LEGAL BRIEFING

Vitpol Building Service v Samen
[2008] EWHC 2283 (TCC), Mr Justice Coulson

The Facts

The defendant invited tenders for building works to convert a hotel back into the family house that it originally was. The claimant's tender was successful. At the time the claimant commenced work there was no contract in place. Thereafter, as the works progressed, there were negotiations between the parties as to price, work-scope and contract terms. The defendant then instructed the claimant to vacate the site.

The claimant argued that the parties agreed that the contract would incorporate the JCT Intermediate Form, 2005 edition (the "IFC Form"); whereas the defendant claimed that there was never any formal contract document. Disputes arose and the parties commenced the pre-action protocol process.

Before the end of the protocol process and without any notice, the claimant began proceedings under Part 8. In those proceedings, the claimant sought three declarations relating to the existence of the contract terms and confirmation that the contract was incorporated. In relation to the third declaration the claimant sought a finding that clause 9.2 of the IFC Form was incorporated because it would then give the claimant the right to refer its claims to adjudication. If clause 9.2 was not incorporated, then the claimant would not have the right to adjudicate because the building works related to work for a residential occupier.

The defendant claimed that the court did not have jurisdiction to hear the dispute on the basis that adjudication proceedings had not been commenced and therefore this matter was not within the scope of the TCC Guide.

The Issues

Does the TCC have jurisdiction to decide a dispute as to the existence and/or terms of a contract, in circumstances where it is said that the court's decision will determine whether or not the claimant has the right to adjudicate, but where there is presently no adjudication (or even reference to adjudication), and there has instead been an almost completed pre-action protocol process?

The Decision

Mr Justice Coulson rejected the suggestion that the court's jurisdiction was defined by reference to the TCC Guide, construing that document as if it were a statute or a contractual exclusion clause. In his judgment, he said that the TCC Guide is designed only to set out in simple terms how the TCC can answer or assist the parties to resolve their disputes. Its provisions do not shut out a bona fide dispute between the parties as to the existence of a contract which may give the claiming party the right to adjudicate.

In this case there was a bona fide dispute about the existence and terms of the contract. The claimant was entitled to have that issue resolved in advance of any subsequent adjudication. In the Judge's opinion it was more convenient for the point to be dealt with now rather than it being allowed to cause delay and

possibly cause a procedural muddle in adjudication.

Critically if the claimant has the right to adjudicate, then it is not for the Court to deprive the claimant of that right.

Comments

This case is no different to the position where two parties to a contract dispute whether or not that contact incorporated an arbitration clause. Often in those circumstances the TCC is required to decide whether or not there was such an arbitration clause because, if so, the underlying disputes are then stayed for arbitration.

However, Mr Justice Coulson did have some sympathy for the defendant who claimed that it was wrong and unfair for the claimant to have started and maintained a pre-action protocol process dealing with the entirety of the claims, only to change tack unilaterally and to focus instead on the contract issue, with the threat of adjudication in the background.

Mr Justice Couslon felt that unnecessary cost was incurred as a result of the decision to embark on a long pre-action protocol process only for the Claimant to now require the Court and the defendant to focus solely on the contractual element of the dispute.

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