

Construction Law Update

Resolving costly domestic building disputes: a proposal by the TCC

In the recent case of *The Sky's The Limit Transformations Ltd v Dr Mohamed Mirza* [2022], the TCC considered a disproportionately costly domestic building dispute involving issues of contract formation, termination and sums due under a final account. The Court also suggested a streamlined procedure for similar disputes moving forward.

Background

The Claimant building contractor, The Sky's The Limit Transformations Ltd, entered into a Federation of Master Builders ("FMB") standard form contract (the "Contract") with the Defendant homeowner, Dr Mirza, to carry out alterations to a residential property in Bolton (the "Works").

In April 2017, the parties' relationship broke down before the Works had been completed and the Claimant purported to terminate the Contract. In December 2019, the Claimant issued proceedings against the Defendant claiming payment for outstanding invoices and damages for loss of profit on the remaining works. The Defendant argued that no further sum was due given the true value and cost of the Works and the costs of remedying alleged defects.

The Court's Decision

The Court found that the Claimant had been entitled to terminate the Contract and that no further sum was payable to the Claimant under the final account. In the absence of a counterclaim, the Court also found that nothing was due to the Defendant. In coming to this conclusion, the Court addressed the following issues.

Was the Contract based on a fixed price quotation or a 'reasonable price' based on an estimate?

Following detailed assessment of the parties' exchanges and documents, the Court decided the parties had agreed to a fixed price contract.

When assessing the Claimant's cost breakdowns which were referred to as "estimates", the Court drew on

Optimus Build Limited v Southall [2020] which established that the term "estimate" was capable of different meanings depending on the circumstances (it could either be an indication of the likely cost, an offer to carry out works on the basis of reasonable cost subject to later valuation or equivalent to a fixed price quotation). As the parties had not used the word "estimate" consistently when discussing payment, the Court decided that the use of the term was irrelevant.

In support of its conclusion, the Court highlighted:

- (i) the Claimant's revised breakdown of costs issued after the specification for the Works was known in greater detail and which resolved ambiguities as to the scope of works before the Works commenced;
- (ii) the FMB form which is intended for use on a fixed price basis and had detailed provisions governing changes to the scope of Works; and
- (iii) had the position been ambiguous, section 69(1) of the Consumer Rights Act 2015 (the "Act") provided if "a term in a consumer contract...could have different meanings, the meaning that is most favourable to the consumer is to prevail". As such, application of the Act would have resulted in the same outcome i.e. that the Contract was based on a fixed price.

What terms had been incorporated into the Contract for interim valuations and payment?

After reviewing the parties' exchanges and the FMB terms, the Court found that the parties had agreed that the Claimant would be paid at monthly intervals, subject to payment provisions akin to the requirements of the Scheme for Construction Contracts as introduced by the Housing Grants, Construction and Regeneration Act 1996.

The Court was notably pragmatic in approaching this issue and referred to the intended purpose of the FMB terms, the intention of the words used in the parties'

Construction Law Update

correspondence and the workability of the same to determine the final dates for payment.

Had the Contract been lawfully terminated?

The Court had to decide whether the Claimant was entitled to suspend the Works and terminate the Contract by virtue of the Defendant's failure to pay pursuant to the Claimant's fourth interim payment application.

The Court found in favour of the Claimant on the basis that the Defendant had failed to issue a valid and timely payment or pay less notice and was, therefore, obliged to pay what was claimed (notwithstanding that the Claimant's interim application was overstated).

The Court dismissed the Defendant's argument that the terms of the Contract were unfair based on section 62(4) of the Act, which provides that a *"term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations...to the detriment of the consumer."* In this case, the Court could not find any lack of good faith on the part of the Claimant, that the relative bargaining position of the parties was equal and the FMB terms were fair and balanced.

What was the value of the final account and what sum, if any, was due?

After considering the price for the Works and the costs associated with variations and remedying defects, the Court concluded that the final account valuation was roughly £120,000. This meant that nothing was due to the Claimant. The Defendant had, in fact, overpaid the Claimant but, in the absence of a counterclaim, no sum was due to it either.

Guideline directions

The parties had been directed to engage in mediation before trial and to consider further settlement discussions after submissions had closed. Ultimately, however, there was a five-day trial involving factual and expert evidence from engineers, quantity surveyors and building surveyors and a Scott Schedule of over 160 items relating to variations, defects and

unfinished works. The Court lamented the *"time, effort, stress and cost of the whole process."*

Noting the danger that these types of cases might end in *"financial disaster"* or *"an expensive and ultimately unrewarding result"* for litigating parties, the Court proposed guideline directions aimed at reducing the time and cost associated with resolving similar domestic construction disputes. These included: (1) disclosure limited to documents relied upon and known adverse documents; (2) a single joint expert to be instructed in all cases to address issues of liability and valuation; and (3) a stay for mediation on receipt of the report and questions. If the parties were unwilling to mediate an order for compulsory early neutral evaluation should be considered and, if no settlement were reached, there would be further directions for limited witness statements and an abbreviated trial (not exceeding one day).

Whilst the Court noted that an order for directions such as this would not be appropriate in every case, the intent was to ensure that key issues were ventilated in a reasonably speedy and inexpensive way.

Analysis

This case reminds parties involved in disputes to properly consider and exhaust alternative means of dispute resolution before taking their claim to court, at potentially disproportionate cost. Whether the Court's ambitious proposals as to streamlined directions in similar cases finds favour remains to be seen.

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