parties had agreed in relation to delay and/or liquidated damages and in particular whether there was a cap of 10 per cent on the liquidated damages recoverable. Such caps are not uncommon in substantial engineering contracts. Basic principles are applicable, such as that, in determining whether a term forms part of the contract or even if the parties have reached agreement at all, the court has to look at the whole course of negotiations between the parties. There was no doubt that a 10 per cent cap on damages was raised in the contractual discussions between the parties and indeed there was a reference to such a cap in draft contract documents that were being discussed. However, the respected Deputy decided that the parties never reached a finalised agreement in relation to damages, liquidated damages or to the cap. Estoppel arguments also failed.

Redbourn Group Ltd v Fairgate Developments Ltd was another TCC case which involved consequences of termination and repudiation of contract whereby the claimant had been retained to act as a development and project manager for a proposed development. Judgment had been entered in default against the defendant and this had not been set aside and so, issues of causation and loss remained. Although there remained an unpaid balance of fees which were due, the claimant claimed the whole of the £200,000 fee and also additional fees due for later stages of the project which had not been implemented before the termination. For one reason or another, the project in question did not go ahead and the Deputy had regard to the principle that a defendant "in an action for breach of contract is not liable for not doing that which he is not bound to do". It was established that the developer client was not obliged to go on with the project and would have been entitled to terminate the claimant's engagement lawfully in time in any event. The claimant's recovery was therefore necessarily limited. This case underlines the need in repudiation cases to analyse not only what did happen after the repudiation but also what could realistically be likely to have occurred.

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