All England Reporter/2005/March/*Amec Civil Engineering Ltd v Secretary of State for Transport - [2005] All ER (D) 280 (Mar)

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[2005] EWCA Civ 291

Court of Appeal, Civil Division

May, Rix and Hooper LJJ

17 March 2005

Arbitration – Arbitration agreement – Construction of arbitration clause – Standard form agreement – Agreement providing for 'disputes or differences' to be referred to engineer before referral to arbitration proceedings – Judge finding claim amounting to dispute within terms of contract – Correctness of decision.

Serious structural deficiencies had appeared in a viaduct which carried the M6 motorway over various waterways and roads in Lancashire. The claimant had as contractor carried out major renovation works to the viaduct under a contract with the defendant under the standard ICE (Institution of Civil Engineers) Conditions of Contract. Clause 66 of those conditions provided for disputes or differences in the first instance to be referred to and settled by the engineer. The initiation by either the employer or the contractor of the contractual machinery for arbitration depended on the parties receiving the written decision of the engineer or on the engineer failing for three months to give a decision. The claimant substantially completed the works in December 1996, which had included replacing an existing reinforced concrete slab and providing new roller bearings permitting the slab or other elements to move. In June 2002, some of the roller bearings appeared to have failed. On 2 October 2002, the defendant informed that claimant that there was a defect to be addressed and that it would be looking for the cost of correcting that defect, and it invited a formal response from the claimant. There was no further material communication between the parties until 6 December 2002, when the claimant was sent a formal letter of claim. The claimant declined to make any comment on liability, and on 11 December, the defendant referred the dispute to the engineer pursuant to cl 66 of the contract. An engineer's decision under cl 66 was given in December 2002, which stated that it was his opinion that the defects had resulted from the use of materials or workmanship not in accordance with the contract, which constituted a breach of contract. Thereafter, the defendant gave the claimant notice of arbitration with reference to the claim advanced in the letter of 6 December. The claimant issued proceedings challenging the arbitrator's jurisdiction on the basis, inter alia, that on 11 December, no dispute existed which was capable of being referred to the engineer under cl 66: therefore, there was no valid engineer's decision and nothing capable of being referred to arbitration. The judge rejected that contention, and concluded, inter alia, that the letter of 2 October 2002 had constituted a claim for the purpose of s 66 of the contract. The claimant appealed against that decision.

It maintained its position that the engineer's decision was not contractually valid because that had at the time been no dispute or difference to refer to him.

The appeal would be dismissed.

On the proper construction of the standard ICE contract, cl 66 referred not only to a 'dispute' but also to a 'difference'. In many instances, it would be quite clear that there was a dispute and in many of those, it might be sensible to suppose that the parties might not expect to challenge the engineer's decision in subsequent arbitration proceedings. However, major claims by either party were likely to be contested and arbitration might well be probable and necessary. Commercial good sense suggested that cl 66 should not be construed with legalistic rigidity so as to impede the parties from starting timely arbitration proceedings. The whole clause should be read in that light, and in favour of an inclusive interpretation of what amounted to a dispute or difference. If the due operation of the mechanism of cl 66 really was to be seen as a condition precedent to the ability to start arbitration proceedings within a period of limitation, the parties could not have intended to afford one another opportunistic technical obstacles to achieving that beyond those which the clause necessarily required. Insofar as the existence of a dispute might involve affording a party a reasonable time to respond to a claim, what might constitute a reasonable time would depend on the facts of the case and the relevant contractual structure.

In the instant case, the relevant facts included that major defects in very substantial works had emerged relatively shortly before the perceived end of the limitation period. Those had required detailed investigation. In consequence, the formulation of a precisely detailed claim had been impossible within a short period. Liability for the defects was bound to be highly contentious, but the claimant was bound to be a first candidate for responsibility. Moreover, the claimant was inevitably going to resist liability well beyond the perceived end of the limitation period. In those circumstances, the judge's analysis had been entirely correct, and he had been entitled to find that there was a dispute or difference capable of being referred to the engineer under cl 66 at any time after the claimant had indicated that it did not accept responsibility.

Vivian Ramsay QC and Simon Hughes (instructed by Wragge & Co LLP) for the claimant.

John Marrin QC and Sarah Hannaford (instructed by the Treasury Solicitor) for the defendant.

Melanie Martyn Barrister.