



LEGAL BRIEFING

Bovis Lend Lease Ltd v Trustees of the London Clinic

[2009] EWHC 64, TCC, Mr Justice Akenhead

The Facts

Bovis applied for summary judgment for the enforcement of an adjudicator's decision. The dispute arose out of a contract made between Bovis and the Clinic by which Bovis agreed to carry out and complete a redevelopment of a medical consulting facility. The Building Contract was the JCT Standard Form of Building Contract (1998) Edition, incorporating amendments 1-4 Contractor's Designed Portion Supplement and as further amended by the parties.

Practical completion was 56 weeks late. Bovis applied for extensions of time and prolongation costs. Although the Clinic had granted a 4 week extension of time and had allowed an additional sum on account of prolongation costs, Bovis made applications for further extensions of time, to a total of 44 weeks, and prolongation costs. These were rejected.

Bovis referred the dispute to adjudication to determine matters including (1) the extent to which delay and disruption to Bovis' work had been caused by the matters for which the Clinic was responsible; (2) the period of any extension of time to which Bovis was entitled; (3) Bovis' entitlement to reimbursement of liquidated and ascertained damages; and (4) the losses and expenses incurred by Bovis by reason of the delay and disruption to the contract works. The adjudicator found that Bovis was entitled to the full extension of time claim and that the Clinic should reimburse Bovis for the liquidated damages together with interest. He further found that the Clinic should pay part of the sum claimed by Bovis in respect of loss and expense and ordered the Clinic to pay his own fees and expenses.

At the enforcement hearing, the Clinic argued that (1) the claim for loss and expense made in the adjudication was new and based on new expert evidence. Therefore, there was no crystallised dispute in respect of the claim and the adjudicator had no jurisdiction to determine the claim; (2) the nature and volume of new evidence served by Bovis for the purpose of the adjudication and the timetable imposed on the Clinic in the adjudication did not give the Clinic a fair or effective opportunity to respond to the new case. As such, the decision was in breach of the rules of natural justice and invalid.

The Issues

Issues were raised as to whether or not the adjudicator had jurisdiction, at least with regard to the loss and expense claim, and as to whether the adjudicator failed to apply the rules of natural justice. A further issue arose between the parties as to whether or not it was legally and practically possible to sever the adjudicator's decision if it was the case that he did have jurisdiction to address the dispute relating to delay, extension of time and the recovery of liquidated damages but did not have jurisdiction to address the loss and expense claim.

The Decision

Mr Justice Akenhead held that a dispute does not arise unless and until it emerges that the claim is not admitted. Unless the claim is presented in a given case is nebulous and ill defined, the fact that a claim for payment is

refused or not accepted on the basis that insufficient information has been provided will usually at least give rise to a dispute.

In determining whether and when a claim is disputed, it is necessary to differentiate between whether a point taken by the potential defending party is one which truly goes to the issue as to whether there is a dispute and a potential substantive defence to the claim in question.

Once it is clear that there is a crystallised dispute, it is necessary to differentiate between the substance of the dispute which is then referred to adjudication and the evidence made in support of or to contest that disputed claim. The fact that some of the evidence has not been formally or informally submitted by the claiming party before the adjudication is not and certainly not necessarily in itself, determinative of the ambit of the referred dispute.

A breach of the rules of natural justice must be material in order to give rise to a challenge to an adjudicator's decision. The facts that the dispute is complex or involves consideration of large volumes of material does not necessarily mean that any decision reached within adjudication is procedurally unfair. The mere fact that there has been an ambush by the claiming party in an adjudication does not in itself amount to procedural unfairness. It was clear that in the instant case there was an expanding dispute between the parties as to the responsibility for delays. Accordingly, there was a disputed claim and the adjudicator had jurisdiction to address the whole claim which was referred to him.

In relation to severability it was held that if the view was that the crystallised dispute did not include the claim for loss and expense, that part of the decision which demonstrably related to the extension of time claim and the recovery of liquidated damages could be recovered. The award was one which was severable. It followed that Bovis' application for Summary Judgment and the Adjudicator's Decision should be enforced.

Comment

Mr Justice Akenhead noted that it will be a rare case, if ever, in which it can be said that there is a material breach of the rules of natural justice in adjudication proceedings, in relation to a party not being given a reasonable opportunity to present its case, defence, evidence or other submissions, if the party complaining of such a breach has not raised the issue during the course of the adjudication. In this particular case, the Clinic never asked for more time. It was difficult to see how there can have been a material breach of the rules of natural justice where, if it was material, the Clinic or its professional advisors did not see fit to mention it as something which was materially affecting them during the course of the adjudication.

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