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Newsletter

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What's inside?

HKIAC amends its Rules to waive fees in certain ad hoc arbitrations in Hong Kong

Justin Yuen

With effect from 1 August 2019, the HKIAC has amended the Arbitration (Appointment of Arbitrators and Mediators and Decision on Number of Arbitrator) Rules, Cap 609C (the Rules), to enable it to waive its fees in certain Hong Kong seated arbitrations. The aim is to reduce a party's costs in seeking an appointment or decision from the HKIAC under the Rules in low-value arbitrations and provide a stronger incentive for parties to choose Hong Kong as the seat of arbitration.

The HKIAC is the default statutory appointing authority for ad hoc arbitrations seated in Hong Kong and in that role performs the following functions under the Hong Kong Arbitration Ordinance (Cap 609) (Ordinance):

- determining the number of arbitrators where the parties have not agreed on the number;
- appointing an arbitrator where the applicable appointment procedure fails to result in an appointment; and
- appointing a mediator where the procedure specified in an arbitration agreement fails to result in an appointment.

The Rules provide that the HKIAC may charge HK$8,000 for carrying out any of the above functions. The amended Rules allow the HKIAC to waive that fee if it considers it reasonable to do so in any particular case. The HKIAC has published details on its website of how it will exercise its discretion to waive fees. It says that unless it directs otherwise, the HKIAC will charge a one off fee of HK$8,000 to the party that submits the first request for the HKIAC's decision or appointment in an arbitration where the total amount in dispute is less than HK$2.5 million and will not charge any further fee for subsequent requests by any party in the arbitration, unless it decides otherwise in appropriate circumstances.

Several other amendments are also made:

- A party must deliver its request for HKIAC's appointment/decision to the other party in accordance with s.10 of the Arbitration Ordinance. S.10 contains provisions regarding the delivery and receipt of written communications in arbitral proceedings. Pre-amendment the Rules contained provisions which were at odds with those in s.10.
- Time limits for parties to provide information before the HKIAC appoints or makes a decision. The Rules include a number of time limits for parties to provide comments or information before the HKIAC proceeds to appoint or make a decision. The amendments give the HKIAC power to amend those time limits if justified in any particular case.
- Some provisions of the Rules require the HKIAC to proceed to appoint or make a decision after a time limit expires, while others give the HKIAC a discretion in similar circumstances. The amendments give the HKIAC a discretion to decide whether and how to proceed to appoint or make a decision, following the expiry of a time limit.

Mosquito breeding on construction sites – does an appointed contractor have a defence?

Stanley Lo

In the recent appeal case of *HKSAR v Kwan On Construction Co. Ltd.* (HCMA 358/2018), the Court of First Instance examined the duties of an appointed contractor of a construction site to avoid mosquito breeding.

Section 27(3) of the Public Health and Municipal Services Ordinance, Cap 132, provides that "*If any larvae or pupae of mosquitoes are found on any premises consisting of a building site of which there is the appointed contractor, the appointed contractor of the site shall be guilty of an offence."* The offence, upon conviction, carries a maximum fine of HK$25,000 and a daily fine of HK$450.

Kwan On Construction Co. Ltd. (the Company) was the appointed contractor of a construction site. The Magistrate convicted the Company of contravening s.27(3) of the Public Health and Municipal Services Ordinance on the ground that mosquito larvae were found in the water accumulated in a sunken part of a water-filled barrier. Although the Company had covered the sunken part of the water-filled barrier with adhesive tapes to prevent the accumulation of water, the adhesive tapes were found to be damaged. The Magistrate held that the offence under s.27(3) was one of absolute liability and that the common law defence was not available. The Magistrate also said that, even if a common law defence was available, the evidence adduced by the Company was inadequate to show that its site foremen had carried out inspections for the purposes of establishing an "honest and reasonable belief", which is an exculpatory defence against charges made under s.27(3).

The Company appealed against the conviction on the grounds that the Magistrate had erred in construing the s.27(3) offence as one of absolute liability and in refusing to allow the Company to rely on the common law defence. The Court of First Instance accepted the Company's grounds of appeal and clarified that the offence created by s.27(3) was one of strict liability. Accordingly, although there is no statutory defence, the common law defence of "honest and reasonable belief" is available. The Court of First Instance also expounded that the onus was on the Company to prove, on the balance of probabilities, that the Company honestly and reasonably believed that there were no larvae or pupae of mosquitoes on the construction site.

In reassessing whether the Company had satisfied the common law defence, the Court of First Instance took into consideration the Magistrate's acceptance of the evidence given by the Company's witness that there was a system in place to prevent mosquito breeding, including regular mosquito preventative training for workers, regular check-ups on the adhesive tapes applied on the sunken parts of the water-filled barriers, and weekly site inspections by foremen and site supervisors. Also, photographs taken on the site showed that adhesive tapes were in fact applied on various sunken parts of the water-filled barriers. In this regard, the problem of mosquito breeding was seemingly mild because mosquito larvae were found only at one location. In addition, the Court of First Instance noted that the law only required an appointed contractor to implement all reasonable measures to prevent mosquito breeding, and the system implemented by the Company complied with the guidelines recommended by the Food and Environmental Hygiene Department. In light of this, the Court of First Instance held that the Company had succeeded in establishing the common law defence and the conviction was therefore quashed.

Comment

This judgment confirms that the offence under s.27(3) is one of strict liability, and an appointed contractor can rely on the common law defence that it honestly and, upon reasonable grounds, believes that under no circumstances will larvae or pupae of mosquito exist on the construction site. It is therefore prudent that appointed contractors take proactive steps to implement effective systems on their construction sites to prevent the accumulation of water and mosquito breeding. In order to discharge their statutory duties in this respect, appointed contractors are also recommended to critically review the guidelines and updates made available by the Food and Environmental Hygiene Department from time to time to ensure compliance.

About the author of this article

The author of this article, Mr. Stanley Lo, was the General Counsel of Kwan On Holdings Limited (the parent company of Kwan On Construction Co. Ltd.) when this appeal case was heard. Mr. Lo subsequently joined Deacons' Construction Practice as a Consultant on 1 April 2019.

Challenging arbitral awards on questions of law

KK Cheung

In *Maeda Kensetsu Kogyo Kabushiki Kaisha & Anor v Bauer Hong Kong Ltd* [2019] HKCFI 916, the Court of First Instance dealt with an appeal against an interim arbitral award on questions of law involving interpretation of contractual terms in a construction contract and valuation of variation works.

Background

In our previous article, we reported on the Court's decision, on 30 August 2018, granting the Plaintiffs leave to appeal the arbitral award on two out of four questions of law raised by the Plaintiffs. On 9 April 2019, the Court made its decision (discussed below) in relation to the appeal on those two questions of law.

To recap, the Plaintiffs were the main contractors, with the MTRC as the employer, to construct tunnels for the Hong Kong to Guangzhou Express Rail Link. The Plaintiffs subcontracted the diaphragm wall works to the Defendant. Disputes between the Plaintiffs and Defendant were submitted to arbitration. The Plaintiffs appealed the Second Interim Award made in the arbitration proceedings on two questions of law:-

(1) Whether there was compliance by the Defendant with Clause 21 of the contract to give notice for its "ground conditions claims"; and

(2) The valuation of variation works under the sub-contract.

Proper notice of the claim given?

The Defendant claimed that it was entitled to additional payment for certain works because (i) unforeseen ground conditions gave rise to a variation of the scope of works under the sub-contract or (ii) alternatively, it had a "like rights" claim under Clause 21 of the sub-contract. A "like rights" claim is a claim by the sub-contractor against the main contractor arising from circumstances which also entitle the main contractor to make a claim against the employer.

The Arbitrator held that there was no variation, as there was no change in the scope of the works or any instruction on variation. The Arbitrator then considered whether the Defendant had duly made any "like rights" claim. Under Clause 21 of the sub-contract, before the Defendant can make such claim, it must give:-

(1) a First Notice showing an intention to make a claim within 14 days after the event or occurrence or matter giving rise to the claim becomes apparent to it (Clause 21.1); and

(2) a Second Notice stating "the contractual basis together with full and detailed particulars and the evaluation of the claim" within 28 days after the First Notice (Clause 21.2).

The Arbitrator found that the Defendant had complied with the notice provisions, despite the fact that the Defendant had made its claim in its Second Notice on the basis of a variation and not on a "like rights" basis. The Arbitrator's reasoning was that as long as the Plaintiffs knew of the factual basis of the Defendant's claim to enable the Arbitrator to assess what to do, the notice provisions were satisfied. He said that it was unrealistic to expect a party to finalise its

legal case within a relatively short period and be tied to that case through to the end of the arbitration. It followed, he said, that the Defendant was not precluded by Clause 21.2 to pursue a different basis of claim in the arbitration.

The Plaintiffs appealed against the Arbitrator's ruling, arguing that Clause 21.3 demanded strict compliance with the notice provisions. The judge agreed. He said that Clause 21.2 was clear and unambiguous and required the Defendant to submit "the contractual basis" of the claim which it wished to pursue in the Second Notice. There could be no dispute, and no ambiguity, the judge said, from the plain and clear language used in Clause 21, that the service of notices of claim in writing referred to in Clauses 21.1 and 21.2 were conditions precedent and must be "strictly" complied with, and failure to comply would have the effect that the Defendant would have "no entitlement" and "no right" to any additional or extra payment, loss and expense. Accordingly, the judge concluded that on a proper construction of Clause 21, the Defendant had failed to give proper notice under Clause 21.2 and the Arbitrator's decision to allow the Defendant's claim of "like rights" was wrong in law. Accordingly, the Plaintiff's appeal on the question of law on notice compliance was allowed. The Defendant was granted leave by the same judge to appeal her own decision to the Court of Appeal. Please see our article below in respect of the court's judgment in the leave application.

Valuation of variation works under the sub-contract

The Arbitrator also found that the Defendant had carried out variation works, required to be valued at a "fair commercial rate" under Clause 19 of the sub-contract. The Arbitrator adopted a "costs plus overhead and profits" approach, and included in the valuation the value of the Defendant's claim for standby plant and equipment for the diaphragm wall works, which was not actually used. The Arbitrator held that in valuing the variation, it is the "cost" in terms of what it would cost which is relevant and not whether a party has or has not paid for a piece of plant.

The judge held that, on a review of the authorities, it could not be said that the Arbitrator had misdirected himself in law, or that his decision was outside the permissible range of solutions which were open to him. Accordingly, the Plaintiff's appeal on the question of law on variation valuation was dismissed.

Comments

This case is a good reminder to parties to construction contracts that they should strictly follow all condition precedents when exercising their rights thereunder. For example, a party making a claim for additional payments should ensure that it has served notices in compliance with the relevant provisions, if necessary. Deviations might lead to the court rejecting the claim.

Furthermore, parties should bear in mind that with a valuation clause, valuation of works is a contractual entitlement and does not usually require proof of loss, such as the actual costs incurred.

Challenging arbitral awards on the ground of serious irregularities

KK Cheung

In *Maeda Kensetsu Kogyo Kabushiki Kaisha & Anor v Bauer Hong Kong Ltd* [2019] HKCFI 1006 (see article above), the Plaintiffs also challenged several of the Arbitrator's interim awards, on the ground of serious irregularities giving rise to substantial injustice.

Idling of rebar and concreting resources

In the arbitration, the Defendant claimed that the rebar and concreting resources idled "one-for-one" with the additional cutter hours. The Arbitrator found that a one-for-one approach was not appropriate without any factual record of particular idling. However, the Arbitrator allowed the Defendant's claim for additional payment at 30% of additional cutter hours.

The Plaintiffs challenged the Arbitrator's decision on the ground that:-

(1) they had been deprived of a reasonable opportunity to present their case on the 30% allowance;

(2) it was not either party's pleaded case that there could be any assessment of the idling rebar and concreting resources on a sliding scale; and

(3) the Arbitrator gave no finding or reasons as to why 30% was appropriate.

The judge quickly rejected ground (3), since a failure by the Arbitrator to set out the detailed reasons for his decision, by itself, is not a ground for challenging the award based on serious irregularities. It should either be dealt with by an appeal on law or under section 7(2) of Schedule 2 of the Arbitration Ordinance.
The judge also rejected grounds (1) and (2), holding that:-

(1) There is a distinction between a party having no reasonable opportunity to address a point or his opponent's case, and a party failing to recognize or take the opportunity which existed. If an issue is raised, however briefly, the opposing party would have had an opportunity to address it. If he chooses to invite the tribunal to reject it without addressing it in detail, he does so at his own risk.

(2) Here, the Plaintiffs clearly had notice of the Defendant's claim for idling of rebar and concrete resources from the pleadings, List of Issues, and submission and had not taken the opportunity to make submissions on the extent of idling and chose to put the Defendant to strict proof. Thus, they could not now complain if the Arbitrator allowed part of the Defendant's claim.

Instruction to change the design of the reinforcement cases

Under the sub-contract, the Defendant had to construct reinforcement cages for installation into the diaphragm wall panels prior to concreting. The Plaintiffs issued new design information (July Drawings) and in the arbitration, the Defendant claimed that this required the reinforcement cages to be of substantially greater quantity and weight than shown in initial tender drawings, and as a result of it having to use higher capacity cranes to lift those cages, sought additional costs.

The Arbitrator found that the Defendant was entitled to additional costs on the basis that the weight of the panels had increased by 105% between the tender stage and July Drawings, and 116% between the tender stage and as-built stage.

While accepting that there had already been changes to the works before the July Drawings, the Plaintiffs argued that the Defendant's only pleaded case was variation by the July Drawings, so its entitlement to additional costs should only be based on changes brought about by the July Drawings. Therefore, the Arbitrator's findings by reference to matters before the July Drawings were based on unpleaded factual matters. The Plaintiffs also argued there was no evidential basis for such findings.

The judge rejected the Plaintiffs' arguments, taking the view that the Arbitrator had reached his conclusion after considering the Defendant's Statement of Claim as a whole and submissions by the parties, and his conclusion was not wrong. The Judge said that if the Plaintiffs' complaint was that the Arbitrator was wrong in allowing the Defendant's claim as a variation in the absence of any written instruction as required by the sub-contract, or that there was no credible evidence to support the claim, the proper avenue for challenge was by way of an appeal on law, upon obtaining leave of the court.

Defective works at certain panels where toe grouting works were not carried out by the Plaintiffs

The Plaintiffs counterclaimed against the Defendant in the arbitration for costs of remedial grouting works they had to carry out, because of the Defendant's defective works. The Arbitrator dismissed the Plaintiffs' counterclaim upon finding that the defects would have been remedied by the toe-grouting works that the Plaintiffs would have to carry out in any event.

The Plaintiffs argued that the Arbitrator failed to address and give any decision in respect of its case and evidence, which showed that additional remedial works were indeed required.

The judge held that the Plaintiffs had already raised extensive evidence for its argument before the Arbitrator. Therefore, in rejecting the Plaintiffs' counterclaim, the Arbitrator must have also rejected their evidence. If the Plaintiffs' complaint was that the evidence did not support the Arbitrator's findings or that the Arbitrator overlooked a particular piece of evidence, they should have applied for leave to appeal on a question of law instead.

Comments

This decision demonstrates the high threshold for challenging an arbitral award based on serious irregularities. For example, if there is a possibility on the pleadings for the Arbitrator's decision, the court will likely hold that the decision was based on a pleaded case and reject the argument that the other party had been deprived of an opportunity to present their case. Therefore, it is advisable for parties to plead to and make submissions on every issue which arises on the face of the pleadings during the arbitration.

Moreover, the judge repeatedly emphasized that a challenge against an arbitral award based on serious irregularities focuses on due process, not the correctness of the arbitrator's decision. Unless the challenges involve very clear procedural irregularities, the court tends to characterise them as challenges on the correctness of the award. If a party feels aggrieved, its primary recourse should be to identity legal errors in an arbitral award and apply for leave to appeal on questions of law. In this regard, one should note that an appeal on a question of law is only permissible if Schedule 2 of the Arbitration Ordinance is opted into by the parties.

Court considers time limits and conditions for leave to appeal arbitral award on a question of law

KK Cheung

In *Maeda Kensetsu Kogyo Kabushiki Kaisha v Bauer Hong Kong Ltd [2019] HKCFI 1427*, the judge granted leave for the Defendant to appeal against her own decision to remit an arbitral award to the tribunal. In granting leave, she said that the application for leave was not made out of time, and that the appeal had a reasonable prospect of success.

Background

For the background, please refer to the first of our two articles above about this case.

Issues

At issue was:-

(1) whether the Defendant's application for leave to appeal was made out of time; and

(2) whether section 14AA of the High Court Ordinance applied, such that the Defendant had to show that the intended appeal had a reasonable prospect of success, or whether the only conditions to be satisfied for obtaining leave to appeal were those set out in section 5(9) of Schedule 2 to the Arbitration Ordinance (Schedule 2).

Decision

Was the application for leave to appeal made out of time?

The judge found that the Defendant's application was not made out of time.

Section 5(5) of Schedule 2 states that, on hearing an appeal under this section, the Court may, amongst others, remit the award (in whole or in part) to the tribunal for reconsideration. Section 5(8) of Schedule 2 further states that the leave of the Court is required for any further appeal from an order of the Court under section 5(5). The combined effect of these two sections is that the appeal is made against the order for remission to the tribunal.

In this case, the judge merely allowed the Plaintiffs' appeal against the award on 9 April 2019 as the parties had not addressed the Court on the consequences of the appeal being allowed at the hearing. It was only on 24 May 2019, after considering the parties' written submissions, that the Court made an order remitting the Award to the tribunal. Accordingly, the application for leave to appeal, which was made on 30 April 2019, was not out of time.

Conditions for leave to appeal

Section 5(8) of the Schedule provides that leave for further appeal must not be granted unless (a) the question is one of general importance; or (b) if the question is one which, for some other special reason, should be considered by the Court of Appeal.

The Plaintiff argued that in addition to the conditions required under section 5(8) of Schedule 2, the Defendant must also satisfy the conditions under section 14AA(1)(4) of the High Court Ordinance (HCO), which essentially provides that an appeal must have a reasonable prospect of success or there must be some other reason in the interests of justice before leave to appeal will be granted.

The judge first observed that section 14AA did not apply to the situation here. Section 14AA of the HCO applies to interlocutory judgments or orders, but the order of remission was a final judgment or order.

However, the judge reviewed an earlier decision in *Maeda Kensetsu Kogyo Kabushiki Kaisha v Bauer Hong Kong Ltd HCMP 1342/2017, 4 September 2017*, and held that the "reasonable prospect of success" test is still relevant because section 5(9) of Schedule 2 is designed to be a filtering process, and it would make no sense if the Court does not consider whether the grounds of the intended appeal are arguable before granting leave. In arriving at this conclusion, the court balanced the need for finality in arbitration against the fact that the parties have chosen to opt into Schedule 2 under which a right to appeal is available.

Applying the observations above, the judge granted leave to the Defendant to appeal against the order of remission. The question of construction of the notice of compliance in question was of general importance. Moreover, the threshold of "reasonable prospect of success" is not high. The Defendant's contention that the Court's construction of the notice was wrong in law for failing to consider the finding of facts in the arbitration satisfied this test.

Comments

This case reminds us that for the court to grant leave under section 5(8) of Schedule2, the appeal must have a reasonable prospect of success (or there must be some other reason in the interests of justice). In contrast with section 6(4) of Schedule 2, the Court will grant leave to appeal against an arbitral award only if the Court is satisfied (amongst other things) that, on the basis of the findings of fact in the award, (i) the decision of the arbitral tribunal on the question is obviously wrong; or (ii) the question is one of general importance and the decision of the arbitral tribunal is at least open to serious doubt. This appears to be a higher threshold than having a reasonable prospect of success. However, it should be noted that in an application under section 6(4), it is only necessary for the Court to form a provisional view on the decision of the arbitral tribunal.

Court considers meaning of "practical completion" in building contract

Joseph Chung

In *University of Warwick v Balfour Beatty Group Ltd* [2018] EWHC 3230 (TCC) England's Technology and Construction Court had to determine whether the liquidated damages provisions in a building contract between the Claimant and Defendant were operable. That depended upon whether, on the proper construction of the definition of "practical completion" under the contract, the entire works were to be complete before a single Section could be certified as complete. On the Court's interpretation, it held that the ordinary meaning of the words used in the contract did not render the provisions inoperable.

The Contract

The Claimant engaged the Defendant contractor under a JCT 2011 Design and Build form of contract with bespoke amendments, to construct the National Automotive Innovation Centre on the Claimant's campus (the Contract).

The Contract divided the works into four Sections. The completion date for Sections 1 to 3 was 10 April 2017, and for Section 4 was 5 July 2017. The Contract provided for different rates of liquidated damages if the works or a Section did not attain 'Practical Completion' by the relevant completion date.

'Practical Completion' was defined in Clause 1.1 of the Contract as *"a stage of completeness of the Works or a Section which allows the Property to be occupied or used …*" "Property" was defined as "*the property comprised of the completed Works*". "Works" was defined as "*the works briefly described in the First Recital, as more particularly shown, described or referred to in the Contract Documents…*"

Clause 2.27.1 of the Contract provided that when, Practical Completion of the Works or a Section is achieved, the Employer shall issue a statement of Practical Completion for the Works or that Section.

Adjudication

The Defendant contended that on a proper interpretation of the Contract, it was impossible to achieve Practical Completion of one Section prior to the completion of the whole of the works and that the liquidated damages provisions were therefore rendered inoperable.

The Defendant commenced adjudication and the adjudicator found for the Defendant on this issue, applying a literal interpretation. The adjudicator found that since the definition of "Practical Completion" stipulated that an individual Section only achieved Practical Completion at a stage of completeness which allowed the completed Works to be occupied and used, all Sections must achieve Practical Completion for any Section to meet the definition of "Practical Completion", although the adjudicator also said the definition on the face of it may seem illogical.

The Claimant sought final determination of the issue by the court.

Court's Decision

General principle on contractual construction

There was no dispute between the parties that the applicable law for construction of a contract is found in Lord Neuberger PSC's judgment in *Arnold v Britton [2015] UKSC 36*. In paragraph 15 of the judgment, His Lordship set out the following general principle:-

"*When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean"… And it does so by focussing on the meaning of the relevant words … , in their documentary, factual and commercial context. That meaning was to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions*"

Then His Lordship emphasized the following factors (rather than principles) which were important in this case:-

(i) the reliance placed in some cases on commercial common sense and surrounding circumstances should not be invoked to undervalue the importance of the language of the provision which is to be construed;

(ii) when it comes to considering the centrally relevant words to be interpreted, it is accepted that the less clear they are, or, to put it another way, the worse the drafting, the more ready the court can properly be to depart from their natural meaning;

(iii) commercial common sense is not to be invoked retrospectively to save a contractual arrangement which, according to its natural language, has worked out badly or even disastrously for one of the parties;

(iv) while commercial common sense is a very important factor to be considered when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed;

(v) when interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties;

(vi) in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention;

Application of principle to present case

The court held that the Defendant's interpretation of the Contract did not accord with the ordinary meaning of the words used. It overly focused on the meaning of "Property", without regard to other provisions of the Contract and the background because:-

(1) The Contract provided for different completion dates for Sections 1 to 3 and Section 4 and different rates of liquidated damages for each of Sections 1 to 4 works. This showed an intention of the parties to permit completion of one or more Sections before the completion of the whole of the works.

(2) The ordinary meaning of Clause 2.27.1, when construed with the Contract as a whole, was that Practical Completion of the Section could be achieved if the works in that Section complied with the criteria in Clause 1.1, without the whole of the works being complete because:-

(i) The use of the word "allows" suggested that "Practical Completion" did not require the whole of the Works to be complete, but something less which enabled a final stage of completion to be achieved in due course.
(ii) The use of the words "the Works or a Section" in Clause 2.27.1 and the definition of "Practical Completion" suggested that they were alternatives and not linked together.

Comments

This case serves as a helpful reminder of the application of *Arnold v Britton* in contractual interpretation. Some view *Arnold v Britton* as advocating an approach to contractual interpretation where the language of the contract trumps commercial common sense by relying on the factors mentioned above. However, this is simply not the dicta of *Arnold v Britton*.

It appears that the factors (rather than principles) are only a particular application of the general principles of interpretation of contracts set out in paragraph 15 of the judgment mentioned above.

Here, the court relied on the language of the contract to reach its conclusion after considering the principle in *Arnold v Britton*. However, it also emphasized that this is not a case where it had to ascertain the intention of the parties by looking beyond the Contract, as the ordinary meaning of the language reflected the parties' intention clearly and unambiguously. In fact, the court stated that even if it was wrong about the absence of ambiguity in the language, business common sense would have supported its construction.

Therefore, *Arnold v Britton*, as applied correctly in this case, is far from suggesting that the language of the contract trumps commercial common sense in contractual interpretation. Rather, it advocates an approach where the ordinary meaning of the language of a contract is clear and consistent with commercial common sense, it shall be the primary basis for interpretation.

Deacons' seminars on competition law issues affecting the construction industry

On 17 May 2019, the Competition Tribunal issued its first two judgments, one of which found that 10 decorating contractors had breached the First Conduct Rule by entering into floor allocation and price package arrangements, with the object of restricting competition. Further details of the judgments can be found in our article of 20 May 2019. Deacons' Construction practice group is running a series of seminars for various contractors' associations on the topic, with its Principal Economist, Sharon Pang, who acted as expert for the Respondents in one of the cases. The contractors' associations include the Hong Kong Construction Association (HKCA), Hong Kong Registered Contractors Association (HKRCA), Hong Kong Construction Sub-Contractors Association (HKCSA), Hong Kong General Building Contractors Association (HKGBCA) and Hong Kong Federation of Electrical and Mechanical Contractors (FEMC).

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