

BEWARE OF WAIVING RIGHTS UNDER DEVELOPMENT DOCUMENTATION

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Legal Briefings

On 2 August 2016, the Technology and Construction Court ("TCC") released its decision in the case of *ZVI Construction Co LLC v The University of Notre Dame (USA) In England* [2016] EWHC 1924 (TCC).

This case confirms that a party cannot simply rely on the terms of its contract with another if, by its words and/or conduct, it is clear that it has agreed to a variation to, or waiver of, those terms. Accordingly, to the extent that words or conduct may be ambiguous or indicate an intention contrary to that expressed in the contract, parties should be careful to expressly reserve their position at the outset.

In summary, the facts of this case are as follows:

- TJAC Waterloo LLC ("TJAC") agreed to sell a property known as Conway Hall to The University of Notre Dame (USA) in England ("UND") pursuant to a Development Agreement dated 25 October 2010 ("Development Agreement"). Completion of the sale was conditional upon certain building works being carried out by ZVI Construction Co LLC ("ZVI"). ZVI was also a party to the Development Agreement.
- The Development Agreement contained an expert determination clause.
- The Development Agreement also contained a no oral variations clause pursuant to which no modification, alteration, or waiver of any provision of the Development Agreement could be made unless it was in writing.
- UND alleged that the work carried out by ZVI was defective and requested that the dispute be referred to expert determination. The expert determined that TJAC / ZVI was

liable for many of the workmanship defects, however the expert's determination as to quantum was postponed by TJAC / ZVI due to illness.

- To protect its position until the issue of quantum could be determined, UND obtained an order from a US Court that TJAC and ZVI be restrained from dissipating, encumbering, or transferring assets.
- ZVI sought an injunction restraining UND from taking any steps to enforce the expert's determination, together with declarations that it did not owe UND any substantive obligations under the Development Agreement because the expert determination clause was limited to disputes arising between TJAC and UND.

CONSENT TO JURISDICTION

The first issue for the TCC to consider was whether the expert had jurisdiction to determine ZVI's obligations to UND under the Development Agreement.

The TCC held that a contracting party could, expressly or impliedly, by words or conduct, confer jurisdiction on an expert where there would otherwise be none. It was a question of fact whether there had been a clear submission to the jurisdiction.

The TCC inferred from ZVI's conduct that ZVI had impliedly agreed that the expert should decide whether and to what extent ZVI (and TJAC) were liable for the defects and the remedial costs of those defects. ZVI's conduct included:

- Failing to challenge UND's suggestion that the expert determination procedure be used to resolve the dispute with ZVI.
- Serving submissions (including in response) without any reservation.
- Exchanging correspondence in circumstances when it might reasonably have been anticipated that if there was any question as to jurisdiction it would have been raised.

On that basis, the TCC held that:

Having impliedly agreed to submit the dispute as to whether there were defects for which ZVI (and TJAC) were responsible under the Development Agreement, ZVI is now bound by [the expert determination clause] which renders the expert's determination final and binding on it.

ESTOPPEL

The TCC then considered estoppel by convention and waiver. Put simply, estoppel by convention occurs when parties share a common assumption of fact or law which the party alleging the estoppel has relied on to its detriment. In such cases, a party will be precluded from denying those assumed facts or law.

ZVI argued that UND had failed to demonstrate reliance on the assumption that the expert had jurisdiction, or that it had suffered detriment as a result. However, the TCC disagreed and held that reliance and detriment could be inferred from the fact that:

UND continued with the expert determination and indeed took proceedings in the US courts on the clear assumption that ZVI accepted that it owed UND substantive obligations under the Development Agreement and that the expert had jurisdiction to determine the disputes as to the nature and extend of the alleged defects and the damages to which UND were entitled.

Accordingly, ZVI was estopped from contending that the expert determination as to liability or the future determination as to quantum was outside the jurisdiction of the expert. Furthermore, the TCC held that precisely the same analysis would support a waiver i.e. ZVI must be taken to have waived any rights it might have had or might still have to object to the jurisdiction of the expert.

NO ORAL VARIATIONS CLAUSES

The TCC held that the existence of a no oral variations clause did not modify the burden of proof required to show that the parties had agreed to a variation or waiver, nor was it necessary to show that the parties intended to modify the no oral variations clause. Rather, in order to determine whether there had in fact been a variation, a court will look at the words and conduct of the parties:

What must be determined by the Court is whether, by their actions, words or conduct they must be taken to have intended to modify or alter or waive a term of the Development Agreement, bearing in mind that they agreed to the terms of the [no oral variations clause] in the first place.

ISSUE ESTOPPEL

Issue estoppel prevents a party from taking a contrary position to one which has already been finally determined by a court or tribunal.

UND claimed that the TCC was prevented from re-opening the US Court's decision on the expert's jurisdiction. The TCC agreed that the US Court had determined the issue of the expert's jurisdiction but because the decision was an order and was not final, the TCC held that there was no issue estoppel.

CONCLUSION

This case highlights the importance of parties thinking before they act. Parties should consider whether they are bound by the dispute resolution process, or any other contractual obligations, before taking any steps which may be viewed as consistent with those processes or obligations. To the extent that there is any doubt regarding their applicability, parties would be well advised to reserve their position before taking any steps.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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