



Neutral Citation No. [2002] HWHC 1315 (TCC) IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT
Case No: HT-02-211

St Dunstan's House 133 – 137 Fetter Lane
London EC4A 3HD
Date: 3 July 2002

Before:

HIS HONOUR JUDGE RICHARD SEYMOURS QC

J T MACKLEY & COMPANY LIMITED Claimant –and–
GOSPORT MARINA LIMITED Defendant

Peter Coulson QC (instructed by Hammond Suddards Edge for the Claimant) Geoffrey Hawker (instructed by Blake Laphorn for the Defendant)

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

H.H. Judge Richard Seymour Q.C.

Introduction

1. In this action, commenced on behalf of the Claimant, J.T. Mackley & Co. Ltd. ("Mackley ") under the provisions of Part 5 of the Civil Procedure Rules on 30 May 2002, Mackley seeks a declaration that a document entitled "In the matter of an arbitration between Gosport Marina Limited Issuing Party and JT Mackley & Co. Ltd First Respondent and Posford Haskoning Ltd. Second Respondent Joint Notice to Dispute and Notice to Refer", to which I shall refer in this judgment as "the Notice to Refer" is invalid. Mackley also seeks an order that any arbitration based on the Notice to Refer be stayed.

2. The Defendant in this action is Gosport Marina Ltd. ("Gosport"). The Notice to Refer was given to Mackley on behalf of Gosport by its solicitors Messrs. Blake Laphorn on 23 April 2002

3. An application has been issued on behalf of Gosport under Part 11 of the Civil Procedure Rules seeking orders that the claim of Mackley in this action be set aside, service of the Claim Form be set aside and the proceedings be stayed. The grounds upon which that application was stated to have been made were that, so it was contended, the effect of Arbitration Act 1996 s 1(c) and s. 32 was that the Court had no jurisdiction to determine the question whether the Notice to Refer was invalid without the agreement in writing of the other parties to the arbitration proceedings which it was contended had been commenced by the giving of the Notice to Refer or without the consent of the arbitrator appointed to decide the issues raised by the Notice to Refer

4. Following the giving of the Notice to Refer Mr. Michael Morris was appointed by the President of the Institution of Civil Engineers on 10 June 2002 as arbitrator in relation to the matters raised in it so far as Mackley is concerned. Mr. Morris has also been appointed by a different appointing body as arbitrator in relation to the disputes between Gosport and Posford Haskoning Ltd.

5. Neither Gosport nor Mr. Morris has in fact consented to the making of the claim made in this action.

6. As an alternative ground for the relief sought by Gosport Mr. Geoffrey Hawker, who appeared on its behalf, submitted that, if, technically, the Court had jurisdiction to make the declaration sought by Mackley, it should not exercise it because the policy of Parliament as indicated by the terms of Arbitration Act s.1(c) and s.32 was that questions as to the jurisdiction of an arbitrator to determine matters in dispute between the parties to an arbitration agreement should be decided by the arbitrator and not by the Court. During the course of the hearing before me, as I shall explain, Mr Hawker indicated that

the sole ground upon which he pursued the Part 11 application on behalf of Gosport was that which originally had been the alternative ground.

7. Logically, if there were an objection that the Court had no jurisdiction which was persisted in, it would be necessary to consider first the objection to the jurisdiction of the Court to decide the issues raised by the Particulars of Claim served on behalf of Mackley in this action and only if that question were resolved against Gosport to proceed then to consider the claim made in this action on its merits. However, as I have indicated, the position ultimately adopted on behalf of Gosport was not that I did not have jurisdiction to entertain the claim of Mackley, but that I should not, in the exercise of my discretion, accede to Mackley's claim. In order to decide whether to entertain the claim of Mackley as a matter of discretion I did hear both the Part 11 application made on behalf of Gosport and the Part 8 claim made on behalf of Mackley. In my judgment it is impossible to consider whether, as a matter of discretion, to entertain the claim of Mackley in this action without an understanding of the nature of, and the alleged justification for, that claim, as well as an understanding of the grounds upon which it was said that I should not exercise my discretion in favour of considering it. It is thus convenient next to explain the basis upon which Mackley claimed to be entitled to the relief sought in the Particulars of Claim.

The Contract

8. By an agreement ("the Contract") in writing, which in the copy put before me was undated but which it was common ground had been made on 7 February 2000, between Gosport and Mackley Mackley undertook to carry out certain land reclamation works ("the Works") at Gosport Marina, Gosport in Hampshire. The Contract incorporated the standard form "Conditions of Contract 6th Edition (January 1991) and Corrigenda (August 1993) and Guidance Note (March 1995) and Amendments (reference ICE 6th Edition/Tax/February 1998) issued by the Institution of Civil Engineers, the Association of Consulting Engineers and the Federation of Civil Engineering Contractors as applicable to dredging and amended as follows. " In this judgement I shall call the conditions so described "the ICE Conditions". None of the amendments made for the purposes of the particular project are material to any issue now before the Court.

The Arbitration Clause

9. Clause 66 of the ICE Conditions makes provision as to the settlement of disputes. It is not necessary for the purposes of this judgment to set out Clause 66 in its entirety, but the following sub-clauses or parts of sub-clauses are material to the matters which Mackley desires to raise in this action:

“(1) Except as otherwise provided in these Conditions if a dispute of any kind whatsoever arises between the Employer [that is to say, Gosport] and the Contractor [that is to say Mackley] in connection with or arising out of the Contract or the carrying out of the Works including any dispute as to any decision opinion instruction direction certificate or valuation of the Engineer (whether during the progress of the Works or after their completion and whether before or after the determination abandonment or breach of the Contract) it shall be settled in accordance with the following provisions.

(2) For the purpose of sub-clauses (2) to (6) inclusive of this Clause a dispute shall be deemed to arise when one party serves on the Engineer a notice in writing (hereinafter called the Notice of Dispute) stating the nature of the dispute...

(3) Every dispute notified under sub-clause (2) of this Clause shall be settled by the Engineer who shall state his decision in writing and give notice of the same to the Employer and the Contractor within the time limits set out in sub-clause (6) of this Clause.

(4) Unless the Contract has already been determined or abandoned the Contractor shall in every case continue to proceed with the Works with all due diligence and the Contractor and the Employer shall both give effect, forthwith to every such decision of the Engineer. Such decisions shall be final and binding upon the Contractor and the Employer unless and until as hereinafter provided either

(a) the recommendation of a conciliator has been accepted by both parties or:

(b) the decision of the Engineer is revised by an arbitrator and an award made and published...

(6) (a) Where a Certificate of Substantial Completion of the whole of the Works has not been issued and either:

(i) the Employer or the Contractor is dissatisfied with any decision of the Engineer given under sub-clause (3) of this Clause or:

(ii) the Engineer fails to give such decision for a period of one calendar month after the service of the Notice of Dispute or:

(iii) the Employer or the Contractor is dissatisfied with any recommendation of a conciliator appointed under sub-clause (8) of this Clause then either the Employer or the Contractor may within 3 calendar months

after receiving notice of such decision or within 3 calendar months after the expiry of the said period of one month or within one calendar month of receipt of the conciliator's recommendation (as the case may be) refer the dispute to the arbitration of a person to be agreed upon by the parties by serving on the other party a written Notice to Refer.

- a. Where a Certificate of Substantial Completion of the whole of the Works has been issued the foregoing provisions shall apply save that the said period of one calendar month referred to in (a)(ii) above shall be read as 3 calendar months...

(8) (a) Any reference to arbitration under this (clause shall be deemed to be a submission to

arbitration within the meaning of the Arbitration Acts 1950 to 1979 or any statutory re-enactment or amendment thereof for the time being in force. The reference shall be conducted in accordance with the 'Institution of Civil Engineers' Arbitration Procedure (1983) or any amendment or modification thereof being in force at the time of the appointment of the arbitrator. Such arbitrator shall have full power to open up review and revise any decision opinion instruction direction certificate or valuation of the Engineer.

(b) Neither party shall be limited in the proceedings before such arbitrator to the evidence or arguments put before the Engineer for the purpose of obtaining his decision under sub-clause (3) of this Clause.

(c) The award of the arbitrator shall be binding on all parties...

No provision for adjudication

1. The Contract did not incorporate any provision in relation to adjudication in the event that a dispute arose between Gosport and Mackley in respect of the execution of the Works. Consequently by virtue of the provisions of Housing Grants, Construction and Regeneration Act 1996 s. 108(5), the Scheme for Construction Contracts set out in Part 1 of the Schedule to The Scheme for Construction Contracts (England and Wales) Regulations 1998. SI 1998 No. 649 was applicable.