Earls Terrace Properties Ltd v Waterloo Investments Ltd [2002] Adj.L.R. 02/14

JUDGMENT : His Honour Judge Richard Seymour Q.C. 14th February 2002. TCC.

1. This action gives rise to a point of some interest and concerning which there is, so far as the researches of Counsel on both sides go, no relevant authority.

2. The issue arises in this way. By an Agreement dated the 4th of December 1996 and made between the Claimant, Earls Terrace Properties Limited and the Defendant, which at that time was called Northacre Limited, but is now called Waterloo Investments Limited as the second party, and Mr Hunter and Mr Nilsson as Guarantors, the Defendant, to whom I shall refer in this judgement as Waterloo, undertook to provide various services to the detail of which I shall come in a moment, for the Claimant, to which I shall refer as Earls Terrace.

3. The core of the Agreement is to be found in clause 3.1 which provided that;
"the Company", meaning Earls Terrace "hereby appoints the Developer", meaning Waterloo "and the Developer hereby agrees to perform the Services fully faithfully and efficiently with a view to maximising the actual or notional income and profits produced by the Site and the Development and upon the terms and conditions set out in this Agreement."

   The expression Services, was defined in clause 1 of the Agreement as;
"the Services to be provided by the Developer as set out in Schedule II hereto."

   Schedule II began in this way;
"*The Services have been divided into various sections as hereinafter provided but such division is not intended to and shall not limit or affect the Developer's obligation generally to provide the Services as and when, may from time to time be necessary or appropriate for the proper and timely carrying out/completion and disposal of the Development but subject always to the provisions of Clause 7."*

4. The remainder of Schedule II to the Agreement sets out at some length, and in considerable detail, the services which Waterloo were to undertake. I hope that it is a sufficiently accurate generic description for present purposes to describe those services as managing the undertaking of the development which was referred to in the Agreement. That development was defined in clause 1 of the Agreement in this way;
"The carrying out of all conversion and refurbishment works, all demolition and clearance operations and all excavation piling building and other construction works and all associated drainage and infrastructure works for the development of the Site (including any ancillary works carried out to adjoining gardens, lodges, peripheral areas and roadways) to create high quality period family houses (including where appropriate a swimming pool and landscape garden) or in the case of those buildings known as numbers 1 and 25 Earls Terrace) houses comprising a number of luxury flats and so that each Redeveloped Building shall comprise not less than 4,500 square feet, (gross external measurement) of accommodation ready and fitted out for immediate occupation for residential use with ancillary facilities generally in accordance with planning consents similar to the consents already issued by the Royal Borough of Kensington and Chelsea, in relation to numbers 4 and 5 Earls Terrace namely planning permission reference number", which was then set out together with a reference to various drawings, "and listed building consent reference number", and again a number was set out and appropriate drawings were also identified. "(subject to such further modification and amendment as may be necessary)."

5. The definition of the Site in clause 1 of the Agreement was this;
"That part of the freehold property described in Schedule 1, together with the Buildings situate thereon, the legal and beneficial title to which has from time to time been acquired by the Company."

   The property identified in Schedule 1 was described in this way:
"All that freehold land and buildings known as numbers 1 to 8 and 12 to 25 Earls Terrace, Kensington, London W8 as the same is registered with title absolute at HM Land Registry under title numbers", and three title numbers were then set out.

   In clause 5.1 of the Agreement provision was made for the payment of a fee. Clause 5.1 said this;
"Subject to any rights of set-off or other rights which they may have at law, the Company", that is to say Earls Terrace, "shall pay the Fee to the Developer as full remuneration for the performance of the Services and any work undertaken by the Developer in relation to the Development."

   The expression "the Fee" was defined again in clause 1 for the purposes of the Agreement as meaning;

"The sums payable to the Developer at the times set out in and calculated in accordance with the terms of Schedule IV of this Agreement."

6. Schedule 4 set out at considerable length provisions by reference to which the fees payable by Earls Terrace to Waterloo were to be calculated. The detail of those provisions it is not necessary to set out for the purposes of this judgement.

   Mr Alexander Nissen, who has appeared on behalf of the Claimant, accepts for the purposes of today's hearing that the Agreement of the 4th of December 1996, was a construction contract within the meaning of that expression in Part II of the Housing Grants, Construction and Regeneration Act 1996. I say he accepts that "for the purposes of today's hearing" because he has made clear that although that is so, in other contexts and for other purposes, there may well be issues as to whether the Agreement of the 4th of December 1996 is indeed a construction contract as defined for the purposes of Part II of the 1996 Act.

   The Agreement of the 4th of December 1996, was varied by an Agreement dated the 20th of July 1998. The Agreement of the 20th July 1998 was made between the same parties as the parties to the Agreement of the 4th of December 1996.

   A cover sheet to the Agreement of the 20th of July 1998 describes the Agreement as a Deed of Variation.

7. The Agreement of 20th July 1998 sets out three recitals by way of background of which two are perhaps material for present purposes. Recital A was in these terms;
   "By the Agreement", which is a reference back to the Agreement of the 4th of December 1996. "the Developer undertook to provide certain development consultancy and project management services in relation to the Terrace for the Company and the Guarantor undertook to guarantee certain of the Developer's obligations as set out therein."

   Recital B was to this effect;
   "The Company and the Developer have agreed to vary the Agreement in the manner set out in this Deed."

8. The operative part of the Agreement began with clause 1 which was headed, "Interpretation". It set out a definition of the expression, "Agreement" essentially as meaning the Agreement dated the 4th of December 1996 and went on;
   "Words and expressions defined in the Agreement", meaning the Agreement of the 4th December 1996, "shall have the same meanings in this Deed unless a different definition is given in this Deed, in which case the definition in this Deed shall apply."

   Clause 1.2 under the heading, "Effect of this Deed", provided "This Deed is supplemental to the Agreement."

9. Clause 1.3 dealt with the question of construction and contained fairly conventional provisions as to cross-references, references to the singular including the plural and the like.

   Clause 2 of the Agreement of the 20th of July 1998 was headed, "Variation of the Agreement".

   Clause 2.1 under the heading, "Variations Made", provided;
   "From and including the date of the Agreement, the Agreement shall be read and construed as varied by the provisions set out in Schedule 1."

   Clause 2.2 under the heading, "Agreement remains in force" said this;
   "The Agreement shall remain fully effective as varied by this deed and the terms of the Agreement shall have effect as though the provisions contained in this deed had been originally contained in the Agreement.

   Clause 3 was headed "Guarantor" and provided in clause 3.1, the only sub-clause in fact;
   "The Guarantor acknowledges to the Company that any guarantee and indemnity previously given by it in the Agreement shall remain fully effective and shall not be varied by the grant of this deed."

10. Clause 4 was headed "Proceedings". Clause 4.1 dealt with the applicable law which is English law. Clause 4.2 dealt with jurisdiction and provided for the English courts to have jurisdiction. Clause 4.3 was headed, "Address for Service", and made provision in relation to that matter.

11. Clause 5, the final clause, had one sub-clause, clause 5.1 which simply said "The parties have executed this document as a deed".

12. As indicated in clause 2.1 of the Agreement, Schedule 1 set out variations to the Agreement of the 4th of December 1996. With one exception, all of the provisions in Schedule 1 to the Agreement of the 20th of July 1998 made alterations to provisions in Schedule 4 to the Agreement of the 4th of December 1996. That is to say, they made modifications to the provisions concerning the fees payable by Earls Terrace to Waterloo.

    The one exception in Schedule 1 was clause 1.4 which provided that clause 13.9(c) of the Agreement should be deleted and that provision, which I need not set out for the purposes of this judgement, essentially was a cross-reference in the main text of the Agreement of the 4th of December 1996 to Schedule 4.

13. Disputes have arisen between Waterloo and Earls Terrace in relation to the sums which are payable by Earls Terrace to Waterloo as fees in respect of the provision of the services for which the Agreement of the 4th of December 1996 initially made provision.

    On the 28th of January of this year Waterloo by its solicitors, Messrs Campbell Hooper, served on Earls Terrace a notice of adjudication pursuant to Part II of the Housing Grants, Construction and Regeneration Act 1996 in relation to the dispute about fees which I have mentioned. The issue which has arisen before me is whether the Defendant, Waterloo, was entitled to refer the dispute which I have mentioned to adjudication.

    A Claim Form under Part 8 of the Civil Procedure Rules was issued on the 6th of this month on behalf of Earls Terrace, and Particulars of Claim of the same date were served with it. In those Particulars of Claim the relief which is principally sought is declarations, first, that the Deed of Variation dated the 20th of July 1998 is not a construction contract within the meaning of the Housing Grants Construction and Regeneration Act 1986, second, that the adjudication commenced on the 28th of January 2002 was void and of no effect and, third, that Mr Atkinson who is the person appointed as adjudicator, has no jurisdiction to act as adjudicator pursuant to the Housing Grants, Construction and Regeneration Act in connection with the Notice of Referral served on the 28th of January 2002.

14. The way in which Mr Nissen has put the claim of Earls Terrace to be entitled to the relief which it seeks is quite straightforward. I have indicated that he has accepted that the Agreement dated the 4th of December 1996 is a construction contract for the purposes of the 1996 Act, that being something, as I have said, which he accepts for the purposes of the hearing before me only. However, he submits that by s. 104(6) of the Housing Grants, Construction and Regeneration Act 1996, the following provision is made,

    "This part applies only to construction contracts which;

    (a) are entered into after the commencement of this part; and

    (b) relate to the carrying out of construction operations in England and Wales or Scotland."

15. He would accept, I think, that the relevant exception is only that in sub-paragraph (a) of sub-section 6. His submission is that as the Housing Grants, Construction and Regeneration Act only came into force after the making of the Agreement dated the 4th of December 1996, the exception applies and therefore it isn't open to Waterloo to seek adjudication pursuant to the provisions of that Agreement.

    So far as the Agreement of the 20th of July 1998 is concerned, Mr Nissen accepts that Agreement was made after the coming into force of the Housing Grants, Construction and Regeneration Act 1996, but Mr Nissen submits that that Agreement is not a construction contract as defined in s.105 of the 1996 Act. Mr Nissen submits that on its face, the Agreement dated the 20th of July 1998 is simply an Agreement which varies the terms of the Agreement made on the 4th of December 1996 without in any way extending the scope of the services agreed to be undertaken by Waterloo under the Agreement dated the 4th of December 1996, or extending the period of time over which those services were to be provided.

16. Mr Adrian Hughes has appeared on behalf of Waterloo and he submits that Waterloo are entitled to invoke the adjudication provisions contemplated by the 1996 Act, for one of three alternative reasons. First of all he submits, in a formulation which I wrote down, which he accepted represented his primary case, that because at the time the 1998 Agreement was made it appeared that the anticipation of the parties as to the duration of the period over which the Defendants would perform the services, which provision was made in the 1996 agreement, would be incorrect, notwithstanding that the Defendants were

contractually bound to provide the services until completion of the development, the Defendants and the Claimant, in entering into the 1998 Agreement, were recognising that the services would be provided for longer and therefore the 1998 Agreement itself is a 'construction contract'. The latter two words are in inverted commas.

17. As an alternative to that analysis, Mr Hughes submitted that a combination of the 1996 and 1998 Agreements formed a revised construction contract which was entered into in its new form on the 20th of July 1998 when the original contract was varied. For the purposes of s. 104(6) of the 1996 Act, submitted Mr Hughes, this, that is to say, the 20th of July 1998 is the relevant date.

18. The third alternative way in which Mr Hughes put Waterloo's case was this. Even if Earls Terrace is correct in contending that the 1998 Agreement is not in itself construction contract because all it did was vary certain terms of the 1996 Agreement, for the purposes of Part II of the 1996 Act, the varied 1996 Agreement was entered into only on the 20th of July 1998 and so falls within the Act.

19. I confess I have some difficulty in making any worthwhile distinction between the second and third alternative submissions that Mr Hughes makes. They seem essentially to be contending for the same thing, and that is that the effect of the making of the 1998 Agreement was, as it were, to incorporate into the 1998 Agreement, the terms of the 1996 Agreement and thereby have the effect that the 1998 Agreement was to be read as if there were set out in it not only the terms of the 1998 Agreement itself, but also the terms of the 1996 Agreement. So analysed the 1998 Agreement was, in the light of Mr Nissen's concession as to the effect of the 1996 Agreement, a construction contract, but a construction contract made after the date upon which Part II of the 1996 Act came into effect.

20. As I have said, the researches of Counsel have not revealed any authority in relation to the proper analysis of the effect of the making of an agreement varying an earlier agreement, in terms of the date as at which the earlier agreements falls to be treated as having been made after the making of the variation agreement. In particular, they have not been able to find any such authority in the context of the adjudication for which provision is made in Part II of the Housing Grants, Construction and Regeneration Act 1996.

21. In my judgement, the proper analysis of the Agreements of 1996 and 1998 against the background of Part II of the Housing Grants, Construction and Regeneration Act 1996 is this. The Agreement dated the 4th of December 1996 was not, when made an agreement to which Part II of the 1996 Act applied.

22. The Agreement dated the 20th of July 1998 is not itself on its face a construction contract, meaning by that, an agreement which would be a construction contract falling within the definition in s. 105 of the Housing Grants, Construction and Regeneration Act 1986, if it fell to be construed independently.

23. The question, then, is whether the effect of the making of the Agreement of the 20th of July 1998, not itself being a construction contract, but which varied the terms of the agreement dated the 4th of December 1996, which was a construction contract, but not a construction contract to which the provisions of the Act applied, was to bring within Part II of the Housing Grants, Construction and Regeneration Act 1996 the Agreement dated the 4th of December 1996.

24. In my judgement, that would be a rather bizarre consequence. By making the provision which it did in s. 104(6) of the 1996 Act, Parliament plainly intended that the far reaching, and to some extent possibly draconian, provisions of Part II of the 1996 Act should only apply to construction contracts which were made at a date after which the parties making the contract were aware that the provisions of Part II were going to apply to that contract. Parliament therefore seems deliberately to have wished not to bring within the scope of Part II of the 1996 Act contracts which were made at a time at which the parties could not have envisaged that provisions such as those which the 1996 Act made in relation to adjudication would be thrust upon them.

25. Is it therefore to be contemplated that an agreement which, when made, was not within the scope of Part II of the 1996 Act, and deliberately not within the scope of Part II of the 1996 Act by conscious wish of Parliament, should be brought within the scope of Part II of the 1996 Act simply because some variation was made to some provision of that contract at some subsequent date.

26. The answer, in my judgement, is no, it is not. It is possible to contemplate an agreement varying a construction contract made before the relevant provisions of the 1996 Act came into force which itself

amounted to a construction contract providing for the carrying out of construction operations as defined in s. 105 of the 1996 Act.

In that event, it seems likely that the provisions of Part II of the 1996 Act would apply at least to the Variation Agreement and possibly, although I express no view on this issue, by virtue of the terms of the Variation Agreement there may be some scope for the application of the provisions of Part II of the 1996 Act to the original Agreement.

But that case is not this case. In this case, the variations which have been made are simply to sums of money which are payable in respect of services which have not been altered and which were to be provided over a period which could accurately be described as however long it took to provide them. So that not only are the services which Waterloo are to provide the services contemplated by the Agreement dated the 4th of December 1996, but the period over which those services have to be provided is the period for which the Agreement dated the 4th of December 1996 made express contractual provision.

27. It may well be that the parties contemplated that actually those services would be provided over a particular period. It may well be that the parties' anticipation in the event was proved to be wrong. But in terms of contractual obligation, the position in my judgement is clear, and the position is that the period over which the defendants were contractually bound to provide the services has not altered.

28. So in those circumstances, in the context of the Agreements with which I am concerned in this case, it seems to me to be clear that the effect of the making of the Agreement dated the 20th of July 1998, varying the terms of the Agreement of the 4th of December 1996 only in relation to fees, was not, as it were, retrospectively to drag bawling and screaming within the scope of Part II of the 1996 Act the Agreement of the 4th of December 1996 which, when made, did not fall within the scope of that Act.

For those reasons, I make the declarations which are sought on behalf of Earls Terrace, first that the Deed of Variation dated the 20th of July 1998 is not a construction contract within the meaning of the Housing Grants Construction and Regeneration Act 1996, second that the adjudication commenced on the 28th of January 2002 is void and of no effect, third that Mr Atkinson has no jurisdiction to act as an adjudicator pursuant to the Housing Grants, Construction and Regeneration Act 1996 in connection with the Notice of Referral served on the 28th of January 2002.

MR A Nissen - (instructed by Simmons & Simmons, CityPoint, 1 Ropemaker Street, London EC2Y 9SS) appeared on behalf of the Claimant)
MR A Hughes - (instructed by Campbell Hooper, 35 Old Queen Street, London SW1H 9JD) appeared on behalf of the Defendant)