



LEGAL BRIEFING

Martin Dawes v Treasure and Son Ltd [2010] EWHC 3218 (TCC), Mr Justice Akenhead

This case raised issues about the point or stage at which an arbitrator becomes *functus officio* or ceases to have jurisdiction and the extent, ambit or scope of a settlement of an arbitration.

The Facts

Treasure and Son Ltd ("Treasure") was a contractor engaged by Mr Dawes to carry out construction works pursuant to a building contract which incorporated the JCT Standard Form of Prime Cost Contract (1998 Edition with Amendments 1 and 2).

Treasure obtained an adjudication decision requiring Mr Dawes to pay to Treasure a certain amount. That decision was not honoured and Treasure successfully enforced that decision in the Court, with the Court giving judgment on 25 October 2007. A dispute was then referred to Court regarding whether payment in relation to the judgment had been made by Mr Dawes' daughter.

Before the first set of court proceedings, on 6 July 2007 Treasure referred a dispute to arbitration. The dispute arose from Mr Dawes' alleged failures to pay sums due under the contract as well as for Mr Dawes' alleged breaches of contract. At this stage, the dispute relating to the repayment of the sum which was to be the subject matter of the adjudicator's decision had not been referred to arbitration; this money was not paid out until after the enforcement in Court, in November 2007.

The parties entered into a settlement agreement during the arbitration proceedings, but Mr Dawes then commenced further proceedings relating to defects in Treasure's works. The arbitrator ruled that Mr Dawes' defects claims had been settled. Mr Dawes argued that he had only used the defects as a defence and they were not at that stage advanced as a counterclaim. Mr Dawes subsequently commenced Court proceedings that raised the following issues.

The Issues

Did the arbitrator become *functus officio*, apart from issues relating to costs, either immediately upon or shortly after the settlement between the parties or at least after the 1st Costs Award?

If he retained jurisdiction, was he right to find that the settlement effectively compromised amongst other things all claims for defects raised in the arbitration proceedings?

The Decision

Mr Dawes' two claims against Treasure were dismissed. The Judge decided that:

- (i) the arbitrator did have jurisdiction to consider and decide whether the settlement agreement between the parties covered all claims for the defects specifically pleaded in the Amended Defence and Cross Claim; he was not *functus officio* when he did consider and decide that issue, and
- (ii) the arbitrator's Award on the defects issue was right; the settlement effectively compromised all claims for defects raised in the arbitration proceedings.

The Judge stated that the expression “functus officio” is not a term of art but in the context of arbitration it describes or implies the point at which an arbitrator has exhausted or concluded all that he or she had jurisdiction to deal with.

The Judge drew the following conclusions from the law and practice relating to arbitrations in relation to the point at which an arbitrator may become functus officio:

- “(i) Primarily, as arbitration is, usually, a consensual process, one must look to the contract between the parties pursuant to which the arbitrator has been appointed to determine what the parties have agreed, expressly or by implication, about when an arbitrator’s jurisdiction becomes exhausted.
- (ii) The settlement of a dispute after it has been referred to arbitration but before any final award does not generally, and certainly does not necessarily, bring to an end to the jurisdiction. Section 51 [Arbitration Act 1996] suggests that even if the dispute is settled there remains a jurisdiction to terminate the substantive proceedings and to resolve issues of costs or indeed any other matters remaining in dispute at that time. That jurisdiction is not expressed to be statutorily limited.”

The Judge formed the view that the CIMAR Rules, agreed by the parties, expressly give a party a right “after an arbitrator has been appointed” to refer another dispute to the same arbitrator and the arbitrator has the right in effect to consolidate it with the existing proceedings. That is what in practice the arbitrator did in relation to the issue as to whether Mr Dawes’ defects claim was effectively encompassed by the settlement. If all facets of the dispute including costs and interest had been resolved then the arbitrator would have ceased to have jurisdiction. In the present case, the arbitrator retained the jurisdictional obligation at least on dealing with costs and could therefore address the defects claim.

Comment

The CIMAR Rules influenced the outcome of this case, in that they provided for the arbitrator to have jurisdiction over any further disputes referred to him following his initial appointment. Notwithstanding the specific facts of the case, the decision emphasises the significance of the terms of the arbitration agreement and the rules under which the arbitration is conducted, in determining when the arbitrator has exhausted or concluded all that he or she had jurisdiction to deal with. On the face of it, the Treasure/Dawes arbitration did not encompass overly complex substantive issues, but disagreements still arose over the scope of the settlement. The Judgment highlights the importance of clearly analysing the scope of pleaded claims and cross claims to determine which matters are in issue between the parties when entering into any settlement agreement. This is especially so when the parties, as they did here, put forward multiple claims, positive defences and cross claims.

Andrew Hales
February 2011