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Setting Aside Certificates for "Manifest Error"

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In a judgment delivered last month, the English Court of Appeal considered the circumstances under which completion certificates under a PFI contract could be set aside for "manifest error".

The concept of "manifest error" is sometimes used in construction contracts and expert determination agreements as one of the limited bases for setting aside an otherwise "final and binding" certificate or determination.

The recent English Court of Appeal decision in *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264 examined the issue of whether four completion certificates issued by the independent certifier under a PFI contract could be set aside on the basis of "manifest error".

Background

In May 2010, Birmingham City Council ("**BCC**") entered into a contract with Amey Birmingham Highways Ltd ("**Amey**") relating to the rehabilitation, maintenance, management and operation of the roads and street lighting network in Birmingham for a 25 year period pursuant to the government's private finance initiative (the "**Contract**"). This project was described as the largest government highways sector PFI contract in the UK, with a total value of £2.7 billion.

The issue in dispute concerned data in a computer model of Birmingham's road network which fed into a computer programme that identified the maintenance works which Amey then had to undertake.

- At the outset of the Contract, both parties were aware that approximately 60% of the data in the computer model was based upon national averages, rather than detailed observation and measurement of the specific roads that Amey was required to maintain under the Contract.
- Amey was required to update the generic data in the computer model with accurate survey data, and to perform the maintenance works on the road network in accordance with the survey data.
- Three and a half years into the project, BCC noted that Amey deliberately began to leave selected areas of the roads and footpaths unrepaired, and challenged Amey for not having undertaken repairs.
- However, Amey argued that, based on its interpretation of the Contract, it was not required either to update the generic data in the computer model with accurate survey data, nor to perform maintenance works in respect of sections of the road network for which updated data was presently unavailable, unless BCC instructed a variation and paid it extra to do so.
- BCC maintained that Amey was in breach of the Contract. In BCC's view, the Contract required Amey to (i) update the data in the computer model with accurate survey data, and (ii) rehabilitate and maintain the road network that *actually* existed, not a hypothetical road network which both parties knew to be based on default data.

- The independent certifier under the Contract took the view that it was not its function to resolve issues of contractual interpretation between the parties, and proceeded to issue milestone certificates 6, 7, 8 and 9 on the basis of the generic data in the computer model rather than actual survey data.

BCC challenged the independent certifier's approach to certification.

Judgment

Clause 13.5 of the Contract provided that:

> *"As between the Parties the decision of the Independent Certifier to issue any Certificate of Completion, Certificate of Partial Completion or Certificate of Non-Completion at any time shall, in the* ***absence of fraud or manifest error****, be final and binding on the Parties but without prejudice to the right of either Party to make a claim under the Independent Certifier's Appointment." [Emphasis added]*

One of the principal issues before the English Court of Appeal was whether milestone certificates 6 to 9 could be set aside for "manifest error", as they were issued based upon erroneous default data, rather than accurate survey data as required by the terms of the Contract.

Citing earlier case law, the Court of Appeal held that a "manifest error" in this context is "one that is obvious or easily demonstrable without extensive investigation".

The court held that milestone certificates 6, 7, 8 and 9 should be set aside for "manifest error", as these milestone certificates were issued based upon erroneous default data rather than accurate survey data as required by the Contract.

Comment

"Manifest error" does not represent a generally available legal ground for attacking an otherwise "final and binding" certificate or determination. It therefore needs to be written into a contract as a basis for invalidating a certificate or determination.

Where a contract does provide for a certificate to be final and binding except in the case of "manifest error", *Amey v BCC* confirms that a "plain and obvious" mistake will need to be established in order to challenge such certification.

- Whether there has been a "plain and obvious" mistake will ultimately be a question of fact.
- A "manifest error" need not be "plain and obvious" from the relevant certificate itself. In *Amey v BCC*, the "manifest error" became evident from a consideration of the terms of the Contract as well as the previous conduct of the parties when the certificates were issued.

There exists a tension between "oversights and blunders so obvious as to admit no difference of opinion", which are regarded as "manifest errors", and "errors of judgment" which are not so regarded unless they amount to gross negligence. Accordingly, if a certifier has relied upon the correct information and procedure in determining whether a milestone has been achieved, but has made an error of judgment as to whether a milestone has been achieved, in the absence of fraud, bad faith or gross negligence on the part of the certifier, the error may well be incapable of challenge unless a challenge is otherwise permitted by the particular contract. No doubt we will be seeing more cases in the future involving arguments over whether an error was a "manifest error", or something of a different character.

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