Neutral Citation Number: [2009] EWHC 1359 (TCC)

Case No: HT08314

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Tuesday, 9th June 2009

Before:

MR JUSTICE COULSON

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Between:

BOVIS HOMES LIMITED	**Claimant**
- and -	
KENDRICK CONSTRUCTION LIMITED	**Defendant**

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- -

Mr Alex Hall Taylor(instructed by **Messrs Reynolds Porter Chamberlain**) for the **Claimant**.

Mr Morgan Rees (Solicitor-Advocate, **Messrs Bell Lax Solicitors**) for the **Defendant**.

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Judgment

Mr Justice Coulson :

INTRODUCTION

1. By an application dated 26th March 2009, the defendant, Kendrick Construction Limited ("Kendrick"), seeks a stay of these proceedings pursuant to section 9 of the Arbitration Act 1996, in order that the dispute between the parties can be resolved by way of arbitration. The claimant, Bovis Homes Limited ("Bovis"), does not object to the imposition of a stay, but seeks the costs thrown away by Kendrick's failure to raise the arbitration point until very recently. Since Bovis say that such costs include some or all of the costs that they incurred in the lengthy Pre-Action Protocol process, their figures are not insubstantial, and the matter gives rise to a potentially important issue in connection with the Pre-Action Protocol for Construction and Engineering Disputes ("the Pre-Action Protocol").

HISTORY

2. Pursuant to a written contract, dated 26th November 1996, Bovis engaged Kendrick to carry out and complete the design and construction of 48 sheltered housing apartments and three retail units at Pinner Court, Harborne in Birmingham. The contract sum was £2,891,462. The contract incorporated the JCT Standard Form of Building Contract with Contractor's Design (1981 Edition). There is no dispute that Article 5 of that Standard Form contained a valid and binding arbitration agreement.

3. It appears that the works were completed in about October 1997. Almost nine years later, in a letter dated 19th June 2006, Bovis put Kendrick on notice of alleged defects in the works, in particular concerning the balcony walkways. A certain amount of desultory correspondence ensued, which culminated in a letter from Kendrick, dated 23rd July 2007, in which they formally rejected any liability for the problems.

4. On 11th October 2007, Bovis sent Kendrick what was referred to as "a pre-action letter of claim". This letter set out the details of Bovis' claim, the specific breaches of contract relied on, the heads of loss, and the agreement sought from Kendrick to the effect that they would rectify the defects identified.

5. There can be no doubt that this letter was intended to be a letter of claim under the Pre-Action Protocol. Furthermore, there is also no doubt that this is how it was treated by Kendrick's solicitors. For example, in their first response, dated 19th November 2007, they said that:

> "To fully comply with the Pre-Action Protocol for Construction and Engineering Disputes, we believe it is sensible to suggest that our client company now has a further 28 days from the date of this letter for us to put together the full response necessary."

There were numerous subsequent references to the Pre-Action Protocol by the solicitors on both sides.

6. As seems regularly to happen, the parties failed to conduct the Pre-Action Protocol process in accordance with its prescribed timetable. Although Kendrick's solicitors provided a nine page letter of response on 18th December 2007, which dealt in

considerable detail with the claim made, thereafter very little happened until Bovis changed solicitors in November 2008. I note that no pre-action meeting (which is specifically required by the Pre-Action Protocol) was ever arranged.

7. In Kendrick's letter of response, a reference was made to limitation. This is perhaps unsurprising given the effluxion of time since the building works were completed. As a result, Bovis' new solicitors advised that proceedings should be issued in the TCC so as to protect the limitation position. Those proceedings were commenced on 4th November 2008. Kendrick's solicitors were informed of this on 3rd February 2009, and were asked if they were instructed to accept service of the proceedings. Although there was an attempt by the solicitors to arrange a belated without prejudice meeting, this seemed to be impossible before the last date for service of the Claim Form and the Particulars of Claim, which was 4th March 2009. Kendrick's solicitors indicated that they were instructed to accept service of those proceedings and, on 2nd March, Bovis' solicitors served on them the Claim Form, the Particulars of Claim and the Response pack. These documents included a full set of the contract documents.

8. On 17th March 2009, Kendrick's solicitors filed an Acknowledgment of Service. On the same day, they wrote to Bovis, referring to the contract documents which they had received on 2nd March. They said, for the first time, that because of the existence of the arbitration agreement in the Standard Form Contract, they wanted the dispute to be dealt with in arbitration. They sought Bovis' consent to a stay. When that was not forthcoming, on 25th March, they issued this application for a stay in accordance with section 9 of the 1996 Act. As I have indicated, Bovis do not now object to the grant of the stay, but seek the costs thrown away by the late raising of the arbitration point.

THE PRE-ACTION PROTOCOL

9. Paragraph 2 of the Pre-Action Protocol sets out its general aim, which is in these terms:

> "The general aim of this Protocol is to ensure that before court proceedings commence:
>
> (i) the claimant and the defendant have provided sufficient information for each party to know the nature of the other's case;
>
> (ii) each party has had an opportunity to consider the other's case, and to accept or reject all or any part of the case made against him at the earliest possible stage;
>
> (iii) there is more pre-action contact between the parties;
>
> (iv) better and earlier exchange of information occurs;
>
> (v) there is better pre-action investigation by the parties;

(vi) the parties have met formally on at least one occasion with a view to

- defining and agreeing the issues between them; and
- exploring possible ways by which the claim may be resolved;

(vii) the parties are in a position where they may be able to settle cases early and fairly without recourse to litigation; and

(viii) proceedings will be conducted efficiently if litigation does become necessary."

10. Paragraph 3 deals with the detail required for the letter of claim. Paragraph 4 sets out the detail required for the defendant's response. Paragraph 4.2 is headed "Objections to the Court's Jurisdiction or the Named Defendant". Paragraph 4.2.1 provides as follows:

> "4.2.1 If the defendant intends to take any objection to all or any part of the claimant's claim on the grounds that (i) the court lacks jurisdiction, (ii) the matter should be referred to arbitration, or (iii) the defendant named in the letter of claim is the wrong defendant, that objection should be raised by the defendant within 28 days after receipt of the letter of claim. The letter of objection shall specify the parts of the claim to which the objection relates, setting out the grounds relied on, and, where appropriate, shall identify the correct defendant (if known). Any failure to take such objection shall not prejudice the defendant's rights to do so in any subsequent proceedings, but the court may take such failure into account when considering the question of costs."

ANALYSIS

11. The issue that arises is therefore whether or not Kendrick's failure to raise their preference for arbitration is a matter which ought now to sound against them in costs, as suggested by paragraph 4.2.1 of the Protocol itself. This requires a consideration of some of the correspondence referred to above, and in particular Kendrick's letter of response of 18th December 2007. That was a very detailed document which took a variety of points, some of them matters of law and some of them matters of fact. The letter did *not* say that Kendrick did not have a copy of the Standard Form of Contract, and contained no request for a copy from Bovis. Instead, the letter set out a number of specific points of detail, and requests for information, which all appear to operate on the basis that Kendrick did have at least some parts of the contract documentation. For example, there was a request by reference to the detailed contents of the Employer's Requirements, an important contract document. The overall impression created by this letter was that Kendrick did have all or at least some of the contract documents, and nothing was said to give rise to a contrary conclusion. In addition,

the letter of response did not suggest that the Pre-Action Protocol process was misconceived because the claim should be referred to arbitration.

12. Mr Rees argues that no mention of arbitration was made in the letter of response because, whatever its contents might indicate, Kendrick did not have a copy of the Standard Form Contract itself, in the form that had actually been executed. He says that this omission became apparent in the correspondence subsequently. Accordingly, he submits that there was no onus on Kendrick to raise their preference for arbitration, or even the possibility of arbitration, until they had seen the executed version of the Standard Form of Contract.

13. Attractively though that point was put, I have concluded that I cannot accept it. There are a number of reasons for that:

(a) There was no obligation on Bovis to provide a copy of the entirety of the executed contract with their letter of claim. They were entitled to assume that Kendrick had their own copy. Of course, they were obliged to provide any part of that contract if and when they were expressly asked for it, but nowhere in the correspondence was any such request made by Kendrick.

(b) Kendrick knew that the Standard Form of Contract was likely to contain an arbitration agreement. Kendrick are experienced contractors and would be well aware of the fact that all JCT Standard Forms contain such provisions. In addition, they had no reason to believe that any arbitration agreement in this case had been deleted or amended in any way which might affect their ability to seek the resolution of this dispute by way of arbitration. Thus, the mere fact that they did not have a copy of the executed version would not have prevented them expressing a preference for arbitration in the letter of response, as required by the Pre-Action Protocol.

(c) I accept Mr Taylor's submission that Miss Bell's statement suggests that the question of arbitration was considered by Kendrick at the time, that is to say late 2007/early 2008, and that a decision was taken not to raise it, perhaps because of the absence of the executed Standard Form. She refers in paragraphs 10 and 11 to her receipt of the executed contract the following year, and she says:

> "When I received it, this enabled me for the first time to see categorically that it contained an arbitration clause, formally advise the Defendants for the first time of that fact and particularly discuss with them as to whether they wished to have matters arbitrated or not. The Defendant's manager, Mr Philip Sheldon, told me this was their preferred way of resolving disputes …"

Accordingly, it seems that the question of arbitration was in Kendrick's mind during the critical part of the Pre-Action Protocol process, but, for reasons which are not wholly clear, they did not raise it. This seems to have been a deliberate decision on their part.

14. The issue, therefore, is this: in a Pre-Action Protocol process, should a defendant who does not request a copy of the contract documents, who knows that the contract incorporated a Standard Form which contained an arbitration agreement, who has no

reason to believe that that agreement has been amended or deleted, and who has expressly considered the possibility of arbitration, nevertheless say nothing at all about that possibility and wait to see if the claim was continued by the claimant before raising it for the first time? In my judgment, a defendant should not be encouraged to act in this way, because such conduct is not in accordance with either the spirit of co-operation required by, or the detailed provisions of, the Pre-Action Protocol. It is important for parties to exchange fully their views, not only on the underlying dispute, but, if relevant, how that dispute should be tried. That explains why paragraph 4.2.1 of the Pre-Action Protocol requires a statement at an early stage of any jurisdictional or arbitration points.

15. Accordingly, it seems to me that, in accordance with the spirit and letter of the Pre-Action Protocol, Kendrick's apparent preference for arbitration, and their knowledge of the probable arbitration clause in the JCT Standard Form, meant that they should have raised the prospect of arbitration in December 2007 in their letter of response. In addition, the letter should have sought any relevant contract documents which Kendrick did not have. Wrongly, the letter did neither of these things.

16. Of course, as paragraph 4.2.1 of the Pre-Action Protocol makes plain, none of this stops Kendrick from raising the point now, but it seems to me that, in accordance with paragraph 4.2.1, this is a case where I should order that they are liable for those costs incurred by Bovis since 18th December 2007, which would not otherwise have been incurred if the stay for arbitration had been referred to in the response letter.

COSTS THROWN AWAY

17. By reference to documentation provided very shortly before this hearing, Bovis were anxious for me to ascertain the precise sums by way of costs which they say have been thrown away. As I indicated to the parties in correspondence yesterday afternoon, and as I reiterated at the outset of this morning's hearing, that is simply not possible. There are two reasons for that.

18. First, whilst a judge can assess the costs of a hearing or a trial, he or she is not normally in a position to decide which element of costs have been thrown away by an act or a course of conduct, and which costs may be recoverable in any event. It seems to me that that is a matter for the costs judge: indeed, as I indicated to the parties, I very much doubt that I even have the jurisdiction to undertake such an assessment.

19. The second reason why I would in any event decline to ascertain the costs thrown away is because, at this stage, I simply do not believe that such costs can be properly assessed. Bovis' claim appears to be based on the assumption that all of the costs incurred in the Pre-Action Protocol process, and certainly those after 18th December 2007, were effectively thrown away and, therefore, caught by any order that I might make. I do not accept that. I have indicated that the purpose of the Pre-Action Protocol is to promote mutual understanding of the nature of the other side's case. Thus, costs incurred in such an exercise ought to be of benefit to the parties in the arbitration and, of course, if they are, they cannot be said to be costs thrown away.

20. For that reason, it is appropriate for any assessment exercise to await the outcome of the arbitration. Only then can a clear view be formed as to what costs were thrown

away in the abortive Pre-Action Protocol process, and what steps proved to be of value, such that the costs thereof would probably have been incurred in any event.

THE COSTS OF THIS APPLICATION

21. It seems to me plain that Kendrick are entitled to the costs of this application for a stay up to the time that Bovis indicated that they accepted the stay and raised the issue of the costs thrown away. There is a letter from Bovis' solicitors making that concession on 14th April 2009. Accordingly, Kendrick are entitled to the costs of this application up to 14th April 2009.

22. The real issue, therefore, turns on the costs after that date, including the costs of today. I have indicated that Bovis are entitled to an order in principle as to the costs thrown away, with those costs to be assessed if not agreed. Therefore at least some elements of the costs since 14th April should be borne by Kendrick.

23. However, I consider that such costs can only include a proportion of the costs incurred. That is because it is clear to me that significant costs have been incurred in relation to the assessment element of the application for the costs thrown away which, as I have indicated, I cannot undertake. It seems to me that these difficulties ought to have been appreciated by Bovis at the outset and that, therefore, those costs should not have been incurred.

24. Allied to that point is the question of the possible adjournment of this hearing, which was raised yesterday afternoon by Kendrick and which we dealt with at the outset of the hearing this morning. The application by Kendrick to adjourn the hearing arose because they said that they had had insufficient time to consider the new documents provided by Bovis. Those documents related entirely to the assessment of the costs thrown away, which, as I indicated in correspondence yesterday afternoon, was not a matter that I could deal with in any event. Thus, the costs incurred in relation to the adjournment application are also related to the inappropriate claim for an assessment of the costs thrown away and ought not, therefore, to be recoverable by Bovis.

25. Accordingly, it seems to me that I ought to make a significant percentage deduction from the costs incurred to reflect this point, before I consider any summary assessment of the costs themselves since 14th April. In all the circumstances, I consider that Bovis are entitled to 50% of the costs that they have incurred since 14th April. That, therefore, will be the starting point of the summary assessment.