KEEP FOCUSED OR RISK SEPARATION

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Lessons from *Dandara South East Limited v Medway Preservation Limited* & Anor [2024] EWHC 2318 (Ch)

The High Court has considered for the first time the issue of whether an expert determination clause can be separable from the underlying agreement, in the same manner as an arbitration clause the separability of which is well established and, indeed, is enshrined in s.7 of the Arbitration Act 1996. The judgment of Master Brightwell was handed down on 10 September 2024.

Background

The proceedings arose in the context of a contract dated 30 June 2022 ("the Contract") pursuant to which Medway Preservation Limited ("Medway") had agreed to sell land in Strood, Kent ("the Land") to Dandara South East Limited ("Dandara"). The sale and completion of the Land was subject to conditions precedent, one being that the second Defendant would carry out earthworks on the Land:

'...to import inert waste to the Property in order to create the engineered development platform to facilitate development of the Property...'

in accordance with a planning permission which had been granted for 123 dwellings on the Land. The specification for the earthworks was contained in an annex to the Contract. Clause 7 of the Contract contains detail provisions relating to the issuance of a practical completion statement that the required earthworks had been completed. This was to be given by the 'Employer's Agent'. Clause 7 includes a provision that Medway and the second defendant would instruct the 'Employer's Agent' to give Dandara not less than ten working days' notice (an 'Inspection Notice') of each of the dates upon which an inspection of the earthworks would be undertaken with a view to issuing the practical completion certificate.

The Contract also provides that Dandara and its surveyor could accompany the 'Employer's Agent' and be allowed to make representations as to why the practical completion certificate should not be issued, implicitly if they were of that view. The Contract identifies that Medway as seller would procure that the 'Employer's Agent' would have regard to such representations, but that the issue or non-issue of the practical completion certificate was 'at the sole professional discretion of the Employer's Agent'.

Once the condition precedents were satisfied the Contract would become unconditional, with a Long Stop Date of 2 December 2023. If the conditions precedent were not satisfied by that date, Dandara as buyer could give Medway as seller a notice to determine the Contract. The Judgment of Master Brightwell records:

"If that right is exercised, the Contract ceases to have effect but without prejudice to any rights which either party may have against the other in respect of prior breaches, and the seller is forthwith to return the deposit to the buyer together with any interest accrued on it."

A dispute had arisen following the service by Dandara of a (disputed) termination notice. This had been proceeded by a certificate issued by the Employer's Agent on 12 November 2023 which, it appears, was relied upon as a practical completion certificate. Master Brightwell notes that Dandara's position was that a valid practical completion statement could not be issued until there had been compliance with the notification and representation provisions within clause 7 of the Contract. Dandara contended that the 12 November 2023 statement was not a valid practical completion statement for a number of reasons, based on the construction of the Contract and/or that it was invalid on its face.

Whilst an Inspection Notice had been sent by email on 23 November 2023 and the parties had agreed an inspection on 8 December 2023, Dandara reserved its right to terminate after the long stop date. The inspection never took place as Dandara purported to serve a termination notice pursuant to its reserved rights.

No defence was filed because the jurisdiction of the court was contested by the defendants. Accordingly, of critical relevance for the matter before Master Brightwell was clause 28 of the Contract, the first paragraph of which provides:

"Any dispute or difference between the parties as to any matter under or in connection with this contract shall be submitted for the determination of an expert (the Expert) and the following provisions of this clause 28 shall apply to any submission and to any other matter required to be dealt with by the Expert."

The following parts of clause 28 provide a detailed framework for the expert to be appointed and how the expert determination was to proceed. Notably the provisions included one stating the expert "*may take whatever independent advice he considers necessary*"; that the experts' determination is to be conclusive and binding (save in the case of manifest error or omission) and that "*The parties are to instruct the Expert to issue a decision within 30 Working Days of his appointment.*"

The Contract also includes the following clause 31:

'Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this contract or its subject matter or formation (including non-contractual disputes or claims).'

The Proceedings

Master Brightwell's judgment records that in the action Dandara claims that it was entitled to terminate and has terminated the Contract and seeks the repayment of its deposit. The defendants disputed the jurisdiction of the court (and has not, therefore, filed a defence), contending that pursuant to clause 28 of the Contract the matter must be resolved by expert determination. They accordingly sought a stay.

Construction and Separability

The question for the court was as to the proper interpretation of clause 28 and whether it was separable from the Contract as a whole.

Reference was made to *Barclays Bank plc v Nylon Capital LLP* [2011] EWCA Civ 826, in which expert determination clauses were

considered by the Court of Appeal, although the issue of separability did not arise in that case. In that decision Lord Justice Thomas referred to *Fiona Trust and Holding Corp v Privalov* [2007] UKHL 40 (which had concerned arbitration clauses) before stating (at paragraphs 27 and 28):

"... although parties must adhere to the agreement which they have made, I do not consider that the approach to an expert determination clause should be the same as that which must now be taken to an arbitration clause. The rationale for the approach in Fiona Trust is that parties should normally be taken, as sensible businessmen, to have chosen one forum for the resolution of their disputes. As arbitration will usually be an alternative to a court for the resolution of all the disputes between the parties, it would not accord with the presumed intention of sensible businessmen to draw fine distinctions between similar phrases to allow a part of the dispute to be outside the arbitration and allocated to the court.

In contradistinction expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the court (or if there is an arbitration clause by arbitrators) ... ... There is, therefore, no presumption in favour of giving a wide and generous interpretation to the jurisdiction of the expert conferred by the expert determination clause as the reasoning in Fiona Trust is inapplicable. The simple question is whether the dispute which has arisen between the parties is within the jurisdiction of the expert conferred by the expert determination clause or is not within it and is therefore within the jurisdiction of the English court. It is a question of construction with no presumption either way."

Accordingly, as Master Brightwell observed, the 'one-stop' principle applicable to arbitration clauses does not generally apply to expert determination clauses.

In the present case, however, the court was faced with an all-embracing expert determination clause. The proper construction of that clause is logically a prior question to that of separability. On the issue of construction Master Brightwell commented "*On the face of it, I consider clause 28 to be an all-embracing provision, requiring all disputes concerning the Contract to be subject to expert determination. ... This would include a dispute as to whether the Contract had been validly terminated, or whether one party was in continuing breach*" whilst also observing "*It may be less obvious on its face that it would include a dispute about whether the Contract was never validly made in the first place*" (this last point being one I shall return to in the postscript at the end).

Having observed that the clause was an unusual one, given that expert determination clauses are generally limited to the resolution of certain matters, Master Brightwell posed the question as to whether, objectively, in this instance the parties intended some disputes to be resolved by the courts? He considered there was no identifiable commercial rationale for such bifurcation, nor was such a distinction justified as a matter of construction.

The Master rejected the submission that clause 28 was only applicable where the dispute was suitable for resolution by a sole solicitor or surveyor within the 30 day permitted period, noting that the clause provided for any expert to take whatever independent advice he or she considers necessary and that the parties may be taken to have been concerned about quick and efficient adjudication in the context of a contract for the sale of land. Furthermore, clause 28 did not denude clause 31 of its effect: the courts would remain the appropriate forum for enforcement of any determination made by an expert which a party fails to comply with. Of course, as recognised in the terms of clause 28 itself (as referred to above), the court also retains jurisdiction to determine whether or not an

an expert has acted in 'manifest error or omission'.

On the issue of separability, Master Brightwell commented, at paragraphs 38 to 40 of his judgment in the following terms:

"*When it comes to the issue of separability … I agree … that the authorities support the view that there is a strong connection with the one-stop principle and separability … … it seems to me, once it is established that a party to an agreement intends for all disputes relating to it to be subject to a prescribed form of dispute resolution, the burden is on the party arguing that such resolution procedures are not separable from the agreement to explain why the parties would objectively have intended some disputes nonetheless to be resolved by the courts. The Claimant did not put forward any such objective explanation why the parties would have so intended. On the matter of principle, there may be no authority holding that an expert determination clause can be separable but it must be a matter of contractual construction, so the parties' objective intentions matter … There is no reason in principle why an expert determination clause cannot be separable from the contract in which it is found, the question being dependent upon the parties' intentions.*"

Accordingly, Master Brightwell concluded that clause 28 was the contractually agreed method for the resolution of all disputes in relation to the Contract, and that it was separable from the Contract, at least for the purposes of determining a dispute as to whether it has been terminated by a supervening event. Indeed, he stated "*In circumstances where, as I have found it, they have created a one-stop shop in the form of clause 28, I consider there to be a presumption of separability as there is with arbitration clauses.*"

A stay was imposed on the proceedings to facilitate expert determination.

Learning points arising from decision

What lessons are there to be taken from *Dandara South East Limited v Medway Preservation Limited & Anor*?

It is suggested there are 3 principal take-aways:

1. Firstly, and rather obviously, the fact there is now authority for the proposition that where an expert determination clause embedded in a contract provides a 'one stop' shop for dispute resolution, as with clause 28 in the present instance, there is a presumption that it is separable akin to the position with arbitration clauses.
2. Secondly, it is likely that such a case is likely to be relatively rare, given the unusual nature of the 'all-embracing' or 'one-stop' nature of the clause 28 expert determination clause in the Contract, as distinct from what might be said to be the more usual position where only specific disputes are to be referred for expert determination. Whether specific provisions are separable is not covered by this judgment; but
3. Thirdly, if, the parties when agreeing their contract do intend that only certain matters are to be the subject to expert determination, but only certain matters, care must be taken to ensure this focus is properly and clearly reflected in the drafting of the contract. If there is no such focus and the clause is construed as being 'all embracing', like clause 28, there is now clear authority of a presumption that such a clause is separable from the underlying contract.

As a postscript, having identified Master Brightwell's comment recited above when considering the proper construction of clause 28 that "*It may be less obvious on its face that it would include a dispute about whether the Contract was never validly made in the first place*", he appears to have expressly left the door open for further consideration by another court on another

day of the circumstance of whether an expert determination clause would be separable and appropriate to determine a question as to whether a valid contract arose in the first instance, as distinct from the scenario in this case of whether a supervening event had led to the termination of the Contract.

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