



LEGAL BRIEFING

Owen Pell Ltd v Bindi (London) Ltd

[2008] 7 BM 50216, TCC (Birmingham), HHJ Kirkham

The Facts

Owen Pell Limited (“Owen Pell”) entered into a contract with Bindi (London) Limited (“Bindi”) for Owen Pell to build an extension and undertake M&E work at Bindi’s property at Holme Lacy. Owen Pell left site before work was complete. The parties later agreed to have their dispute determined by an independent expert, to be appointed by RICS. The RICS appointed Mr Cartwright as the expert. In September 2007, Mr Cartwright decided that Owen Pell was entitled to be paid £53,487.76 plus VAT within 7 days of the decision and that Bindi should pay 80% of his fees.

Bindi refused to make payment. Owen Pell issued proceedings and sought summary judgment. Owen Pell argued that Mr Cartwright answered the question put to him and therefore his decision was binding, even if it was wrong. They argued that the rules of natural justice do not apply to expert determination. Bindi argued that it was an implied term of the expert determination agreement that the expert’s decision would be of no effect and/or liable to be set aside if the expert did not abide by the rules of natural justice, was biased or gave the appearance of being biased or was guilty of gross or obvious error and/or was perverse in his conclusions.

The Issue

Should the term suggested by Bindi be implied into the parties’ contract?

The Decision

The term would not be implied into the contract. The agreement between the parties was silent as to whether the expert should give reasons or not and therefore was apparently neutral on the point. Mr Cartwright’s decision to give reasons was arrived at after the parties’ agreement was reached and therefore the agreement could not be construed using this post-contractual event.

There was nothing in the agreement to suggest that this dispute and the approach to it was different from other expert determinations. The parties did not suggest that they gave consideration to the rights enshrined in the Human Rights Act when they agreed to submit to expert determination. Both parties were represented by professionals. The wording of the Agreement indicated that the parties intended to be bound by it. Therefore to imply the term suggested by Bindi would frustrate rather than promote the commercial purpose of the Agreement. There was no reason to depart from the general rule that there was no requirement for the rules of natural justice or due process to be followed in an expert determination in order for that determination to be valid and binding between the parties.

Comment

The nature of expert determination is that it is generally quick, there are limited costs and parties achieve certainty and finality. As the expert in this case had not made a decision outside his jurisdiction, was not biased and there was no real possibility that he was biased, and he had not made any gross,

obvious or perverse errors on the face of the decision, it was not open for the court to review the expert's decision. As there was no real prospect of success, summary judgment was granted.

Charlene Linneman
July 2008