Legal Briefing

Delta Reclamation Ltd v Premier Waste Management Ltd

[2008] EWHC B16 (QB), HHJ Behrens

The Facts

On 21 December 2006 the claimant, Delta Reclamation Limited ("Delta"), and the defendant, Premier Waste Management Limited ("Premier"), signed an agreement which regulated the storage and processing of UTDAR (an acronym for "Used Tyre Derivative Aggregate Replacement") at a quarry near Coxhoe. The agreement contained an arbitration clause submitting:

> *"all disputes arising out of the agreement to a single arbitrator to be mutually agreed between the parties or… nominated by the President… of the Chartered Institute of Waste Management."*

Within a year of the agreement, disputes arose and Premier served a notice on Delta withdrawing from the agreement. Delta was seeking to compel Premier to remove processed UTDAR from the agreed storage and processing area while on the other hand Premier contended that, as the agreement was at an end, there was no obligation on them to remove UTDAR from these agreed areas. Delta's solicitors wrote to Premier stating that their client had little alternative but to commence proceedings and would seek an urgent interim injunction compelling compliance with the contract until either trial or arbitration.

Rather than seeking an injunction under section 44 of the Arbitration Act 1996 within arbitration proceedings, Delta issued and served a Part 7 Claim Form, Particulars of Claim and a Part 23 application seeking an injunction under the ordinary court proceedings in December 2007. Premier argued that as the agreement was governed by an arbitration clause, the court needed to be satisfied that the case was one of urgency within section 44(3) of the Arbitration Act 1996. It also indicated to the court that is was intending to apply for a stay under section 9 so that the matter could be determined by arbitration. The application for an injunction was rejected. No further action was taken by Premier at this point in respect of the court proceedings and neither an acknowledgment of service nor a defence or counterclaim was served.

In July 2008, Delta served on Premier a notice to arbitrate the dispute and suggested two potential arbitrators, inviting Premier to join with Delta in the appointment of one of them within 28 days. Premier responded one month later challenging Delta's right to arbitrate and at this point served a defence and counterclaim, notably well past the required time as specified by the Rules. At the end of August 2008, Delta applied for a stay of the counterclaim and invited the court to stay its own action on the ground that there was no justification for parallel court and arbitration proceedings. Premier argued that as Delta had engaged the jurisdiction of the court to determine their claim, it was too late for them to rely on the arbitration agreement.

The Issue:

Does the commencement of court proceedings mean that it is too late for a claimant to rely on a valid arbitration clause?

The Decision:

His Honour Judge Behrens held that it is *"too simplistic an approach to assert that the existence of the proceedings means that it is necessarily too late for Delta to rely on the arbitration clause."* Just because Delta had initially chosen to litigate rather than to arbitrate, that fact could not of itself be determinative of whether the dispute was to be litigated or arbitrated. In this case there was nothing in the pre action correspondence which amounted to a repudiatory breach of the arbitration agreement by Delta. In its initial letter prior to the proceedings it plainly recognised the efficacy of the arbitration agreement. Furthermore, Delta had not adopted a course of action which could be described either as an abuse of the court process or of the arbitration procedure.

Accordingly, the Judge held that the arbitration agreement had not become inoperable and therefore the court was bound to grant a stay of the counterclaim under section 9(4) of the Arbitration Act 1996. He was also persuaded by the submissions of Delta and stayed the claim under CPR 3.2(f) in order to avoid parallel proceedings in both arbitration and litigation.

Finally, as there was no formal application for the court to appoint an arbitrator or to substitute a different appointer, His Honour Judge Behrens declined to interfere with the arbitration agreement which called for one to be nominated by the President of the Chartered Institute of Waste Management.

Comment:

In situations where there is a clearly agreed arbitration clause and it is common ground that the disputes fall within this clause, a party should think twice prior to commencing court proceedings. Though in this case there was nothing which amounted to the acceptance of a repudiatory breach of the arbitration agreement, there could well be situations where the issuing of a Part 7 Claim Form does in fact bring the arbitration agreement to an end.

Stacy Sinclair
October 2008