Taylor Woodrow Holdings Ltd v Barnes & Elliott Ltd [2004] ABC.L.R. 12/20

JUDGMENT : HIS HONOUR JUDGE DAVID WILCOX : TCC. 20th December 2004.

1. I am going to direct that a transcript be prepared of my judgment and it is to be made available to you. Applications in relation to costs and any other applications consequential I will date from when you and counsel have had chance to consider it.

2. This is an appeal under section 69(1) of the Arbitration Act 1996 from an interim award of Eric Mouzer, an arbitrator, made on 18 August 2004. The appeal is brought without leave by reason that the terms of the contract between the parties provide that appeals from the arbitrator may be made directly to the court without leave.

3. By an agreement of 4 August 2000, executed as a deed, Taylor Woodrow Holdings and George Wimpey (Southern) Limited ("the consortium") employed Barnes & Elliott ("Barnes") to carry out and complete the design, refurbishment and conversion works at Longrove Park, a former psychiatric hospital, near Epsom in the county of Surrey. The object was to create 64 duplexes out of the north and south blocks comprising the main buildings, and to provide new ancillary amenities such as parking spaces for both visitors and residents, bin stores, footpaths, garages and safe vehicular and pedestrian access.

4. The works were commenced on or about 4 August 2000. Delays occurred and the works were not completed until June 2002. They should have been completed on or about 3 December 2001.

5. The consortium has claimed that it is entitled to liquidated damages in the sum of £843,500. The arbitrator's interim award contained his decision on two preliminary issues arising under the contract. This was a JCT Standard Form of Building Contract with Contractors Design (1998 edition), subject to amendments made by the parties. The agreed preliminary issues that were raised for determination by the arbitrator were:

   (1) Is the liquidated damages provision valid or is it void for uncertainty or inoperable?

   (2) Is the liquidated damages provision a genuine pre-estimate of the loss and enforceable or a penalty and unenforceable?

   The arbitrator determined that the liquidated damage provision was not valid and that it was void for uncertainty and was inoperable. He concluded that the liquidated damages provision was not a genuine pre-estimate of loss, but a penalty and therefore unenforceable.

6. The contract provided for sectional completion. The works were divided into six sections. The contractual provisions, which are relevant to the preliminary issues determined are:

   "The Conditions of Contract

   2.1 The contractor shall, apollo(?) subject to the conditions, carry out and complete by sections the works referred to in the Employers' Requirements, the contractor's proposals (to which the contract sum analysis is annexed) the articles of agreement, these conditions and the appendices in accordance with the aforementioned documents."

   In the amended conditions there purports to be a definition of "section". It reads:

   "Section

   One of the sections into which the works have been divided for phase completion as identified in the Employers' Requirements and/or contractor's proposals."

7. Clause 210 of the Employers' Requirements is entitled "Completion in Sections or Parts". It is divided into three bullet points:

   "* *where the employer is to take possession of any section or part of the works, and such section or part will after its completion depend for its adequate functioning on work located elsewhere on the site, complete such other work in time to permit such possession to take place;*

   * *during the execution of the remainder of the works, ensure that the completed sections or parts of the works have continuous and adequate provision of services, fire precautions, means of escape and safe access;*

   * *a section of the works will not be accepted for practical completion unless the <u>appropriate number</u> [my emphasis] of parking spaces, garages, bin stores, footpaths and safe pedestrian and vehicular access for potential purchasers and owners have also been completed."*

   Paragraph 210 of the Employers' Requirements must be read with clause 17 of the conditions which I deal with later. Paragraph 210 is entitled "*Completion in Section or Parts"*. Under the first two bullet points it provides for the employer taking possession of a section or part of the works. The adequate functioning of either must be provided for, whether involving work elsewhere on the site or in the common areas, or as part of the works of which possession is given, and the continued provision of those services which include fire precautions, means of escape, and safe access. The wording clearly relates to possession of living units, which must be viable from a services and access point of view.

8. Under the last bullet point is a description of the requirements before sectional practical completion can be achieved. These are much wider and refer to the completion of an appropriate number of parking spaces, garages, bin stores, footpaths and the pedestrian and vehicular access for both potential purchasers and owners. These are all matters that it is contemplated should be ascertained or ascertainable for marketing and conveyancing purposes. For instance, for access what licences or rights of way are necessary? In relation to such matters as bin stores, car parking, the identification of the number and location of those to be appropriated to each living unit. Those matters are important. There is no requirement that each living unit must enjoy the use of a garage (as opposed to a parking space) or two garages (as opposed to one). Clearly intending purchasers or

lessees may have different requirements as to these ancillary amenities, which may fall to be considered as late as at the marketing stage. The planning requirement for the whole site envisages sufficient parking for both visitors and residents.

9. The contractor's proposals do not, in my judgment, afford any assistance as to which of the ancillary amenities are appropriated to any particular living unit or section. The proposals include a programme which shows the proposed sequence, timing and duration of construction works. There are six sections referred to in the bar chart programme. The works shown in these sections relate to the creation of the living units in the north and south blocks of the old hospital building. The external works, which include the provision of access roads, common services, parking spaces, garaging and hard and soft landscaping are not identified as being part of any of the six nominated sectional works. In effect they comprise a seventh or additional section. They contain many of the works which are the subject of the prescribed requirements to achieve partial possession of works and practical completion of a section under the Employers' Requirements. Nowhere in the contract is there a provision which divides the whole of the works into six discrete sections. Mr Bowdery argues that this is not an oversight because the contract was a design and build contract and gave Barnes considerable discretion as to matters such as the lay-out of the living units and, by analogy, a similar discretion as to which of the ancillary amenities would be appropriated to each living unit. On the face of it, that would confer upon the contractor a considerable degree of control as to when practical completion of a section was complete, irrespective as to whether or not it accorded with the reasonable commercial requirements of the consortium developers to be able to market and to progressively sell the living units together with suitable facilities, which include garages, parking spaces and bin storage facilities.

10. Mr Bowdery further submitted that practical completion of a section is clearly intended to be ascertained by reference to the completion of living units because the programme in the contractor's proposals refers to six sections of living accommodation. Further, he argues that by virtue of Appendix 1, liquidated damages are calculated by reference to the number of living units comprising a section. Thus, if a section included twelve living units, the liquidated damages would be 500 x 12 per week, namely £6,000.

11. Miss O'Farrell for the defendants submitted that the arbitrator's construction of the agreement was correct. At paragraph 51 et seq of his award the arbitrator said:

> *"I find as a fact that the work required to be undertaken as part of any section was not defined within the contract. Further, I find as a fact that at the time of entering into the contract, indeed during the construction process, it was not possible by reference to the criteria set out in the Employers' Requirements or other contract documents to determine with any certainty that what work was required to be undertaken was part of any given section.*
>
> *52. In view of that conclusion it is necessary to consider its impact on the operation of the liquidated damages provisions under clause 24. The trigger for the operational clause 24 is the contractor's failure to complete the construction of a section by the completion date for such section.*
>
> *53. It is common ground that the completion date is included in the contract in respect of each of six sections. However, the claimant contends that in order to have any meaning you need to know what is in each section. It is equally common ground that each section is not solely limited to the units which they comprise in that a requirement for clause 210 that work located elsewhere on the site necessary for the adequate function of the unit is also required to be completed.*
>
> *54. As to what comprises a section, I have found that there is no definition in the contract and the extent of the required work cannot be determined with any certainty. On the face of it, therefore, it is not possible to define what comprises the section, and it is not possible to determine whether that section was or was not complete by the particular date or, more particularly in respect of liquidated damages, the completion date for the section. If that is right, there is not effective trigger for clause 24 to operate."*

12. Mr Bowdery's submission that Barnes were empowered under the contract to determine, as they wished, during the currency of the contract what comprised a section and whether it was complete, I reject. It does not accord with commercial good sense that what constitutes a complete unit for sale or letting is a matter for the contractor, as opposed to the developer who markets and sells during the rolling contract process. In my judgment the arbitrator's construction of the contract and provisions as to what comprised the work in each section is correct. There is no sensible mechanism contained in the contract enabling the works to be identified for the purposes of sectional practical completion under clause 24.

13. In relation to part possession, the Employers' Requirements paragraph 210 (which I referred to earlier) and clause 17 govern this. Clause 17 which deals with partial possession by the employer. 17.1 is in these terms: *"If at any time or times before practical completion of a section the employer wishes to take possession of any part or parts of such section and the consent of the contractor (which consent shall not be unreasonably delayed or withheld) has been obtained, then, notwithstanding anything expressed or implied elsewhere in this contract, the employer may take possession thereof. The contractor shall thereupon issue to the employer a written statement identifying the part or parts of the section taken into possession and giving the date when the employer took possession. Clauses 17, 20.3 and 22C.1 referred to as the relevant part and the relevant date respectively."*

(These clauses refer to insurance matters, liability for injury or damage to part of the property, and to the exclusion of certain parts of the works and site materials in connection thereof.)

14. 17.1.14 provides: *"In lieu of any sum to be paid by the contractor or withheld or deducted by the employer under clause 24 in respect of any period during which such section may remain incomplete occurring after the relevant date, there should be paid such sums as bear the same ratio to the sum which would have been paid apart from provisions of clause 17 as they might include in the contract sum such section, less the amount contained therein in respect of the relevant part bear such amount, or the employer may give a notice pursuant to clause 30.3.4 that he will deduct such sum from monies due to the contractor."*

In short, it provides for a proportional reduction of liquidated damages according to the ratio formula.

15. At paragraph 77 of his award, the arbitrator found that the value of the part taken into possession was calculable. An employer wishing to enter into possession of any part of the works would have satisfied himself under the Employers' Requirements paragraph 210 that it was functional, and a competent quantity surveyor would be able to ascertain its value, particularly since under clause 17.1 the contractor would have identified in writing the parts taken into possession.

16. The difficulty which arises was identified by the arbitrator when considering the effect of 17.1.4. He concluded, in my judgment correctly:

"To operate the provisions of clause 17.1.4, three values are required:

(a) the rate of liquidated damages for the relevant section;

This was calculable by reference to the number of living units.

"(b) the value of work included in the contract sum in respect of that section;"

In my judgment, that was something that was not known or within the contract by way of any mechanism ascertainable.

"(c) the value of the part taken into partial possession."

As I have held already, the arbitrator, in my judgment, properly held this is calculable and could be valued.

17. Mr Bowdery submitted that, applying the correct approach to the construction of the contract, the arbitrator ought to have decided that clause 17.1.4 of the JCT conditions were immaterial to the issue he had to decide, first, because the rate of liquidated damages was tied to each unit; and secondly, in the event that possession of a unit was taken before practical completion of the applicable section, liquidated damages would be payable from the date for completion of the sections to the date of possession of the unit.

18. As to the first matter, it is correct that the rate of the LADs was referable to the number of living units in the section. But as to the second, whilst liquidated damages would be payable from the date of the completion of the section to the date of possession of the unit, its amount was intended to be adjusted to give proportionate relief based upon the value of the partial works taken into possession, that relief to be calculated by reference to the ratio set out in 17.1.4.

19. Thirdly, Mr Bowdery submitted that the parties did not provide for any liquidated damages to apply to other work within the section, save for other units. Fourthly, he submitted that there was no need, therefore, to undertake the calculation in clause 17.1.4 because there were no damages payable for non-completion of other work in the section. The thrust of this part of the submission is that 17.1.4 was redundant and that no proportionate relief thereby is appropriate.

20. I reject that submission. In my judgment, the arbitrator's analysis was correct. He concluded that 17.1.4, which governs the computation of the relief from LADs on account of partial possession, was operable only if a valuation could be placed on the sectional works. He concluded, in my judgment rightly, that the contract failed to provide any means of ascertaining what was contained in any section and there was no certainty as to what works comprised each contract sections. It was not possible to value any sectional works and therefore the proportional relief against LADs contemplated were incapable of being calculated.

21. For the sake of completeness I set out clause 24, which governs liquidated damages:

> *"24.1 If the contractor fails to complete the construction of a section by the completion date for such section, the employer shall issue a notice in writing to the contractor to that effect. In the event of a new completion date for a section being fixed after the issue of such notice in writing, such fixing shall cancel that notice and the employer shall issue such further notice in writing under clause 24.1 as may be necessary."*

Clause 24.2.1 deals with the issuing of a notice under clause 24.1. Clause 24.2.1.1 requires in writing the contractor to pay to the employer liquidated and ascertained damages. Clause 24.2.1.2 requires a notice to be given pursuant to clause 30.3.4 or clause 30.6.2.

22. It follows inexorably that if for the purposes of clause 24 the contents of any section were not ascertained in the contract, or any mechanism agreed between the parties whereby they could be ascertained, there is no basis for triggering the operation of clause 24 since it would be uncertain what had remained undone and when. The arbitrator so found. In my judgment his construction of the contract was correct. Clause 24 was void for uncertainty; it was incapable of operation. Clause 17.1.4 was inoperable. By virtue of that, where partial possession was given, the proportionate relief from any LADs on the section was incapable of calculation. Any LADs, referable as they were to living units, however comprised, would not bear a proper relationship to the extent of the section not taken into possession.

23. This contract was a JCT contract, which had been the subject of amendment. It endeavoured to provide for sectional completion. A sectional completion supplement is published by the joint contract tribunal for this purpose. The dangers inherent in not using this are exemplified in this case. It is for the court applying business commonsense and meaning to the construction of commercial documents to endeavour to avoid frustrating the reasonable expectations of the businessman. But it is not for the court, however, to re-write the contract. The provisions of the contract considered by the arbitrator, in my judgment, cannot be characterised as ambiguous. They were in fact uncertain and inoperable. There is no question, in my judgment, of the contra proferentum rule applying in this case. That applies only where there is a clearly identified ambiguity.

24. In view of my findings as to the first conclusion of the arbitrator, it is not necessary in my judgment to consider the second matter because the first matter disposes of this appeal. I dismiss this appeal. I say in passing that the approach of the arbitrator to the second limb is an approach that I could not fault, save that, interestingly, he received the evidence of forensic accountants. That evidence was not formally put before me by counsel. I say no more about it.

25. I direct that a copy of my judgment be made available to the parties.

MR MARTIN BOWDERY QC and MISS RITCHIE (20.12.04) appeared on behalf of THE APPELLANTS/CLAIMANTS
MS FINOLA O'FARRELL QC and MR TOLSON (20.12.04) appeared on behalf of THE RESPONDENT/DEFENDANT