



LEGAL BRIEFING

Dalkia Energy & Technical Services Ltd v Bell Group UK Ltd

[2009] EWHC 73, TCC, Mr Justice Coulson

The Facts

Dalkia subcontracted to Bell certain repair and painting works at 143 stations and 22 footbridges owned or controlled by Central Trains. The parties agreed that this was a construction contract in writing, but they disagreed over whether or not Bell's standard terms and conditions were incorporated into that contract.

During 2008 Bell sought payment from Dalkia for sums they alleged were due, including variations. When no further payment was forthcoming from Dalkia, Bell commenced adjudication proceedings. Bell served an initial notice of adjudication on 1 December 2008 which named an adjudicator. Dalkia did not respond until late on 8 December and disagreed about Bell's nomination. In order to avoid any technical arguments Bell served a second notice of adjudication by fax on 8 December and recorded delivery on 9 December.

Both before and after the adjudicator was nominated, and in front of Mr Justice Coulson, Dalkia submitted the following points:

- (i) The Bell standard terms and conditions were not incorporated into the contract;
- (ii) If they were, the Bell standard terms and conditions did not comply with section 108, and so therefore the Scheme applied instead;
- (iii) The adjudicator did not have the jurisdiction to decide the dispute referred to him, principally because: he had been appointed under the Bell standard terms and conditions and not the Scheme; the approach to the RICS took place before the provision of the notice of adjudication to Dalkia; and the notice of adjudication purported to refer more than one dispute to the adjudicator.

The adjudicator had decided that Bell's standard terms and conditions were incorporated and that he did have the necessary jurisdiction. Whilst the adjudication was ongoing, Dalkia commenced proceedings in front of Mr Justice Coulson under CPR Part 8, for declarations of the above issues. In response, Bell disputed each of these points and submitted that the entire claim was unsuitable for CPR Part 8 and/or an abuse of process, and that the court did not have the jurisdiction to deal with the application.

The Issues

There were a number of issues before the court, namely:

- (i) whether the current proceedings were suitable for CPR Part 8 and/or an abuse of process;
- (ii) whether or not the court had jurisdiction; and
- (iii) whether or not the Bell standard terms and conditions complied with the Act.

The Decision

The Judge decided that the current proceedings were suitable for CPR Part 8. Bell had submitted that there were two matters of fact in dispute. Mr Justice Coulson held that one matter in dispute was irrelevant to the issue of the terms of the contract, and the other matter was a matter of law not fact.

The Judge further held that he should not decline to deal with the issues on the grounds of abuse of process.

The Judge thought the court did have jurisdiction to deal with the CPR Part 8 application. It was clear from correspondence that Dalkia had reserved their right to challenge throughout the nomination and adjudication process. If the matter of incorporation of Bell's standard terms and conditions had arisen before the court in enforcement proceedings, then the court would not have the power to review the decision. But, as these were CPR Part 8 proceedings and the court was being asked to give final determination on the issue, the Judge decided he "should not duck that issue". In the event the Judge approved the decision of the adjudicator.

The next issue to be decided was whether the Bell standard terms and conditions complied with the Act. If not, the Scheme would apply instead. It was held that the terms and conditions allowed the adjudicator a small extension in which to issue his decision, not reach it. As such it was not inconsistent with the Act. In any event, if the Bell conditions were not incorporated, or the Bell conditions were non-compliant with the Act, this would not have any effect on the adjudicator's jurisdiction.

Comment

The Judge was particularly troubled by the unacceptable and unexplained delay by Dalkia prior to the commencement of the Part 8 proceedings. Despite this conduct, Mr Justice Coulson was of the view that if Dalkia were entitled to a declaration to the effect that the adjudicator did not have the necessary jurisdiction to decide this dispute, it would still be better for everyone if, having got this far, that declaration were granted now, rather than everyone waiting for the point to arise in subsequent enforcement proceedings.

Nicholas Gould
February 2009
