



LEGAL BRIEFING

Cundall Johnson & Partners LLP v Whipps Cross University Hospital NHS Trust

TCC HHJ Jackson QC [2007] EWHC 2178

The Facts

This was an application for a stay of proceedings on the grounds of non-compliance with the Pre-action Protocol for Construction and Engineering Disputes. Cundall Johnson & Partners LLP (“Cundall”) were a firm of consulting engineers. Whipps Cross University Hospital NHS Trust (“Whipps”) was an NHS Trust responsible for Whipps Cross Hospital. Whipps embarked upon a series of construction projects to redevelop and improve the hospital.

Two preliminary construction projects proceeded: first, for the demolition of certain buildings (the “enabling works”) and secondly, for the construction of a new energy centre to replace the existing boiler house (the “EC works”).

In relation to the enabling works, in early March Cundall sent a letter to Whipps’ director of finance and administration requesting payment of five outstanding invoices. Cundall responded requesting Whipps forward it copies of the relevant appointment documents. Cundall’s solicitor responded enclosing an illegible fees schedule and its covering letter. Correspondence then passed between Cundall’s solicitor and Whipps’ solicitor. Whipps maintained that Cundall’s response forwarding the illegible fees schedule was not satisfactory and refused to attend a meeting until proper details were provided. Cundall then issued proceedings.

In relation to the EC works, Cundall’s solicitors wrote to Whipps’ solicitors claiming unpaid fees. Correspondence regarding Cundall’s entitlement to bring adjudication proceedings then ensued. At no point in this correspondence was there any coherent summary of Cundall’s claim in respect of the EC works. Proceedings were then issued.

The Issue

Should the proceedings be stayed to enable the parties to attempt settlement, on the ground that Cundall had failed to comply with the Pre-Action Protocol or the Protocols Practice Direction?

The Decision

The proceedings were stayed. The Protocol applied to both the enabling works claim and the EC works claims. Cundall did not comply with the requirements of the Protocol in respect of either claim. The contractual basis of the enabling works claim remained obscure until proceedings were issued. In relation to the EC project, Cundall’s solicitors did not send a letter summarising the contractual basis of their claim for additional fees.

The stay was granted as there was a real possibility of settlement if the parties followed the Protocol processes. The stay would be in the best interests of both parties as it may save them unnecessary litigation costs. It was also unfair on Whipps to proceed immediately with litigation when a proper summary of the claim had not been notified in advance.

Comment

The Construction and Engineering Pre-Action Protocol sets out a procedure for the exchange of information between the parties, followed by a meeting. Neither the letter of claim nor the defendant's response is required to resemble pleadings either in their length or in their detail. What is required from each side is a clear and concise summary of their respective cases.

The Protocol is designed to provide a framework for discussions between the parties to avoid the need for litigation and it is mandatory to comply with the Protocol before bringing proceedings. As is demonstrated in this case, failure to comply with the Protocol may lead to the proceedings being stayed.

Charlene Linneman
December 2007
