39 Essex CHAMBERS

OUTLOOK

NEWS AND VIEWS FROM THE
39 ESSEX COMMERCIAL AND CONSTRUCTION GROUP
September 2020

INTRODUCTION

David Hopkins

Welcome to the September 2020 edition of Outlook, a roundup of news and views from the 39 Essex Commercial and Construction Group.

Costs are rarely far from any disputes practitioner's mind and, with the economic fallout of the pandemic looming in the background, are likely to become an even more critical consideration for lawyers and their clients. In this context, we have launched a new podcast series, Current Topics in Commercial and Construction Costs, featuring contributions so far from **Peter Hurst, Paul Darling OBE QC, Marion Smith QC, Judith Ayling** and **Shaman Kapoor.** In parallel with the podcasts, this month's newsletter features an article which examines the effect of five recent costs decisions dealing with issue-based costs orders and Third Party Costs orders and litigation funding.

It is not unheard of for a party to an arbitration dissatisfied by the tribunal's decision to seek to impeach the award on the basis of serious irregularity. While the bar for a successful challenge is relatively high, such an application

Contents

may well succeed if, for example, a witness is not cross-examined on a central aspect of the case. **David Sawtell FCIArb** considers three recent decisions of the English court following claims brought under s 68 of the Arbitration Act.

In present times, many public authorities are reassessing their spending due to falls in demand for certain services, the reallocation of budgets and other factors. Where they have already commenced a procurement exercise, this may create difficulties. **Philippe Kuhn** considers the case law on contracting authorities abandoning procurements prior to award of the contract.

And **Shaman Kapoor** examines an epic falling out between solicitor and client, involving poorly drafted CFAs and patchy record-keeping, and leading to an 81-page judgment recently handed down by Master James in the Senior Courts Cost Office.

QUARANTINE QUERIES

The Commercial and Construction team continues to offer our initiative which we hope will help those of you who are working from home or in isolation. We have established a team of silks and juniors who will be available for up to half an hour – free of charge – to talk through the kind of issues that you would previously have mulled over with a colleague at the coffee machine. The discussion will be on a "no liability" and "no names" basis; however, you will be asked to provide some brief details of the query to our clerks so that they can make a barrister available.

If there is a matter that you would like to discuss (COVID-19 related or otherwise) please contact:

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and book a slot with one of our barristers.

CURRENT TOPICS IN COMMERCIAL AND CONSTRUCTION COSTS

Peter Hurst
Paul Darling OBE QC
Marion Smith QC
Judith Ayling
Shaman Kapoor

The costs of litigation, and any form of dispute resolution have always mattered. They are going to be even more important as the world faces a deep global recession – particularly in the complex international commercial and construction disputes dealt with in the UK.

In parallel with our newly launched podcasts, Current Topics in Commercial and Construction Costs, this is the first in a series of updates on recent developments in Costs case law.

We look at two topics: issue-based costs orders and Third Party Costs orders and litigation funding, the subject of the following decisions:

- *Pigot v Environment Agency* [2020] EWHC 1444 (Ch); [2020] Costs LR 825;
- *Scales v Motor Insurers' Bureau* [2020] EWHC 1749 (QB); [2020] Costs LR 771;
- *Chapelgate Credit Opportunity Master Fund Limited v James Money* [2020] EWCA Civ 246; [2020] 1 WLR 1751;
- *Sharp v Blank* [2020] EWHC 1870 (Ch); [2020] Costs LR 835; and
- *Singularis Holdings Limited v Chapelgate Credit Opportunity Master Fund Limited* [2020] EWHC 1616 (Ch); [2020] Costs LR 881.

Issue-based Costs orders

Where a party succeeds on some issues and fails on others, judges are frequently asked to consider making issue based costs orders. CPR r 44.2 provides that the court has discretion as to: (a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid.

If the court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but the court may make a different order. In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including: the conduct of all the parties; whether a party has succeeded on part of its case, even if that party has not been wholly successful; and any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

The conduct of the parties includes whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; and whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.
The rule sets out the orders which the court may make as follows:

(a) a proportion of another party's costs;
(b) a stated amount in respect of another party's costs;
(c) costs from or until a certain date only;
(d) costs incurred before proceedings have begun;
(e) costs relating to particular steps taken in the proceedings;
(f) costs relating only to a distinct part of the proceedings (i.e. an issue based order); and
(g) interest on costs from or until a certain date, including a date before judgment.

Rule 44.2(7) specifically requires the court, before it considers making an issue based order, to consider whether it is practicable to make a proportionate order under paragraph (6)(a) or costs from or until a certain date only under paragraph (6)(c) instead.

In *Pigot v Environment Agency*, at paragraph 6, Stephen Jourdan QC summarised the principles guiding the approach to issue based Costs Orders:

- The fact that a party was not successful on every issue did not alone justify an issue based Costs Order or make it appropriate to deprive them of their costs.
- An issue based Costs Order might be appropriate if raising a discrete or distinct issue had caused additional costs to be incurred or where the overall costs were materially increased by the unreasonable raising of one or more issues on which the successful party failed.
- If a discrete issue causing additional costs to be incurred was reasonably raised, the overall successful party was likely to be deprived of its costs of the issue.
- If the issue was unreasonably raised, that party was likely to be ordered to pay the costs incurred on that issue. An issue might be treated as unreasonably raised if it was hopeless and should never have been pursued.
- Where an issue based Costs Order was appropriate, the Court should attempt to reflect it by ordering payment of a proportion of the receiving party's costs if that is practicable.
- An issue based Costs Order should reflect the extent to which the costs were increased by the raising of the issue; costs which would have been incurred even if the issue had not been raised should still be paid by the overall unsuccessful party.
- Before making an issue based Order, it was important to stand back and ask whether, applying the principles in CPR r 44.2, it was the right result in all the circumstances of the case and reflected the overall justice of the case.

In *Scales v Motor Insurers Bureau*, Cavanagh J quoted the principles above, as set out in Pigot, with approval. The major problem with issue

based costs orders is that, on assessment, every item of work has to be analysed to ascertain what proportion of the work done related to the particular issue. This is both extremely time consuming and, in a complex case, very difficult. In those circumstances, in any case where a judge may be minded to make an issue based order, s/he should be strongly urged to make a proportionate order, e.g. 60% of the costs.

Third Party Costs orders and litigation funding

The Court of Appeal has now held in *Chapelgate Credit Opportunity Master Fund Limited v James Money* that the so-called "Arkin" Cap is not a binding rule.

For many years, a third party commercial funder's liability for costs has been treated as limited to the extent of the funding actually provided. This was based on the criticised decision of the Court of Appeal in *Arkin v Borchard Lines Ltd (Nos 2 and 3)* [2005] EWCA Civ 655; [2005] 1 WLR 3055.

The Court of Appeal has now held in Chapelgate that the Arkin cap is not a binding rule. Judges retain a discretion and depending on the facts may consider it appropriate to take into account matters other than the extent of the funder's funding. In the case of a funder who funded only a distinct part of a claimant's costs, a judge might well decide that it should pay no larger sum towards the defendant's costs. A judge could also, however, consider the funder's potential return significant. The more a funder had stood to gain, the closer he might be thought to be to the "real party" ordinarily ordered to pay the successful party's costs.

The implications of this decision will be worked out in the coming years. Sir Alastair Norris, in *Sharp v Blank*, provides an example of the pragmatic application that can be expected from the Court, and evidences an expectation that commercial parties will use ADR in resolving costs issues.

In these proceedings, the claim brought in group litigation by 5,800 Claimants, funded in part by commercial funders Therium, against the Directors of Lloyds TSB, failed. Costs were dealt with after the Court of Appeal decision in *Chapelgate* (see left). The Defendant claimed costs in excess of £30m against the Claimants and Therium. The Claimants were ordered to pay an interim payment on account of £17m.

The Judge said that did not know enough about the detail of the funding arrangements effected by the Claimants with Therium properly to exercise the discretion in relation to the entirety of the Defendants' costs claim at that hearing.

However he knew enough to conduct a limited exercise. Even if the Arkin cap were to be applied the amount of the interim payment on account of costs ordered would fall below that cap.

Accordingly the Judge made an order that Therium and the Claimants were to pay the interim payment on account with a "permission to apply" for Therium as a "failsafe". Otherwise the extent of Therium's liability for costs was adjourned for further consideration.

However the Judge expressly said that he expected the parties (as commercial entities) to engage in an ADR process and to come back to the Judge if that did not work. The Judge saw no reason in principle why the liability of Therium (which has indemnified the Claimants) should be secondary and not simply joint and several in the usual way.

Finally, if of interest, details about the litigation funding business model are set out in *Singularis Holdings Limited v Chapelgate Credit Opportunity Master Fund Limited,* Andrew Lenon QC.
The issues involved in this case relate to the construction of the funding agreements and not costs.

CHALLENGING AN ARBITRAL AWARD FOR SERIOUS IRREGULARITY: RECENT DEVELOPMENTS

David Sawtell

"No one likes losing." As the authors of *Redfern and Hunter on the Law and Practice of International Commercial Arbitration* (6th edition) note in their opening words to their chapter on challenges to arbitral awards, a losing party will often look for ways to disturb what should be a final and binding determination of the dispute. If, however, there has been a serious irregularity affecting the fairness of the arbitration, both the Arbitration Act 1996 ('AA 1996') in England and the UNICITRAL Model Law contain provisions allowing a limited right to challenge the award.

Three recent decisions in the English High Court dealing with challenges to arbitral awards on the grounds of serious irregularity arising out of the way in which the arbitral tribunal dealt with evidence and procedure provide an opportunity to re-visit the statutory framework for such challenges and the principles that are applied. In two of them, the challenge failed *(Obrascon Huarte Lain SA (trading as OHL Internacional) and another company v Qatar Foundation for Education, Science and Community Development* [2019] EWHC 2539 (Comm); *ASA v TL* [2020] 2270 (Comm)); in one of them (*P v D* [2019] EWHC 1277 (Comm), [2020] 1 All ER (Comm) 174), where a witness was not cross-examined about a central aspect of the case which led to a conclusion against a party, the challenge succeeded.

The statutory framework and principles

Section 33(1)(a) AA 1996 imposes a general duty on the tribunal to *"act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent"*. This duty applies, in particular, when conducting the proceedings themselves, in its decisions on matters of procedure and evidence, and in the exercise of all other powers conferred on it (AA 1996, section 33(2)). This mandatory provision is derived from the UNCITRAL Model Law, article 18 *("The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.")* Similar provisions are therefore found in jurisdictions that have adopted the Model Law either in whole or in part: for example, the wording of section 25 of the DIFC Arbitration Law No. 1 of 2008 mirrors article 18.

A party may apply to the court challenging an award *"on the ground of serious irregularity affecting the tribunal, the proceedings or the award"* under section 68(1) AA 1996. The grounds upon which a court may find serious irregularity are exhaustively listed in section 68(2), which also requires the court to find that the irregularity has *"caused or will cause substantial injustice to the applicant"*. A failure to comply with section 33 AA 1996 is one such ground under section 68(2)(a).

It has been repeatedly re-emphasised that a party seeking to rely on section 68(2)(a) faces a high hurdle to make out this ground. The Departmental Advisory Committee on Arbitration Law noted the criticism that under the Arbitration Act 1950 courts had intervened more than they possibly should have done in the arbitral process. In *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2005] 3 All ER 789 at [27], it was commented by Lord Steyn that *"The DAC observed about cl 68 that it 'is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected'"*.

While there is no precisely comparable provision in the Model Law, Article 34(2)(iv) also provides that an arbitral award may be set aside by the court if the party making the application furnishes proof that *"the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law"*. Again, this provision is typically transposed into

jurisdictions that have adopted the Model Law, for example in section 41(2)(a)(iv) of the DIFC Arbitration Law.

Both the AA 1996 and the Model Law require the arbitral tribunal to give each party a fair opportunity to present its case. The arbitral tribunal, therefore, must not decide a matter on a basis that has not been argued before it.

In a challenge made under the AA 1996, it is not appropriate, however, for the court to delve too deeply into the effect of any procedural failing. In particular, it should not ask whether, but for the default, the arbitral tribunal would have arrived at a different conclusion. In *Vee Networks Ltd v Econet Wireless International Ltd* [2005] 1 All ER (Comm) 303, Colman J at [90] stated that:

> *"Thus, where there has been an irregularity of procedure, it is enough if it is shown that it caused the arbitrator to reach a conclusion unfavourable to the applicant which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is at least reasonably arguable. Above all it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process."*

The English court's approach to an application under section 68 in a series of cases was recently usefully summarised by Carr J in *Obrascon Huarte Lain SA (trading as OHL Internacional) and another company v Qatar Foundation for Education, Science and Community Development* [2019] EWHC 2539 (Comm) at [45]:

> *"45. Determining whether or not the duty of fairness has been breached will always be a question of fact and sometimes degree. However, the relevant broad legal principles are un-controversial and can be summarised for present purposes as follows:*
>
> *i) There will generally be a breach of s. 33 of the Act where a tribunal decides the case on the basis of a point which one party has not had a fair opportunity to deal with. It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him;*
>
> *ii) If a tribunal considers that the parties have missed the point and/or contemplates a completely different basis for a decision, the parties need to be given notice and a proper opportunity to consider the position and respond. This does not mean that every nuance or inference which the tribunal wishes to draw needs to be put to the parties if it differs from that which has been precisely contended for in the arbitration;*
>
> *iii) A tribunal does not have to set out each step by which they reach their conclusion or deal with each point made by a party to an arbitration and a tribunal can deal with a number of issues in a composite disposal rather than address each issue seriatim;*
>
> *iv) (Save possibly in exceptional cases) s. 68(2)(a) in referring to the general duty of fairness in s. 33 does not allow a party to contend that the tribunal has disregarded or overlooked a particular piece of evidence since that amounts to an assertion that the arbitrators made mistakes in their findings of primary fact or drew unsustainable inferences from the primary facts;*
>
> *v) In determining whether there has been substantial injustice, the applicant does not need to show that the result would necessarily or even probably have been different. He simply has to show that the tribunal might well have reached a different view and produced a significantly different outcome. It is enough for the applicant to show that the arbitrator reached a conclusion unfavourable to him which, but for the irregularity, he might well never have reached, provided always that the opposite conclusion is reasonably arguable."*

In that case, Carr J rejected a challenge to an arbitral award under section 68(2)(a): the high threshold required to make out a successful application had not been met. At [97], she noted that notwithstanding the detail in the parties' submissions, it was necessary to avoid *"an unduly legalistic or minute textual analysis of the Award."* Instead, it had rejected one party's interpretation of the Qatari Civil Code *"in a manner which reflected the evidence and arguments canvassed at the hearing"* ([98]).

The importance of cross examination

In *P v D* [2019] EWHC 1277 (Comm), [2020] 1 All ER (Comm) 174, the arbitrators found that, notwithstanding a 'no oral modification' clause, an estoppel had arisen which prevented D from demanding payment of loans due to it, but rejected P's submission that there was either an agreement or estoppel extending the repayment date to January 2020. P applied under section 68(2)(a) AA 1996, arguing that there was no cross examination of a witness to the meeting in question; despite this, the arbitrators had made a finding against him.

Cross-examination forms an important part of common law civil procedure. If a party wants to suggest that another party's witness is to be disbelieved, it is incumbent for that to be put to that witness in order to give them a fair opportunity to deal with the allegation: *Browne v Dunn* (1894) 6 R 67. In *Markem Corporation v Zipher Ltd* [2005] EWCA Civ 267, [2006] IP & T 102, at [56]ff, Jacob LJ reviewed this doctrine, noting that *"procedural fairness not only to the parties but to the witnesses requires that if their evidence were to be disbelieved they must be given a fair opportunity to deal with the allegation"*. The Privy Council re-affirmed the rule in respect of an appeal from the Eastern Caribbean Court of Appeal in *Chen v Ng* [2017] UKPC 27, [2017] 5 LRC 462. It was confirmed that the rule applied in relation to an application under section 68 in *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd, The MV Pamphilos* [2002] EWHC 2292 (Comm), [2002] 2 Lloyd's Rep 681 at 686. While an important rule, however, it is not inflexible: for example, it may not be possible, in the time available, to cross examine on every point, while a witness may be recalled to have the matter put to them: *Edwards Lifesciences LLC v Boston Scientific Scimed Inc* [2018] EWCA Civ 673, [2018] FSR 29.

In *P v D*, Sir Michael Burton, sitting as a Judge of the High Court, accepted that there had been no cross-examination on the core issue of whether there had been an agreement or understanding. He then went on to observe that in order to make out a section 68 challenge, it was not sufficient to make out serious irregularity: the Court also had to consider whether it had caused substantial injustice to the applicant. In this case, the witness did have a potential answer to the point that had been made. Sir Michael cited Colman J's comments in *Vee Networks*, referred to above. At [39], he held that he could not possibly say that if the witness had not been properly cross-examined, there might have been a different outcome. As a result, the application under section 68 was allowed.

Acceptable inference or point not put to the parties?

In *ASA v TL* [2020] 2270 (Comm), the applicant submitted that the arbitrator had decided two important issues on the basis of points that it did not have a fair opportunity to deal with because they were not put forward by either party or their experts. The case involved the question of whether a particular cargo vessel was capable of transporting oil, which would have an effect on its rate of hire. The submission was that the arbitrator had decided that it was so capable, not from the expert or other evidence before her, but from her own reading of the class documentation for the vessel. It was submitted that it was not evidence, argument or analysis that either party had advanced, while the charterer's expert had given unchallenged evidence that the publicly available documents supported the conclusion that the vessel should not be valued as one having the capability to carry such cargoes.

Sir Ross Cranston, sitting as a Judge of the High Court, rejected this submission. At [60], he held that the arbitrator was drawing a permissible inference on an issue that the charterers themselves had raised during the course of the hearing. It was not a case of the arbitrator using their own 'special knowledge'. It was, instead, an example of where the point was not strictly argued or pleaded by the parties, but was *"in play"* or *"in the arena"* in the proceedings, citing *Russell on Arbitration* (24th edition), at para 8-092. At [64], the Judge went on to note that the court was not permitted to review the arbitrator's assessment of the experts' expertise under section 68.

Conclusion

The ultimate aim of a party referring a claim to arbitration is not to win the arbitration, but to secure an enforceable award in their favour. In conducting an arbitration, a party should be careful to ensure that the arbitral tribunal is given adequate assistance to achieve this goal. Parties should put their case clearly, so that each other party has a fair chance to present their case. A failure to do so could jeopardise the prospect of an enforceable award being rendered. While there may be different expectations as to the degree to which a witness should be cross examined or arguments flagged in advance, this basic level of fairness is common to both the AA 1996 and jurisdictions which have adopted the Model Law.

The English courts will be very slow to accede to an application under section 68 AA 1996. In the appropriate case, however, where there has been unfairness in the way that the arbitral tribunal has dealt with the evidence, such an application may well be successful.

ABANDONING EXISTING PROCUREMENTS WITHOUT CONTRACT AWARD

Philippe Kuhn

The current global Covid-19 pandemic has thrown into sharp relief the legality of abandoning existing procurements without proceeding to contract award. This may be relevant to contracting authorities for reasons including; a sudden drop in demand for certain services or products, re-allocation of tight budgets to emergency spending, and pausing procurement where it is expedient to start afresh in future in view of anticipated shifts in pricing and supply. This article addresses alternatives to abandonment and the leading cases on abandonment, as well as providing practical guidance based on the case law, in particular in a Covid-19 world.

(1) Alternatives to abandonment:

This is the first question to consider in any case. Abandonment is a drastic step and, in most cases, carries with it greater risks of legal challenge than less onerous steps.

The first option is variation. This is governed by the detailed provisions of Regulation 72 of the Public Contracts Regulations 2015 ("PCR 2015"). In brief summary, there are six permitted categories or "safe harbours". Namely: (1) amendment clauses, (2) economic and technical reasons, (3) unforeseen changes, (4) new contractor cases, (5) "insubstantial" modifications and (6) minor modifications. The detail is beyond the scope of this article. Notable authorities include *Edenred (UK Group) Limited v HM Treasury* [2015] UKSC 45; [2015] PTSR 1088, *Gottlieb v Winchester City Council* [2015] EWHC 231 (Admin) and *Finn* Frogne (C-549/14) [2016] PTSR 1569.

Another option are call-offs from existing contracts, framework agreements or dynamic purchasing systems ("DPS"). Key prerequisites are: (1) prior identification as a permitted customer, (2) compliance with the original scope of the contract,

framework agreement or DPS, (3) that the procurement was PCR 2015 compliant originally and (4) the adequacy of the existing contractual terms.[1]

(2) Case law on abandonment:

The two leading cases on abandonment both pre-date the current pandemic, but Government guidance in the form of Public Procurement Notice 01/20 ("PPN 01/20") at the start of the lockdown was quick to reiterate that the PCR 2015 continue to provide the applicable legal framework. The key cases thus remain *Amey Highways Limited v West Sussex County Council* [2019] EWHC 1291 (TCC); [2019] PTSR 1995 and *Ryhurst Ltd v Whittington Health NHS Trust* [2020] EWHC 448 (TCC).

Amey:

Amey arose out of a claim for damages against West Sussex County Council ("the Council"). Amey alleged breaches of the Council's duties under the PCR 2015 in respect of a procurement exercise for the award of a 10-year highways service contract awarded to another bidder, Ringway. Amey had scored only fractionally lower than Ringway. It argued that, but for errors in scoring, it would have won. In light of claim no.1, the Council did not award the contract but instead decided to abandon the procurement process and start again. Amey brought a second claim challenging the lawfulness of the decision to abandon the first procurement. Claim no.2 was tried at same time as preliminary issues in the damages claim concerning the effect of the abandonment (claim no.1).

The judgment of Stuart-Smith J provides a helpful summary of the general principles:

- A contracting authority has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and thus in any decision to abandon a procurement: [12](a).
- The exercise of that discretion is not limited to exceptional cases or does not necessarily have to be based on serious grounds: [12](b).
- The decision to abandon is subject to fundamental rules of EU law, i.e. rationality, equal treatment (including reason-giving) and transparency: [12](d)-(e),(g).
- It is not enough to merely examine whether the decision to abandon was "arbitrary": [12](f).
- Potential triggers include (1) changes in the economic context or factual circumstances or (2) the needs of the contracting authority: [12](h).

On the facts, Stuart-Smith J concluded that after taking into account planned savings and benefits of the proposed Ringway contract, the Council decided that "contracting with Ringway and pursuing the Amey litigation to a conclusion was an unpalatable risk": [41](ii). The key Council officials had "hoped and intended" that abandoning the procurement would have the effect of terminating claim no.1, but did not believe that abandonment "was bound to have that effect": [41](iii). He went as far as finding there was "no other rationale that was driving the decision to abandon the Procurement": [41](v).

Stuart-Smith J concluded it is wrong that a procurement can only engage public law principles and remedies: [57]-[58]. Irrespective of a concurrent public law claim, a damages claim for breach of the PCR is essentially a private law claim upon completion of cause of action, subject only to *Francovich* conditions: [11]. Thus, while a lawful abandonment may prevent private law claims from coming into existence *subsequently*, it does not extinguish an *accrued* cause of action on the part of an economic operator: [60]-[62]. This meant the abandonment decision had no effect on claim no.1 if Amey did succeed in establishing that (accrued) damages claim: [79]. The judge also briefly applied the general principles at [12] in deciding on the question of *lawful* abandonment at [80]-[89]. He declined to find irrationality, breach of equal treatment or lack of transparency. The remarks are quite fact-specific and *Ryhurst* provides a more helpful and thorough illustration.

1 See the summary in PPN 01/20, page 5.

Ryhurst:
Ryhurst was a specialist provider of health estate management services. Controversially, it was part of a group which included a company responsible for supply and installation of cladding at the Grenfell Tower. In June 2016, Whittington Health NHS Trust ("the Trust") had begun a procurement exercise for a 10-year strategic estates partnership ("SEP") contract. In October 2017, the Trust decided to award the contract to Ryhurst. By June 2018, a decision was taken to abandon the procurement for reasons including (1) the Trust's improved financial position, (2) strengthened relations with other partner organisations, (3) risk of insufficient stakeholder engagement and (4) the need for approval from the Trust's regulator.

Ryhurst claimed the real reason for the decision to abandon the procurement was pressure from local campaign groups, MPs and others due to the Grenfell connection. It brought a claim against the Trust for breach of its duties under the PCR 2015, seeking damages for losses.

The trial was heard by HHJ Stephen Davies in the TCC. Notably, he approved at [20] the summary of principles on abandonment in *Amey* at [12]. The key issue on the facts turned out to be the identity of the bidder. The judge held that "a public authority may decide to abandon a procurement by reference to reasons connected with the individual circumstances of the tenderer concerned", subject to "fundamental principles of EU procurement law": [25].

For present purposes, HHJ Stephen Davies provided the following key clarifications:

- Regarding transparency, Ryhurst would have to establish that, had the Trust not breached that obligation, it would either on the balance of probabilities have entered into the SEP or, alternatively, not have wasted further time and expenditure: [32].
- It was not sufficient for Ryhurst to show that it had a characteristic that no other bidder had, i.e. the Grenfell connection. Materially, the judge considered that it is not always necessary to apply a two-stage analysis without consideration of objective justification at stage (1), and that Ryhurst must show that it was "manifestly erroneous or irrational or disproportionate or not objectively justified": [41], [44]. He also considered that the non-discrimination principle does not add anything to equal treatment: [45].
- In relation to manifest error, he concluded that contracting authorities have a margin of appreciation as regards manifest error and the EU law concept is comparable to the Wednesbury unreasonableness standard in English public law: [54].
- The English public law doctrine of relevant considerations does not usually apply to damages claims in the procurement context: [55]-[65].

Dismissing the claim, the judge considered the Trust had established a significant change in its financial position in June 2018 and that that was "a genuine and a principal reason" for abandonment: [219]. He added that strengthening relations with other partner organisations would not have been a sufficient reason in itself, but the Trust was reasonably entitled to and did consider it "as supporting the decision to abandon": [231]. Importantly, he also held that the Trust was not obliged to put out of its mind the fact that there was a lack of stakeholder support simply because one or the principal reason for that was the Grenfell connection: [247]. Accordingly, there was no breach of the obligations of equal treatment, non-discrimination, proportionality or avoiding manifest error: [247].

(3) Practical guidance:

Both *Amey* and *Ryhurst* deserve careful reading. *Ryhurst* in particular provides a detailed and very recent illustration of how the principles of EU law summarised in *Amey* at [12] are likely to be applied by the TCC. The key lesson to take from both judgments is that it is vital not to look at abandonment in a vacuum. Contracting authorities

should consider carefully any accrued rights, which will survive abandonment.Timing is crucial irrespective of Covid-19.

A more heartening observation for contracting authorities is that the level of scrutiny as to whether a decision to abandon was *lawful* is modest, though not limited to *arbitrariness*. That point is made in terms in *Amey* at [12](f). Arguably, it will be even harder to attack decisions to abandon in the majority of (genuine) emergency situations arising from Covid-19. That said, there are no special principles in the present pandemic context and (if PPN 01/20 is followed strictly by the courts) these may never develop.

Consideration of political sensitivities (such as the Grenfell connection in *Ryhurst*) are not necessarily impermissible, but care must be taken to see how and why they are relevant to the efficacy and success of the subject-matter of the procurement. In other words, mere political controversy is not itself a sufficient or good reason for abandonment.

Lastly, as ever, it is best practice to document the reasons for abandoning a procurement clearly and contemporaneously to avoid fact-sensitive disputes. While this is more challenging given time and resource pressures resulting from Covid-19, it is a crucial step in curbing costs and litigation risk. It is a worthwhile investment.

ALL-IN or ALL-OUT?

Shaman Kapoor

This case provides an example of a solicitor-client fall-out on an epic scale.

***Global Energy Horizons Corporation v The Winros Partnership (formerly Rosenblatt Solicitors)* [2020] 8 WLUK 247 (SCCO Ref: JJ1602737, Master James, 20/08/20)**

Back in December 2016, I recall a year in which the candle appeared to have been burning at both ends and looking forward to a rare skiing holiday with friends after Christmas. And then, on about 27 December, my then senior clerk phoned to see if I would be interested in being a part of the counsel team on what was on its face an exciting and long-running commercial dispute requiring immediate hands-on. As many (I am sure) in my position would have done, I bowed out of the holiday and looked forward to reading into 180 lever-arch files. I was recruited by the Defendant, Mr Gray, amidst a change in his legal team, and in due course the counsel team took on more leaders and evolved itself. My contribution was, in the grand scheme of things, very small. Nevertheless, the case was fascinating and I witnessed supreme skill from solicitors and leaders at the common law and commercial Bar. Upon my arrival, it appeared that the Claimant had also had a change in legal team from Rosenblatt Solicitors ("RS") to Bird & Bird LLP. The dispute between the parties was bitter. Allegations and cross-allegations were made at every level. It took its toll on the Defendant. It had been running for years. The significant judgments were given first by Vos J (as he then was) in 2012, later from Sales J (as he then was) in 2014 and later still Asplin J (as she then was) in 2015. And here it is again, in 2020, this time unravelling some detail about the massive dispute between solicitor and client on the Claimant side.

The basic facts

Global Energy Horizons Corporation ("GEHC") is a Canadian based venture capital corporation which

had invested in new technology in the oil and gas sector. Specifically, it had invested in exploring the use of ultra-sound technology to regenerate old (and considered spent) oil and gas wells. The technology applied ultrasound stimulation to the wellbore area in order to diminish wellbore damage and restore or enhance production in low-performing or late-life wells. The tools delivering the technology were inserted into the wellbore area and applied a wide range of frequencies and power in continuous or pulse modes, designed to stimulate oil and gas production. The financial upside to the technology being proved successful would obviously have been immense. Mr Gray, a former partner of GEHC, parted company from GEHC after many years together exploring the potential of the technology. After his departure, GEHC asserted that Mr Gray had diverted an opportunity for it to acquire interests in the technology. GEHC further claimed that Mr Gray had, in breach of fiduciary duty, wrongfully applied the technology with success, generating a profit in Russia and later in the USA, for which he was accountable to GEHC. Mr Gray denied those claims and asserted that the technology had been a commercial failure.

Liability and quantum were tried separately.

As for quantum, the claim was said to be worth at least hundreds of millions of dollars by GEHC, but by the time the case came to face valuation, expert valuation obtained by RS put the value at about US$15 million. Further, as GEHC considered the litigation had changed in focus towards patents law, GEHC brought in a new firm (Bird & Bird LLP) in the hope that the two firms would work in tandem but that disbursements would remain the responsibility of RS. RS considered that the situation was untenable and thought that GEHC had engineered a situation that would cause RS to walk away and thus potentially forfeit their success fee under the CFAs. GEHC contended that there was no such engineering. They maintained that RS held the favour of successive CFAs each of which carried substantial payments, the consideration for which was the funding of disbursements and acting on a no win no fee basis (save for one CFA).

Mr Gray lost the liability trial and was ordered to pay £2.6m in costs to GEHC (although Mr Gray succeeded in avoiding a success fee for a period of time due to RS's failure to serve a Notice of Funding). GEHC and RS were agreed that all of that money ought to have been paid to GEHC. In fact, RS laid claim to around £1.5m to which GEHC agreed, and despite that agreement, RS retained the entire sum refusing to pay any amount to GEHC. GEHC claimed that the fall-out came about because GEHC demanded the return of funds received from Mr Gray.

As far as quantum was concerned, and not known to the parties when the costs proceedings were issued, the valuation hearing was held in May 2019 before Arnold J and the Court found that the interests held by Mr Gray were valueless and was scathing in its dismissal of GEHC's case and its expert evidence. It should also be noted that Master James appears to have been informed that GEHC were still pursuing Mr Gray, although the basis of that pursuit was not articulated.

Clearly, the relationship between GEHC and RS never recovered. Indeed, before Master James, GEHC's made allegations that RS, through its evidence, had lied to the Court and RS made cross-allegations that GEHC's witnesses were dishonest, making untrue and unfounded allegations. Nonetheless, GEHC appears to have expressed its gratitude to RS for a sterling job on a number of occasions. The judgment of Master James handed down on 20 August 2020 (79 pages) raises points of general interest in costs and commercial litigation generally.

The Issues

The matter was funded under several CFAs with so-called 'Advance Fees' to be payable in any event. GEHC additionally raised funds from investors for certain disbursements. If the quantum valuation was only to have been about US$15m, after lawyers being paid there would

have been little, if anything, from which the investors could recoup their financial support and nothing by way of compensation for GEHC. When the relationship between GEHC and RS ended, GEHC issued proceedings for a solicitor-client assessment of invoices rendered by RS. Those proceedings were issued on 31 March 2016, and preliminary issues were directed to be determined. The judgment of Master James was the determination of those preliminary issues, after ten days of hearings (in December 2018, March and May 2019), live evidence and written submissions (in August and September 2019), together with live transcription throughout. The core preliminary issues enquired as to (i) the validity of the CFAs; (ii) RS's entitlement to terminate the retainer; and (iii) whether an invoice dated 21 December 2012 fell within the scope of the assessment.

If GEHC won on either of the first two issues, any fees unpaid to RS would not require payment and any fees already paid to RS would have to be reimbursed. GEHC asserted that it had already paid approximately £7.6m to RS, several million pounds in disbursements, an alleged outstanding liability of £800,000, and a potential success fee of £3.4m, thus a total exposure of up to £12m.

It is noteworthy that if GEHC were relieved of its liability to RS, then there would be a reduction in the liability paid by, and inevitable repayment to, Mr Gray given the indemnity principle. This matter, although recognised, was not the subject of determination before Master James.

The Court found that there were numerous instances where, on RS's best case, binding decisions relating to large sums of money being volunteered to RS by GEHC, and said to have been made in the course of a single conversation, were never reduced to writing nor even kept by way of contemporaneous records on RS's own file. And although there was not a finding of dishonesty as such, the Court found that ABC's evidence (a witness for RS) was simply not consistent with reality.

Dealing with the issues in reverse order, the Court found that the December 2012 invoice was not an interim statute bill It noted a tension between clauses in the CFA itself as to when fees would become payable. On the one hand, success was defined as *"you achieve a settlement or any other benefit arising out of the Claim, or if you do not achieve a settlement and you go on to issue proceedings, the Court orders in your favour an order your opponent to pay you costs"*. Yet on the other, and presumably as part of the risk assessment, the success fees were set, inter alia, on the basis of *"the fact that if you win we will not be paid our basic charges until the end of the claim."* The Court referred back to the scope of the CFA for the definition of 'claim' in this context where it was stated: *"The claim is brought by you against Robert Gray and others…Any proceedings you take to enforce a Judgment, Order or agreement. Negotiations about and/or a court assessment of the costs of this claim."* The Court noted that the scope included the work involved in the assessment of costs, albeit that it excluded its scope from any appeal. The Court was further encouraged to its conclusion by RS's inability to demonstrate 'delivery' of the bill, having maintained a vivid recollection of it being sent by post with voluminous timesheets and asserting that it had never been sent by email, to being forced to change its evidence in the face of GEHC's received email which was unravelled during the course of the hearing. Upon review of that email, the Court found the bill to have been sent without covering letter, without any accompanying timesheet, and therefore falling foul of the solicitor's obligation to inform the client about the purpose of sending the bill, the consequences of the client's action to pay upon its right to later challenge the bill and the expectation of payment. A copy of a covering letter on RS's file would have been compelling evidence of service by post, but there was none. As a result, the bill, amounting to about £3.4m itself, would fall within the scope of the detailed assessment.

The Court found that the failure to serve a Notice of Funding in respect of a part of the success fee fell at RS's door. There was no documented record

of GEHC having given instructions on an informed consent basis or indeed any other, and as a result, GEHC would be not be responsible for that success fee on a solicitor-client basis either, given the express terms of the retainer. Similarly, the Court found that GEHC would not be responsible for the shortfall in recovery of success fee after the between-the-parties assessment.

The Court found that RS had not stuck to the terms of the first CFA, and rather than limiting its fees to the 'Advance Fee' when a "win" had not been achieved, it sought to recoup its lost fees by entering into the second CFA, making that CFA retrospective and to cover the fees that it had already lost. The 100% success fee did not make sense in that light and the Court found that "RS had overreached themselves, and certainly left GEHC's best interests in their rear-view mirror…RS favoured its own interests over its client's".

Moving to the validity of the CFAs, the Court found that the CFAs were poorly drafted insofar as they said two conflicting things. They stated that the 'Advance Fee' would be credited against future billing, but they also stated that the 'Advance Fee' would belong to RS, "win or lose". Despite being recognised as an old-style technical point going right back to the early days of satellite litigation under CFAs, the Court found that the "win or lose" provision rendered the CFAs fatal. GEHC's argument that the sum total of the agreement, taking into account the 'Advance Fees', base costs and success fees meant that RS would in fact be entitled to a sum greater than twice the base costs (i.e. equivalent to a success fee of more than 100%) and thus contrary to the Regulations, struck a chord with the Court.

The Court also found that RS had wrongly advised GEHC that the second CFA had come to an end resulting in a "win" thus requiring a new retainer; and wrongly did the same thing again in respect of the third CFA.

On the final core issue of termination of the retainer, the Court found that the true reason for termination was not Bird & Bird's involvement but in fact because of the fall-out between RS and GEHC over the entitlement to the monies which had been received from Mr Gray, and which RS belatedly accepted they were not entitled to retain.

This is unlikely to be the end of the dispute and an appeal is highly likely if only because of the sums at stake and the deep rooted animosity that festered between solicitor and client, despite the solicitor having done a "sterling job". And that, seemingly over the course of several intense years of high-pressure litigation, only to be undone by the failure to properly draft the retainer or even take advice along the way. Beware.

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Peter Hurst LLB MPhil FCIArb was the Senior Costs Judge of England & Wales, at the Royal Courts of Justice, from 1992 to 2014.

During a judicial career which has spanned thirty years, he was also Judicial Taxing Officer of the House of Lords from 2002 to 2009 and of the United Kingdom Supreme Court from 2009 to 2014 and also of the Judicial Committee of the Privy Council from 2002 to 2014. He sat not only as a costs judge in the SCCO but also as a recorder in civil and criminal matters, including costs appeals from District Judges. He sat as an assessor with High Court Judges dealing with numerous costs appeals. He was invited to sit with the Court of Appeal as an assessor when that Court was dealing with difficult or complex costs appeals.

He is the author of Civil Costs (Sweet & Maxwell Litigation Library), now in its Sixth edition, and *Criminal Costs* (OUP). He was until retirement a member of the Senior Editorial Board of Civil Procedure ("The White Book", Sweet & Maxwell) as well as being an editor contributing the commentary on all the costs rules and practice directions. He is now an advisory editor of "The White Book" and the main editor of *Costs & Funding following the Civil Justice Reforms*, now in its fourth edition.

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Paul Darling OBE QC has established a formidable reputation as an advocate in all types and levels of tribunals all over the world. He specialises in complex cases which feature multiple parties, large teams, and high volumes of material, and is often brought in by clients at short notice, late in proceedings. An ability to work with colleagues from any jurisdiction, and to grasp detail, strategy, and tactics quickly has allowed Paul to develop a practice which has taken him to every major jurisdiction, appearing in a wide variety of construction, energy, and commercial matters. Adaptability and focus have contributed to Paul's reputation as a gamechanger, brought in to direct some of the construction and commercial world's most difficult cases. Paul has represented diverse clients in tribunals such as the Commercial Court, the Technology and Construction Court, and the Court of Appeal in London, the High Court and the Supreme Court in Dublin, the High Court in Northern Ireland and Arbitration Tribunals globally. Since the early 1990s he has conducted many arbitrations in Hong Kong, Singapore, and the Middle East. He has acted in ICC, LCIA HKIAC, SIAC and DIAC Arbitrations.

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