



LEGAL BRIEFING

DGT Steel and Cladding Ltd v Cubitt Building and Interiors Ltd

Technology and Construction Court, Judge Peter Coulson QC [2007] EWHC 1584

The Facts

In February 2006, Cubitt Building and Interiors Ltd (“Cubitt”); the applicant contractor in these proceedings, engaged the respondent subcontractor, DGT Steel and Cladding Ltd (“DGT”) to carry out external cladding works at Telephone House in East London. The subcontract was on Cubitt’s standard terms and conditions and contained an adjudication provision which stated:

Any dispute, question or difference arising under or in connection with the subcontract shall, in the first instance, be submitted to adjudication in accordance with the Association of Independent Construction Adjudicators (AICA) Adjudication Rules and thereafter to the exclusive jurisdiction of the English Courts.

In February 2007, DGT referred a dispute to adjudication claiming payment of £193,815 plus VAT. The claim was based on the alleged failure by Cubitt to serve payment notices and notices to withhold on certain applications. Cubitt defended the adjudication on the basis that it had in fact complied with the notice provisions of the subcontract. By a decision dated 12 March 2007, the adjudicator found in Cubitt’s favour.

Then, in April 2007, DGT commenced proceedings in the Technology and Construction Court (“TCC”) seeking £242,547 plus VAT and interest in respect of the validity of DGT’s valuation of the subcontract works and the deductions made by Cubitt. There was a dispute between the parties as to the degree of overlap between the unsuccessful claim in the adjudication and the claim brought by DGT in the TCC proceedings.

Cubitt applied to the TCC for an order that there be a stay of DGT’s court proceedings, arguing that the TCC claim was markedly different to the claim in the adjudication and that, as a result of the binding adjudication agreement, the litigation should be stayed until the new claim had been the subject of adjudication. DGT argued that the adjudication provision was not mandatory but, even if it were, there was no breach of that agreement as the dispute was the same as the dispute that had been adjudicated and that therefore there should be no stay. In the alternative, DGT argued that the court should exercise its discretion against granting a stay.

The Issues

Three main issues arose at trial. These were: whether there was a mandatory agreement to adjudicate; if so, whether the court proceedings were brought in breach of that agreement to adjudicate; and whether there existed any grounds to justify why the agreement to adjudicate should not be enforced by way of a temporary stay of the court proceedings.

The Decision

Citing a number of cases in support, Judge Peter Coulson QC held that the court had an inherent jurisdiction to stay court proceedings in breach of an

agreement to adjudicate. He found that although the jurisdiction is discretionary, there is a presumption in the parties' agreement to adjudicate, which placed the burden of proof on the party resisting the stay to show good reasons for its stance.

There existed a mandatory provision to adjudicate in the first instance. Even if the clause was not a mandatory adjudication provision, the right to refer a dispute to adjudication would nevertheless be conferred on both parties by virtue of the Housing Grants, Construction and Regeneration Act 1996. Because the dispute in the TCC proceedings was not one which had been referred to adjudication, the proceedings constituted a breach of the adjudication agreement.

DGT failed to establish grounds for not imposing a stay of proceedings. The stay was accordingly granted.

Comment

This is the first reported case that considered the situation where a temporary stay might be granted to restrain court proceedings until an adjudication of the underlying dispute had taken place. It is worth noting that where a party resisting a stay of proceedings argues that an adjudication provision is not mandatory, that argument is not likely to succeed in light of the adjudication provisions contained in the Housing Grants, Construction and Regeneration Act 1996. However, it is more likely that a stay will be granted if there is a mandatory adjudication provision in place.

This case also highlights that the court will take into account parties' compliance with the Pre-Action Protocol for Engineering Disputes when exercising its discretion as to whether to grant a stay of proceedings. In this instance, DGT had failed to comply with the Protocol before bringing the claim. Ordering a stay to adjudication would have the same effect and fulfil the same purpose as complying with the Protocol.

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