



LEGAL BRIEFING

The Dorchester Hotel Ltd v Vivid Interiors Ltd

[2009] EWHC 70, TCC, Mr Justice Coulson

The Facts

The claimant, “The Dorchester Hotel”, engaged the defendant, “Vivid Interiors”, under the JCT98 Standard Form of Building Contract to carry out the refurbishment of its hotel. The works were completed in September 2007 and Vivid Interiors provided its draft final account at the end of March 2008. On 19 December 2008, just before the Christmas holiday, Vivid Interiors commenced adjudication proceedings with respect to its final account claim. The 92 page Referral Notice was accompanied by 37 lever arch files, including five entirely new files containing six substantial witness statements and two experts’ reports. Furthermore, many of the individual claim figures within the final account had been revised, albeit by a modest amount, from those claimed in March 2008.

The adjudicator accepted the reference on the condition that the holiday period from 24 December 2008 to 4 January 2009 would not be included within the calculation of the 28 day adjudication period. Vivid Interiors agreed to this and the time for completion of the adjudication was extended to 28 January 2009. Though the adjudicator appeared to accept that this timetable was sufficient, Vivid Interiors agreed with The Dorchester Hotel to extend the timetable, allowing the response to be served by 28 January 2008 and the adjudicator’s decision to be provided by 28 February 2008.

The Dorchester Hotel maintained throughout that the timetable was too tight and that there was a very real risk of a breach of natural justice. It was concerned that the date for its response of 28 January 2008 was only 18 working days after 5 January and was simply not long enough to respond to the detailed claim submitted given the new evidence and revised figures. The Dorchester Hotel therefore sought declarations from the court through Part 8 proceedings that:

“there is a serious risk of a breach of natural justice in the conduct of the adjudication ... and, unless the parties agree a realistic timetable ..., any decision issued by the adjudicator against the existing timetable ... would be unenforceable by reason of breach of natural justice”.

Vivid Interiors argued that the court has no jurisdiction to grant these declarations as it would interfere with the adjudicator’s discretion and right to set his own timetable. It also contended that the extended timetable was more than sufficient given that The Dorchester Hotel had the majority of the final account details since March 2008.

The Issue

In an ongoing adjudication, to what extent should the Technology & Construction Court (“TCC”) intervene in connection with potential breaches of the rules of natural justice?

The Decision

Mr Justice Coulson referred to paragraph 9.4.1 of the TCC Guide and held that the court does have the jurisdiction to consider applications for declaratory

relief arising out of the commencement of a disputed adjudication. He stated that:

“If an ongoing adjudication is fundamentally flawed in some way, or may be just about to go off the rails irretrievably, than it seems to me that it must be sensible and appropriate for the parties to be able to have recourse to the TCC; otherwise a good deal of time and money will be spent on an adjudication which will ultimately be wasted.”

However, he also confirmed that it would only be appropriate in rare cases for the TCC to intervene in an ongoing adjudication and would only do so in clear-cut cases. He suggested that one such case would have been *CJP Builders Ltd v William Verry Ltd* [2008] BLR 545 if such declarations had been sought.

Mr Justice Coulson then went on to conclude that the declarations sought in this case should not be granted for four separate reasons. First, the adjudicator had clearly stated that he was able to fairly determine the adjudication by 28 January (or of course the extended date of 28 February). And, in accordance with *CIB v Birse* [2005] 1 WLR 2252 where HHJ Toulmin CMG QC held that it was up to the adjudicator to decide whether or not he could reach a fair decision within the timetable, it would only be in the rarest of situations where the court would intervene.

Secondly, Mr Justice Coulson stated that he did not believe that such a timetable is incapable of giving rise to a fair result. Thirdly, he considered that he was not in a position to be able to say whether or not the new material would lead to a breach of natural justice. And finally, by refusing to grant the declarations, the claimant would not be left without a remedy. If the claimant is not happy with the adjudicator's decision, it is of course always open for it to attempt to resist enforcement in the future with the allegation that there has been a breach of natural justice.

Commentary

Though the court is prepared to intervene in an ongoing adjudication, parties must remember that it will only do so in the rarest of situations. Even in the not so uncommon situation where a party has commenced an adjudication on the last day before the Christmas holiday with an extensive amount of supporting documentation, as was the case here, the court is reluctant to interfere. Mr Justice Coulson reminds us that:

“The concepts of natural justice ... are not always easy to reconcile with the swift and summary nature of the adjudication process; and in the event of a clash between the two, the starting point must be to give priority to the rough and ready adjudication process”.

Stacy Sinclair
January 2009
