Legal Briefing

Brookfield Construction (UK) Ltd v (1) Foster & Partners Ltd (2) HOK Sport Ltd

[2009] EWHC 307, TCC

The Facts

This is yet another case which stems from the ongoing disputes in relation to the construction of the Wembley stadium. It arises out of a claim which has already commenced by Brookfield Construction (UK) Ltd (formerly known as Multiplex) ("Brookfield"), the design and build contractors, against Mott MacDonald, the consultant engineers.

In 1998, Wembley National Stadium Ltd engaged the World Stadium Team ("WST"), a consortium comprised of Foster & Partners and HOK Sport) to design the new stadium. In 2002, this consultancy appointment was novated to Brookfield in such a fashion that WST would continue to perform certain retained architectural services for Wembley Nation Stadium Ltd in addition to performing other architectural services for Brookfield under a "Consultancy Agreement".

The heart of this dispute arises out of clause 8 of this Consultancy Agreement ("Services Review") which provides that:

> *"8.1 The Consultant [WST] shall provide the Client … with assistance including arranging for the Client … to have access to personnel, plans, drawings, data files, calculations, programmes, printouts, details and the like from time to time…, to enable the Client … to carry out a full and systematic review of any part of the Services, provided always that any such assistance requested by the Client … does not disrupt the performance of the Services by the Consultant [WST] …"*

Clause 8.2 goes on to confirm that WST would not be entitled to any additional fees for carrying out the obligations of clause 8.1.

During the course of the pre-action protocol process in their claim against Mott MacDonald, Brookfield made certain allegations of delay. Mott MacDonald in turn suggested that it was in fact WST who might be responsible for this delay. Brookfield then sought to rely on clause 8.1 to obtain relevant information from WST by holding a number of meetings in order to test the validity of Mott MacDonald's responses. Accordingly, Brookfield brought proceedings pursuant to CPR Part 8 seeking the two following declarations:

(i) [WST's] obligations to provide access to its personnel pursuant to clause 8.1 of the Consultancy Agreement … are continuing and/or are presently operative… ; and/or

(ii) [Brookfield's] request for access to [WST's] personnel in order to carry out a full and systematic review of the Services as set out below falls within the ambit of clause 8.1…

WST maintained that, as a matter of construction, the obligations of clause 8.1 did not survive once its Services (as listed in Appendix 3 of the Consultancy Agreement) were complete. In addition, it argued that the obligation under this clause was potentially onerous and could not therefore mean what it says.

The Issues

As Mr Jusice Coulson stated, the issues which arose included:

> *"Issue 1: Do the obligations under clause 8.1 [of the Consultancy Agreement to provide the Client with assistance to review their Consultant services] survive the completion of the Services by WST?*
>
> *Issue 2: If they do not, are WST's Services complete and/or are Brookfield estopped from alleging that they are not complete?*
>
> *Issue 3: If the obligations under clause 8.1 remain live, what is the proper nature and scope of the assistance to be provided by WST in the circumstances that now arise?*
>
> *Issue 4: Even if Brookfield are otherwise entitled to the declarations sought, should the court refuse to grant them because no order for specific performance is sought and any such order would be inappropriate in a contract for personal services?"*

The Decision

Mr Justice Coulson held in favour of Brookfield and granted the two declarations which they sought, with the limitation that Declaration (2) was modified.

On Issue 1, he held that on proper construction of the words of clause 8.1, the obligation to provide personnel did not cease on completion of the Services - the principal reason being that the clause utilised the word "review". By its very definition, in order to hold a "review", the WST Services must first be complete. Otherwise, the clause would have very little meaning or purpose unless the obligations under clause 8.1 were to continue past the completion of those Services.

With respect to Issue 2, Mr Justice Coulson went on to find that WST's Services had not yet been completed. In summary, WST continued to work in conjunction with Brookfield to address the defects during the defects liability period. In addition, the Consultancy Agreement required Brookfield to issue a certificate to the effect that the Services were complete, and as yet, this had not been issued.

Issue 3 related to the scope and nature of assistance WST is to provide to Brookfield under clause 8.1. Mr Justice Coulson granted Declaration (2) with the limitations that a reasonable approach was to be taken and that the process should not go on indefinitely, lasting no more than the six months indentified by Brookfield. He pointed out several other limitations which Brookfield would have to accept including the fact that WST had no obligation to retain any specific individuals to assist in this process, nor would the individuals be expected to have a full recall of the relevant events. Furthermore, it would be for Brookfield to provide WST with the necessary documents in advance of any meeting. He stated that Clause 8.1 was always limited by purpose, and as time goes by, it becomes more difficult to conduct a review in a meaningful way – thereby limiting any open-ended obligation.

Finally, in relation to Issue 4, the judge found that it would be wrong in principle to conclude that the declarations are valid and that there is no reason why they should not be ordered, and then refuse to grant them simply because if WST fail to comply, Brookfield's further remedies in court may be limited.

Comment

Have you priced for the services you have agreed to carry out? This case

demonstrates the implications of agreeing to onerous, bespoke obligations within consultant contracts. Here, the court reminds us that simply because the obligation may involve a considerable amount of work, if express and unambiguous words have been used, there is no reason why the clause cannot mean what it says. Consultants must therefore watch out for clauses which expand their scope of services. If agreeing to an onerous clause, as was the case here, one must not only make certain that their fee takes into account the associated risks, but also ensure that the clause limits the time under which the obligation is to be performed. In the current economic climate, one must be careful not to write a blank cheque.

Stacy Sinclair
March 2009