

Legal Briefing

Ted Lowery looks at a case that examined conflicting dispute mechanisms in a PFI contract

Surrey County Council v Suez Recycling and Recovery Surrey Limited [2021] EWHC 2015 (TCC)

Before Mr Alexander Nissen QC

Technology and Construction Court

Judgment delivered 16 July 2021

The facts

Under a PFI project agreement dated 22 June 1999 Surrey engaged Suez to manage its domestic waste disposal obligations including the design, construction and operation for 25 years of two mass burn energy-from-waste facilities. The project agreement schedules established expert procedures for certain types of discrete dispute including accounting and planning issues but otherwise provided for arbitration. Clause 63 stated that the parties submitted to the exclusive jurisdiction of the courts of England and Wales.

The energy-from-waste plants were never constructed due to planning difficulties. Starting in 2007 Surrey and Suez entered into a series of deeds of variation in order to re-focus the project providing amongst other things, for the construction of an EcoPark at Sunbury-on-Thames. The deeds of variation provided that the courts would have exclusive jurisdiction in relation to any claim, dispute or difference concerning or arising under the deeds. The deeds did not provide for any material amendments to the original arbitration clause in the project agreement and confirmed that save as expressly varied, the project agreement remained in full force and effect.

Disputes arose between Surrey and Suez over the cause of delays to the construction of the EcoPark and over the proper interpretation of the performance test standards required to secure the acceptance certificate. In December 2020 Surrey issued a letter of claim under the pre-action protocol, on the assumption that the deeds made the court the proper forum for disputes concerning the construction and commissioning of the EcoPark. Suez challenged the reference to the pre-action protocol, contending that the un-amended arbitration clause in the project agreement still applied.

In early 2021 Surrey commenced court proceedings seeking a number of declarations including that they were entitled to issue a notice of termination under the project agreement. Suez issued an application under section 9 of the Arbitration Act 1996 for the proceedings to be stayed to arbitration.

The issue

Were disputes concerning the EcoPark subject to the arbitration clause in the project agreement?

The decision

The judge found in favour of Suez on several grounds.

Firstly, the deeds were framed as variations to the project agreement and as such, in contrast to a termination agreement or settlement agreement, reflected the parties' continuing relationship. The judge accepted Suez's characterisation of the project agreement as the master document and the deeds as its servants. It was therefore more likely that parties would have intended to retain the dispute resolution procedure fixed by the project agreement rather than by the subsidiary deeds. Second, the judge noted and followed the courts' usual practice of giving a broad construction to arbitration clauses, finding that the arbitration clause in the project agreement was of sufficient breadth to encompass disputes over the EcoPark.

Third, from the commercial point of view, the judge thought it obviously sensible that all disputes arising under the project agreement and any variations to the project agreement should be determined in the same forum. The parties had evidently recognised the advantages of arbitration when entering into the project agreement and there was no suggestion by Surrey that these advantages would be dissipated in a dispute concerning the EcoPark.

Fourth, where Surrey's ultimate aim was to terminate the project agreement including by reference to the acceptance certificate mechanism in the project agreement, the judge thought it would be a surprising outcome to hold that the centre of gravity of these disputes lay in a different document. Therefore construing the contract documents overall, the judge considered that the references to court proceedings in the deeds could be reconciled with the arbitration clause in the project agreement along the lines that by re-stating the provisions of project agreement, the deeds confirmed that the courts of England and Wales would have exclusive jurisdiction in circumstances where court intervention was necessary to supervise any arbitration process.

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Commentary

PFI contracts are notoriously complex and frequently include anomalies that fail to neatly dovetail interlocking rights and obligations over the lifespan of the project. Post contract variations and supplemental agreements that add to the page count are likely to exacerbate the risk of ambiguities.

Here, following a detailed scrutiny of ostensibly competing provisions in the project agreement and in the deeds of variation, the judge was able to reconcile these terms so that the arbitration clause in the master project agreement was not superseded by the provision for court proceedings in the subservient deeds of variation. This is typical of the analysis that must often be undertaken when seeking to construe the broad spectrum of documents that make up PFI contracts.

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