

# Construction & Engineering eNews: October 2011

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**Courts enforce performance bond despite an ingenious legal argument**

*Meritz -v-Jan De Nul [2011] BLR 196 Court of Appeal*

## **Facts**

Jan De Nul ('JDN') is a Dutch company which contracted with a Korean shipbuilder to buy ships from it. The Korean shipbuilder provided a performance guarantee – in the form of an on-demand bond upon Meritz. Meritz was therefore absolutely liable to pay on the bond provided a properly worded demand was made by JDN. The shipbuilder then went through a merger and joined with another Korean company to form a quite new entity. It also failed to deliver on time, so JDN gave notice to determine the shipbuilding contract and then gave notice calling in the bond from Meritz. Meritz sought a declaration from the court to the effect that they were released from paying under English Law because there had been a fundamental change in the identity of the shipbuilder, which changed the nature of the contingent obligations against which the bond had been given.

## **HELD**

The Court of Appeal held that the bond contract between JDN and Meritz said nothing about reserving any right to Meritz to complain in such circumstances. The clear intention of the International Chamber of Commerce Rules, under which this bond was drawn up, was that if a properly prepared Demand was presented upon a performance bond, then the bondsman cannot avoid payment by reference to changes in the underlying circumstances.

## **Comment**

The Claimants instructed specialist lawyers including a leading QC to argue ingeniously that they should not be bound to pay because of the change in character of the shipbuilder. The court had no difficulty in asserting yet again that public policy and confidence in the International Bonding system set up by the ICC Rules requires that bonds should be enforced wherever possible.

Normally bondsmen do not object in this way because they usually have the comfort of counter indemnities in place behind the bond so that any sum which they have to pay out they can claw back from the performer of the contract who procured the bond in the first place. One can only assume that in this case Meritz was taking a shortfall between the sum it had to pay to JDN and the sum it could recover from the Korean shipbuilder.

## **Dangers of Apparent Bias in Adjudication**

### ***Lanes Group plc -v- Galliford Try Infrastructure [2011] BLR 553 TCC***

#### **Facts**

Galliford Try ('GTI') had a main contract for construction works at the railway maintenance depot, Inverness; Lanes had a sub-contract. Each prepared adjudication proceedings against the other. The adjudicator was appointed for both adjudications by the ICE. The Adjudicator produced a draft document of 35 pages setting out his "preliminary views" on various matters of fact and law, expressed as if it was a final decision. He invited submissions from the parties. Subsequently he went on to produce a Decision which awarded £1.3m against Lanes in favour of GTI. Lanes refused to pay on the basis that the adjudicator had displayed bias. Lanes took the initiative by bringing proceedings in the TCC for a declaration that the adjudication was not effective. GTI made a cross-application to the TCC for the enforcement of the Decision.

#### **HELD**

That the Decision would not be enforced, because the Adjudicator's actions had created a real possibility of bias.

The judge said the test was that "if a fair minded and informed observer, having considered all the circumstances which have a bearing upon the suggestion that the Decision maker is biased would conclude that there was a real possibility that he is biased, then that was sufficient for the Decision not to be enforced."

The judge went on to remark that the preliminary views document read like a judgment, and looked on its face as though it had been prepared as a draft judgment. This was unfortunate where the other side in the adjudication had not yet made any submissions at all. It was also unfortunate that the final Decision followed the same findings of liability as those contained in the preliminary views document. The final Decision read as though the author had made up his mind already notwithstanding his remarks to the contrary when he produced the preliminary views document. These facts were enough to give an objective observer the appearance of bias and to make the Decision unsafe and unenforceable.

## Challenging the Adjudicator's Fees – Requirement of Reasonableness

### *Fenice Investments -v- Jerram Falkus Construction (2011) CILL Technology and Construction Court*

#### Facts

Fenice contracted with Jerram Falkus ('JF') to design and build its residential development in Camden, London. The parties fell out over delays, and Fenice tried to charge liquidated damages. An adjudicator was appointed by the RICS and wrote to both parties setting out his terms of business and indicating that he proposed to charge £350 per hour. Jerram Falkus did not object.

The Adjudicator subsequently found in favour of Fenice and sent JF a large bill. JF's solicitors objected that the fees were too high, the rate was too high, and offered payment of £5,000 plus VAT. However, the adjudicator was looking for £19,700 plus VAT! He collected payment in full from Fenice on the basis that they were jointly and severally liable even though under his award he had directed that as between the parties, JF should pay all his fees. Fenice then sued JF, who again argued the fees were too high. JF lost and were ordered to pay all of the fees.

#### HELD

1. JF would struggle to convince the court that an hourly rate of £350 per hour was unreasonable when it had failed to make any objection at the outset.
2. This hourly rate was not an unreasonable figure for the type of adjudication and the qualifications of the adjudicator.
3. In general, the court will use a robust approach to adjudicator's fees (in his or her favour) and will bring "a considerable margin of appreciation" in the adjudicator's favour.
4. The court will always take into account that adjudicators have to work at speed, and each adjudicator will approach the task differently.
5. As a matter of policy, challenges to adjudicator's fees after the Decision should be discouraged, because if this became prevalent, adjudicators will be discouraged from taking on appointments.

#### Comment

The way in which this case developed caused considerable embarrassment and difficulty to Fenice. It was "the innocent party" in that JF had been ordered to pay the whole of the adjudication fee and yet Fenice found itself being pursued by the adjudicator's solicitors on the basis that it was, at least in theory, jointly and severally liable. This also caused Fenice the trouble and cost of having to pursue JF in turn.

The court suggested that in these situations, the best way forward would be for the party ordered to pay to seek a declaration as to the reasonableness of the disputed fees. If a party was not prepared to take the initiative then the adjudicator would have to bring proceedings. No doubt he would feel it necessary to pursue both parties in which the case the "innocent" party should confine itself to making a non-admission as to the adjudicator's fees, leaving it to the adjudicator and the "paying" party to argue it out amongst themselves.