

Payment Act 2004 (Singapore) (Cap 30B 2006 rev ed.) s.13; Building and Construction Industry Security of Payment Act 2004 (Singapore) (Cap 30B 2006 rev ed.) s.13(2); Building and Construction Industry Security of Payment Act 2004 (Singapore) (Cap 30B 2006 rev ed.) s.17; Building and Construction Industry Security of Payment Act 2004 (Singapore) (Cap 30B 2006 rev ed.) s.27; Building and Construction Industry Security of Payment Regulations (Singapore) (Cap 30B, Reg 1, 2006 Rev Ed) reg.5(1)

ELLIS BUILDING CONTRACTORS LTD. V VINCENT GOLDSTEIN; 18 FEBRUARY 2011
[2011] EWHC 269 (TCC)

Case no. 1066886

Subject: adjudication- admissibility of without prejudice material

Summary

The defendant, Mr. Goldstein, sent the claimant, Ellis, a letter of intent for some repair and refurbishment works. Mr. Goldstein explained that some of the design had to be finalised. In the meantime the contract sum was stated to be £429,270.28 with a 10% contingency. The letter of intent gave Ellis the authority to proceed with the pre-construction works so that the works could start as quickly as possible. The letter of intent also said that the contract would be the JCT 2005 Intermediate form. If the contract were not to proceed, Mr. Goldstein was to be liable to Ellis for the total pre-construction costs plus any reasonably incurred expenses.

Ellis had commenced work in September 2009. By April 2010, the architects, Farmiloe Architects, FA, were warning that there was going to be an overspend of £110,000. Ellis wrote to Mr. Goldstein, pointing out that the value of the works was nearly that stated in the letter of intent. If the promised contract had been entered into, this would not have been a problem, since the contract would contain the necessary mechanism for adjusting the contract sum. Ellis urged Mr. Goldstein to either issue a further letter of intent to deal with the increased value of the works, or urgently issue the formal contract documents. After further discussions, a second letter of intent was issued. This increased Mr. Goldstein's liability by a further £107,802.69, stating that the maximum liability was to be £580,000. Mr. Goldstein paid £100,000. Ellis wrote again on 3 June 2010, warning that the limit in the second letter of intent would soon be exceeded, and a further payment of £44,769.92 was needed. Mr. Goldstein refused to agree to another increase. Ellis sent another letter, hinting that work might have to stop if the financial limit in the second letter of intent were exceeded.

Minutes of a meeting on 30 June 2010, showed that FA issued two copies of the contract document, one to be signed by Mr. Goldstein's associate, Mr. Conway. FA asked Ellis to include the second letter of intent with the contract documents and return it to them. Before Ellis received these minutes, it had sent Mr. Goldstein the signed contract documents asking him to sign them. Ellis wrote that it had incorporated the additional documentation requested and as detailed in its letter to FA dated 1 July 2010. This letter made it clear that the Letters of Intent were not incorporated into the documents.

A certificate of practical completion was issued. Ellis made claims for additional sums in respect of variations and prolongation amounting to £650,224.46. Ellis served a statutory demand on Mr. Goldstein. In his formal application dated 29 October 2010 to the Bankruptcy Court to set aside the statutory demand, Mr. Goldstein's solicitor in effect said that there was a dispute about the alleged sum claimed but only argued that, although there was "an unsigned building contract" subsisting between the parties, and that the contract was subject to an "express fixed sum provision". There was no mention of the second letter of intent and its financial limit. Ellis served a notice of adjudication, which prompted a without prejudice letter to their solicitors. This set out Mr. Goldstein's position that there had been a financial cap in the first letter of intent, but, again, no mention was made of the second letter of intent or the cap it contained.

In his formal application dated 29 October 2010 to the Bankruptcy Court to set aside the statutory demand, Mr. Goldstein's solicitor, presumably upon instructions, in effect said that there was a dispute about the alleged sum claimed but only argued that, although there was "an unsigned building contract" subsisting between the parties, that the contract was subject to an "express fixed sum provision". From the referral, it was clear that Ellis was asserting that the Intermediate Contract was part of the contract. Mr. Goldstein's view was that Ellis had not been entitled to exceed the limit of £580,000 in the second letter of intent. He did not address the valuation made by Ellis. In their reply, Ellis argued that the binding and limiting nature of the second letter of intent had only been raised by Mr. Goldstein for the first time in his Response. Ellis referred to the without prejudice letter, pointing out that even in that letter, Mr. Goldstein had not sought to rely

upon the second letter of intent as a defence or at all.

Between the service of the Reply and the decision of the adjudicator, neither Mr. Goldstein nor his solicitors objected to the reference to the “without prejudice” letter or made any request made to rebut any part of the Reply.

The adjudicator decided that the parties had firstly contracted on the first letter of intent, then on the second letter of intent, and, finally, on the contract documents prepared by FA and given to Ellis on 30 June 2010 for completion. These contract documents had not contained any financial limits. He found that Ellis was entitled to the sums claimed. In the present proceedings, Ellis sought to enforce that award. Mr. Goldstein resisted the enforcement of the award, arguing that the adjudicator had decided the matter on a basis which had not been argued by either side i.e. that the contract had been the Intermediate form as prepared by FA, and that this was a breach of natural justice. In addition, Mr. Goldstein submitted that there had been apparent bias by the adjudicator by allowing in and not raising with the parties the “without prejudice” letter because it was unclear what, if any, weight had been given by the adjudicator to the arguments in relation to the Second Letter of Intent which had only been raised for the first time in the Response in the adjudication.

THE USE OF WITHOUT PREJUDICE MATERIAL IN ADJUDICATION

When “without prejudice” communications are presented in court, because judges are legally qualified, they can usually put them out of their mind. In adjudication, however, because most adjudicators are not legally qualified, there is a sense of “unease” that such material might influence the adjudicator. For this reason, without prejudice communications should not be put before an adjudicator, and lawyers who do so may face professional disciplinary action.

If an adjudicator decides a case principally on the basis of without prejudice material, that decision may not be enforced. In enforcement proceedings, the Court should look at all the facts which may support, or otherwise, accusations of apparent bias whether those facts had been known to the adjudicator or not.

The use of the without prejudice letter had been improper, and the material it contained was not admissible. There were three material considerations when deciding whether the adjudicator had been influenced by its content:

Neither Mr. Goldstein nor his solicitors had made any objection between the service of the Reply and the issue of the decision, and three of those days had been working days. There was no evidence to suggest that they could not have challenged the introduction of the “without prejudice” letter within that time;

The adjudicator had expressly said at the end of his decision that he had “taken account of all submissions made whether or not specifically mentioned” in the decision. This type of statement was commonly used in adjudication decisions to show that the adjudicator has considered everything which has been put before him or her;

It was also clear however that the adjudicator did not base his decision at least openly on the contents of, the fact of or inferences drawn from what was or was not in the “without prejudice” letter.

On the face of his decision, it was clear that the adjudicator had analysed the case as presented in a simple way. On the material before the court, there was no reason to conclude that the adjudicator had not acted impartially. The very fact that the adjudicator did not mention the “without prejudice” communication suggested very strongly that it was not part of and clearly did not and did not need to influence his reasoning.

Law Cases Referred to:

Balfour Beatty Construction Ltd. v The Mayor and Burgesses of the London Borough of Lambeth, [2002] 16 BLISS 1; Cantillon Ltd. v Urvasco Ltd., [2008] EWHC 2218 (TCC); In re Medicaments, [2001] 1 WLR 700; Rush & Tompkins v Greater London Council & P.J. Carey [1988] 1 All ER 549; Specialist Ceiling Contractors v ZVI Construction, [2004] BLR 403; Volker Stevin Ltd. v Holystone Contracts Ltd., [2010] EWHC 2344 (TCC)