



LEGAL BRIEFING

Vision Homes Ltd v LancsVille Construction Ltd

[2009] EWHC 2042 (TCC) Mr Justice Christopher Clarke

The Facts

The claimant, Vision Homes Ltd (“Vision”) was a property developer. In 2007 it entered into a contract in the form of the JCT Design and Build Contract 2005 edition (with amendments) (“the contract”) with the defendant LancsVille Construction Ltd (“LancsVille”). Under the contract LancsVille was to construct the structural shell and external envelope to five new blocks of residential apartments being developed by Vision, together with landscaping and infrastructure work.

LancsVille realised that they were unable to undertake the external envelope works. Following discussions with Vision, it was agreed that the external envelope works would be omitted from the contract, resulting in a 40% reduction in the value of the works. With regard to the remaining works, the parties agreed a revised method for working for Block 5 and other fundamental changes to the way the work was to proceed and be handed over.

Block 5 had fallen substantially behind schedule on account of problems with planning permission. It was agreed that the works would be carried out but again on an entirely different basis. Subsequently, Vision claimed LADs against LancsVille for the alleged late completion of the amended works. LancsVille denied liability on the grounds that the original completion dates had been superseded by the subsequent agreement.

LancsVille submitted a notice of intention to refer a dispute to adjudication alleging Vision, had in breach of contract, decided to levy LADs in respect of the purported late completion. On the same day, Vision submitted a notice of intention to refer a dispute to adjudication. Vision’s dispute was referred for determination to an adjudicator (X) by a referral notice claiming an entitlement to LADs. LancsVille’s dispute was referred to an adjudicator (Y) but later that day, LancsVille submitted a slightly modified notice of intention to refer, including an additional claim that Vision should pay the adjudicator’s fees. Both adjudications proceeded.

In relation to LancsVille’s dispute, Y determined that the parties had “dumped” the contract and had reached an agreement whereby the remaining works were to be done ‘as and when’ using the best guidance from rates and prices in the original deal. The events completely left behind the extension of time machinery, and therefore “out went the LADs”.

As a result, X came to the conclusion that he lacked the jurisdiction to give any decision as the disputes appeared to relate to the same or substantially the same dispute and decided to withhold his decision pending the outcome of the instant challenge. Vision then served its Part 8 claim.

Vision claimed that the decision Y’s could not stand because it was not clear what it means. It was expressed in idiosyncratic terms and therefore it was unclear whether the decision was that the parties had abandoned the contract or otherwise.

Furthermore, it was claimed that the Scheme provides that the request to the nominating body should follow the giving of a notice which, as a consequence, invalidated Y’s decision.

Vision also submitted that Y purported to decide something that was not referred to him and thereby exceeded his jurisdiction. No part of the dispute referred included a dispute as to whether or not the contract had been abandoned or left behind. Since

that was not part of Lancsville's case, Vision did not have the opportunity of dealing with it, such that there has been obvious unfairness.

Vision submitted that there could not be two adjudications on the same dispute at once. It was necessary that the court imply a term into the contract that time should not run on X's adjudication between the date of issue and the date of resolution of the proceedings so that X might issue a valid decision.

The Issues

There were a number of issues before the court:

- (i) was Y's decision so unclear on its face that no effect can be given to it?
- (ii) was Y's decision invalid because the request for nomination preceded the notice?
- (iii) did Y purport to decide something that was not referred to him?; and
- (iv) finally, is it possible for two adjudications to run at the same time on the same dispute and should the court imply a term into the contract that time should not run on X's adjudication until resolution of the court proceedings?

The Decision

It was not accepted that the decision was so unclear on its face that no effect could be given to it. The fact that the adjudicator describes certain clauses as unworkable indicated to the court that he was not holding that all of them are either unworkable or inapplicable.

It was accepted by the court, although not without some misgiving, that Y had no jurisdiction to act as he did under the second notice because that notice was not followed but was in fact preceded by a request to the nominating body under the Scheme. It was not possible to regard a request as continuing so that it may be regarded as made both before and after the second notice. If the provisions which establish the jurisdiction of the adjudicator are not complied with it is irrelevant whether or not the other party has suffered prejudice as a result.

If the existing referral does not enable him to deal with the dispute in the way in which he wishes, the adjudicator is powerless to alter the terms of the referral in the absence of the agreement of both parties. However, in this case, the dispute as defined in the notice related to whether Vision was in breach of contract in deciding to remedy LADs in respect of the purported late completion. In those circumstances, it was open to Y to consider any point which bore upon the question of Vision's contractual entitlement or lack of it.

The Scheme makes no provision for the resignation of an adjudicator where the dispute that he is asked to decide has previously been referred to adjudication but no decision has been taken in that adjudication. It was held that the contract was not unworkable if such a term was not implied, even though the absence of such a term may, in certain circumstances, lead to a race to achieving a final decision.

Comment

In the court's opinion, where one notice is served, a nomination sought, a second notice follows, and the adjudication proceeds pursuant to the second notice, the question of jurisdiction cannot be decided by the determination of the degree of the importance of the additional claim. Therefore, where amendments are made to an existing notice, parties must ensure that they then send a request to the nominating body as it is clear that the adjudicator's jurisdiction will not extend to the new notice.