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Legal Briefing

Ted Lowery looks at a judgment dealing with interim applications in a multi-party PFI fire defects dispute

Sheffield Teaching Hospital Foundation Trust v Hadfield Healthcare Partnerships Ltd & Ors [2023] EWHC 644 (TCC)

Before Mrs Justice O'Farrell DBE

In the Technology and Construction Court

Judgment delivered 22 March 2023

The facts

Under a PFI project agreement dated 20 December 2004, the Trust appointed Hadfield to design, build and thereafter operate a new wing for the Northern General Hospital. Hadfield engaged Kajima as design and build contractor and Veolia as hard services provider for the wing during the operational period.

The wing was completed in 2007. During 2017 the Trust began to identify defects in the fire protection installations. In January 2018 the Trust, Hadfield, Kajima and Veolia entered into a standstill agreement that stopped time running for any fire defects disputes. On 14 November 2018 the South Yorkshire Fire and Rescue Service issued a fire safety prohibition notice forcing the Trust to vacate the wing on 3 December 2018.

During December 2020 the Trust commenced proceedings against Hadfield alleging design and construction defects and claiming £13 million in damages. In August 2021 Hadfield commenced Part 20 proceedings against Kajima seeking an indemnity in respect of any liability to the Trust resulting from Kajima's failure to design and/or construct the wing in breach of the design and build contract. Kajima denied liability contending that any losses arose from maintenance failures by Hadfield in breach of the project agreement and/or by Veolia in breach of the hard services agreement.

During May 2022 Hadfield commenced Part 20 proceedings against Veolia claiming an indemnity and/or damages on grounds that the fire protection defects and/or remedial works were Veolia's responsibility under the hard services agreement.

During late 2022 Kajima issued an application for summary judgment and/or to strike out elements of Hadfield's pleading on grounds that the claims were time barred and that no common law duty of care arose. Veolia also issued an application for security for costs against Hadfield.

The issue

Should either application be granted?

The decision

The judge decided that Kajima had not satisfied the test for summary judgment in CPR 24.2; i.e., that it could not be said that Hadfield's claims had no reasonable prospect of success and there were no other compelling reasons why the claims should not be allowed to go to trial. Contrary to Kajima's submission, the judge considered it arguable, with a more than fanciful prospect of success, that as a matter of interpretation the January 2018 standstill agreement encompassed Hadfield's rights to bring claims for breach of the design and build contract (which claims would otherwise be time barred). It was likewise arguable that Hadfield's claims in negligence and for specific performance were not excluded by the express terms of the design and build contract. The judge also rejected Kajima's submission that Hadfield's reliance upon the existence of a concurrent duty of care not to cause economic loss should be summarily dismissed: the case law was controversial and the question of whether or not a duty arose would have to be decided with the benefit of factual and expert evidence.

The judge dismissed the strike out application finding that Kajima had not demonstrated, as required by CPR 3.4(2), that Hadfield's statement of case disclosed no reasonable grounds for bringing the claims.

Turning to Veolia's application, Hadfield conceded that it could not meet an order for security but contended that the threshold test in CPR 25.13(2)(c) was not satisfied where Hadfield's claims against Veolia were entirely pass-through, so that if the Trust's case against Hadfield failed, and in turn, Hadfield's case against Veolia, it was more likely that the Trust would be ordered to pay Veolia's costs. Whilst accepting

that this outcome was possible with simple back-to-back claims, the judge rejected Hadfield's arguments noting that in these disputes the complex contractual arrangements and inter-dependencies between the parties meant that any costs orders at the end of any trial were not predictable.

In exercising the discretion conferred by CPR 25.13(1)(a), the judge concluded that it would be just to make an order for security for some £2.6 million. The evidence presented did not suggest that Hadfield would be unable to raise an appropriate sum, nor was it likely that an order for security would lead to Hadfield's claims being stifled and/or termination of the project agreement on grounds of insolvency.

Commentary

Whilst disputes over liability for fire stopping defects are commonplace in the PFI sector, it is unusual to see court proceedings involving all of the key parties: the authority, the project company, the design and build contractor and the services contractor. Applications for summary judgment, strike out and security for costs are likely to proliferate as more multi-party PFI disputes reach the courts.

Ted Lowery
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