

Peace in our pipeline

Akin Akinbode and Phil Vickers consider how best to avoid disputes under PF2/PFI contracts



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With more PF2 projects ahead, there are lessons to be learnt from recent PFI disputes.

In the Autumn Statement, the Chancellor of the Exchequer confirmed that:

... the government will develop a new pipeline of projects that are suitable for delivery through the PF2 Public Private Partnership scheme.

A list of projects to make up the initial pipeline, covering both economic and social infrastructure, is expected soon and, no doubt, the procurement process will commence soon after. Now is a good time, therefore, to reflect on lessons learnt from disputes in private finance initiative (PFI) projects.

Dispute resolution clauses can be complex and may give rise to difficulties

It is rare that a PFI dispute makes its way to the court for a determination. Putting to one side the potentially adverse repercussions of a bitter dispute on the parties' long-term commercial relationship, the underlying contracts will usually contain a multi-tiered dispute resolution provision aimed at resolving disputes at an appropriate level (and often, as a first step, between the parties by negotiation). These dispute resolution provisions usually ensure that only the most complicated and difficult disputes ever get to court. Two recent cases show how these dispute resolution provisions can raise difficulties.

The court's jurisdiction is limited by the terms of the contract

In *Amey Birmingham Highways Ltd v Birmingham City Council* [2016], a dispute arose between parties to a PFI contract in respect of various services to be provided

to the highways in Birmingham. The dispute was referred to an adjudicator, Andrew Goddard QC, and a decision was issued on 9 July 2015 in favour of the defendant, Birmingham City Council (BCC). The claimant, Amey Birmingham Highways Ltd (ABHL), challenged the decision in the Technology and Construction Court (the court).

The court very carefully considered its jurisdiction in this matter. It concluded that its jurisdiction was limited by the specific terms of the PFI contract between the parties. Those terms provided that the court could only consider questions of law arising out of the adjudicator's decision. Accordingly, the court could not consider disputes that were not before the adjudicator. The judgment summarised the position as follows:

65. It thus follows that this court can consider only questions of law and not decide facts in respect of the Dispute which forms the subject of the Adjudicator's Decision. Thus, the jurisdiction given to the court is limited to those particular matters which, as a result of the Dispute, the Adjudicator has been asked to decide and has given a reasoned Adjudicator's Decision, which, so far as a matter of law, is open to challenge by either party. What the dispute resolution process plainly does not provide for is that the court will have power to consider other or further Disputes not contained in the Notice of Intention to Refer such dispute to adjudication. It is, taken in the round, a very circumspect involvement by the court.

66. ... Thus, to the extent ABHL may seek that the court give further decisions on law beyond that initiated by BCC,

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that would not be a proper course as a matter of contractual entitlement for this court to undertake.

Ultimately, the court was asked to consider whether the adjudicator had reached the wrong decision. The court concluded that the adjudicator had erred in granting declarations to BCC that went 'well beyond' that which BCC had sought from the adjudicator. The court was unable to construe the words and definitions of the PFI contract in the way achieved by the adjudicator and disagreed with the thrust of the adjudicator's reasoning.

As a result of the court's findings, the adjudicator's decision was set aside.

The dispute resolution provisions constrained the court's jurisdiction to questions of law arising out of the adjudicator's decision. The court formed the view that it could not consider some of the issues that the parties wished to rely on as those issues were outwith the court's jurisdiction. The judgment explained:

270. ... Contractually the role and function of this court is simply to consider whether the actual dispute placed by BCC before the Adjudicator and then the matters raised in the Adjudicator's Decision are wrong as a matter of law.

Had the court been given the jurisdiction to consider the entire dispute, rather than simply questions of law arising out of the adjudicator's decision, this might have assisted the parties. A definitive judgment, resolving the underlying dispute, may have allowed the parties to move on beyond the dispute. Instead, the court's inability to consider the whole dispute may have left parties feeling that unresolved issues must now be the subject of the dispute resolution process. This result may raise more issues and disputes than it solves.

Restitution

Also in *Amey*, ABHL sought to recover the costs that it incurred in implementing the adjudicator's decision in the interim period between the adjudicator's decision and the court's judgment. This issue was stayed and, therefore, not resolved by the court.

It would have been interesting to see how the court would have resolved

this issue. The position in respect of a statutory adjudication is clear. The Scheme for Construction Contracts (England and Wales) Regulations 1998 (the scheme) provides (at s23):

- (2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.

HEC sought to strike out a part of CP's claim form on the basis the court had no jurisdiction to consider these claims, as they had not been determined by the expert.

In *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015], the Supreme Court held that the scheme contains an implied term that the unsuccessful party is entitled to seek a final determination by litigation and, if successful, obtain repayment of any sum paid pursuant to the adjudicator's decision.

In *Amey*, ABHL did not seek monies paid to BCC, but instead costs incurred as a result of implementing the adjudicator's decision. PFI head contracts are exempt from the statutory regime (and, therefore, the scheme). The dispute resolution provision in *Amey* contained wording similar to that used in the scheme:

- 70.2.3 ... Unless and until revised, cancelled or varied by the Arbitrator, the Adjudicator's decision shall be binding on both Parties who shall forthwith give effect to that decision (save where clauses 70.3.1.2 or 70.3.1.3 apply).

The issue has yet to be considered by the court and, therefore, the position remains unclear.

Challenge to expert determination

In *Connect Plus (M25) Ltd v Highways England Company Ltd* [2016], a dispute arose between parties to a PFI contract in respect of various services to be provided to the M25. In particular, the parties were in dispute as to the interpretation

and operation of an element of the compensation mechanism, known as the 'Critical Incident Adjustment'.

The facts before the court in this case were less complex than those in *Amey*. The parties referred the dispute to an expert (Sir Robert Akenhead) for determination. The expert issued his decision in February 2016 in favour of the defendant (HEC). The claimant (CP) challenged the expert's decision by commencing a claim in court. The PFI contract's dispute resolution clause allowed the court to 'open up, review

and revise' an expert's determination, but only if the claim was the 'same or substantially the same' as the dispute determined by the expert. HEC sought to strike out a part of CP's claim form on the basis the court had no jurisdiction to consider these claims, as they had not been determined by the expert.

HEC argued that, in fact, CP was barred from ever raising the claims: CP should have advanced them before the expert in the expert determination and, having failed to do so, CP was prevented from doing so later.

Coulson J had no doubt that HEC's submission was incorrect:

... given that the Decision was only binding if it was not challenged by one of the parties, and it has been challenged. There is currently therefore no binding decision, on anything, until the matter is resolved by the court... In the present circumstances, I consider that it is impossible to argue that CP are somehow prevented as a matter of law from raising the issues which they want before either an expert or the court and which, on this assumption, they have never raised before.

In any event, Coulson J found that the issues had been raised before the expert, albeit not in precisely the same way. Accordingly, CP was entitled to raise the issues before the court.

HEC also argued that CP should be prevented from raising any arguments regarding the expert's jurisdiction. CP

said that their claim was that the expert reached the wrong decision, not that the expert exceeded his jurisdiction and/or that he did not have jurisdiction to reach his decision. The court accepted CP's submissions.

Complex dispute resolution clauses can themselves cause difficulties

These cases provide a rare insight into the operation of these major PFI contracts and the disputes that can arise between the parties. In these two cases, the operation of the dispute resolution

- As a result of guidance in HM Treasury's document titled *Standardisation of PF2 Contracts*, parties should, and in the main do, use tiered dispute resolution provisions that escalate any dispute from negotiation to expert determination or adjudication, and then upwards to arbitration or court for final determination. For example, in the *Amey* case referred to above, clause 70 of the project agreement required the parties to first 'consult in good faith' to resolve the dispute,

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provisions did not lead to a definitive resolution of the underlying dispute. The court will often be constrained by the terms of the parties' contracts and may not be in a position to address the issues that underlie the dispute.

The complicated nature of the dispute resolution clauses in PFI contracts may lead to arguments regarding the meaning of those provisions. This will then become a yet further issue for the court to grapple with.

Tips/key points about dispute resolution clauses in PF2/PFI contracts

- An industry that signs up to and adheres to well-drafted PF2 contracts is essential if the government is to fulfil its key goals of improving the quality, cost and performance of UK infrastructure.
- The contracts that cover PF2/PFI projects are complicated: disagreements are inevitable. Appropriate dispute resolution clauses, which set out clear and simple instructions for the parties in the event of a dispute, can help the parties to avoid disputes or better manage and reduce the negative effects of contractual disagreements. Such clauses guide the parties through dispute resolution procedures in a way that can safeguard their working relationships – and the overall success of the project.
- failing which the dispute was to be referred to adjudication. Disputes were then intended to be the subject of arbitration except where an issue was taken on a point of law arising from the adjudicator's decision.
- The complexity of dispute resolution clauses may lead to disputes over their meaning. They may also act as a constraint, preventing parties from putting certain issues to the court (or any other dispute resolution forum). It may, ultimately, be preferable for all disputes to be resolved by arbitration or by the courts (rather than by a mixture of the two).
- The diverse obligations of the various parties on a PF2 project are normally covered by a number of contracts. The procuring authority and the private-sector-funded special purpose vehicle (SPV) will enter into a project agreement. The SPV will then enter into sub-contracts with the building contractor, an ICT contractor and the operations and management or facilities management contractor. There may also be an 'interface agreement' to regulate the relationship with and the obligations of the sub-contractors.
- Disputes can arise within any one or a number of these contractual

relationships. The dispute resolution clauses must therefore be drafted 'back to back' with each other and in a way that enables disputes to be resolved in the quickest, most cost-efficient way. As PF2/PFI project agreements are not covered by the Housing Grants, Construction and Regeneration Act 1996 (as amended in 2011) under the Construction Contracts (England and Wales) Exclusion Order 1998 (SI 1998/648), in ensuring that dispute provisions are back to back drafters must therefore work around this exemption. They quite often do this by including in the PF2/PFI project agreement contract adjudication provisions that are similar to the statutory adjudication procedure. (The SPV sub-contracts will be covered by the provisions of the 1996 Act.)

- HM Treasury's guidance, referred to above, discourages the joinder of sub-contract disputes with related disputes under the head contract. It is said that this will only lead to an increase in the time and cost of the dispute resolution process for the authority. As a result of such guidance, 'equivalent project relief' and/or name-borrowing provisions are commonly used in PFI and PPP contracts. In this way, the sub-contractor can be satisfied that it will have the ability to resolve disputes involving the authority in an effective manner. For example, in *Amey*, ABHL elected that its subcontractor, Amey LG Ltd (ALG), name-borrowed in order to defend the claim made by BCC and to pursue the subsequent court proceedings seeking to overturn the adjudicator's decision. As a result, it was ALG who pursued the court proceedings in the name of ABHL. ■

Amey Birmingham Highways Ltd v Birmingham City Council
[2016] EWHC 2191 (TCC)

Aspect Contracts (Asbestos) Ltd v Higgins Construction plc
[2015] UKSC 38

Connect Plus (M25) Ltd v Highways England Company Ltd
[2016] EWHC 2614 (TCC)