



LEGAL BRIEFING

Barr Ltd v Klin Investment UK Ltd

[2009] CSOH 104, Lord Glennie

The Facts

Barr Ltd ("Barr") entered into a construction contract with Klin Investment UK Ltd ("Klin") for the design and construction of a number of flats in Kilmarnock on 21 February 2005 (the "Contract"). The contract was a construction contract within the meaning of Sections 104 and 105 of the Housing Grants, Construction and Regeneration Act 1996 (the "Act").

Clause 7 of the contract provided that if any dispute or difference arose under or by reason of breach of the contract, either party may refer it to adjudication in accordance with Clause 39A.

Clause 39A.3.2 provided that:

"An Adjudicator must resign where the dispute is the same or substantially the same as the one which had previously been referred to Adjudication, and a decision has been taken in that Adjudication."

The parties entered into a series of adjudications after practical completion.

In the first adjudication, which concerned interim application 22, Barr sought a declaration that Klin had failed to give either a payment notice or a withholding notice within the required time and that, in those circumstances, Klin were obliged to pay Barr the entire amount of the interim application. It was held that the withholding notice was served within time.

In the second adjudication, also regarding interim application 22, a different adjudicator was asked whether the liquidated damages clause within the contract was a penalty and therefore void. It was held that the liquidated damages were void and unenforceable.

The third adjudication, for which enforcement was being sought, related to interim application 23. Barr claimed for payment of the amount of £375,600 withheld on account of a claim for liquidated damages. The adjudicator ordered payment of the sum on the basis that withholding notice served was insufficient to give Barr clear notice of the claims in respect of which Klin were seeking payment and ordered that the amount set out in Klin's payment notice (£375,600) was payable.

The Issue

Was the dispute submitted to the third adjudication the same or substantially the same as the dispute dealt with in the previous adjudications?

The Decision

The adjudicator's decision was enforced.

Lord Glennie noted that, when submitting a dispute or difference to adjudication, a party is not required to submit all the disputes or differences which have arisen up to that date. He may pick and choose. The dispute or difference is therefore the one that the referring party chooses to refer, no more or no less. He added that there was no good reason why the court should seek to discourage attempts by a party to a construction contract from seeking an interim decision in his favour by referring sequentially legal points, or short points of disputed facts or narrow the issues, rather

than having to engage in what would, in effect, be a dress rehearsal for a full arbitration.

He went on to comment that, if a party refers to adjudication a narrow point of construction so as to enable him to claim payment turning upon that point without having to go to the trouble and expense of a contested hearing on the whole of the underlying facts, but fails on that point of construction, he cannot then be barred from referring to adjudication the disputed factual basis upon which the other party says that he should not be paid. The sum sought to be recovered as a result of the adjudication might be the same in each case, but that would not make the dispute referred to adjudication in the second case even the same or substantially the same as that referred to in the first adjudication.

Lord Glennie noted that the first adjudication had referred the question of whether the combined payment and withholding notice was served within time for interim application 22. In the second adjudication the dispute referred was whether the liquidated damages provisions in the contract were void and unenforceable.

By contrast, the dispute referred to the third adjudication was whether Klin was entitled to withhold £375,600. Lord Glennie observed that this was the first occasion on which the pursuers had referred to adjudication the question of their entitlement for payment of that sum and upheld enforcement.

Lord Glennie also rejected the other arguments raised by Klin. These were that the Adjudicator had no jurisdiction to consider arguments about the withholding notice, that he had shown apparent bias in helping the contractor in its arguments on the withholding notice and that he had breached the rules of natural justice by failing to allow the parties time to comment on his proposed findings of fact.

Comment

Although this case is a Scottish decision, and therefore not binding in the English courts, Scottish cases are often referred to in English proceedings and may provide guidance on how English courts could approach such issues. The case is interesting because of its discussion of what constitutes a dispute. It confirms that parties do not have to refer an entire dispute to adjudication. If the referring party wishes to select a narrow part of the dispute between the parties (i.e. "cherry pick") so that they do not have to get involved with a time consuming and expensive adjudication on all disputes that have arisen between the parties prior to an adjudication, then they are entitled to do so.

Claire King
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