BCLP. Client Intelligent

Insights

BEWARE THE SHORT-CUT – ARE PRELIMINARY ISSUE HEARINGS A BAD IDEA?

Jun 05, 2019

Anyone who has used a GPS knows that sometimes the shortest route can take a mighty long time. On a trip to Pebbly Beach in New South Wales it took me down a little dirt road with so many potholes it resembled swiss cheese. If that wasn't bad enough, the road led to a dead end, necessitating a slow drive back, in reverse, trying not to get trapped with no mobile phone service.

Preliminary issues hearings carry the risk of becoming much like that shortcut, at least for the parties in *Walter Lilly v Clin* as they navigated the equally treacherous terrain of court procedure. Unfortunately the preliminary issues hearing, while supposed to assist with resolving their dispute, failed to achieve its aims and ended up taking the parties through four hearings spread out over four years, lengthening and adding to the expense of the court process.

In this post I look at the difficulties that arose in the case and discuss some key considerations to bear in mind when framing a preliminary issue. But first, let's have a quick recap of the procedural history and the facts.

The procedural history

The case started in the TCC with six procedural issues in 2016 (on which BCLP commented). Clin appealed and the Court of Appeal heard the appeal in 2018 (which Katie Parkinson discussed). Once the preliminary issues were determined this was then returned to the TCC for a hearing on disclosure followed by, finally, the main hearing last month.

The facts

Mr Clin and Walter Lilly entered into a contract that involved the removal of the entire interior, but retaining most of the façade, of two adjoining properties set in a conservation area. At the time, Conservation Area Consent (CAC) was required for the demolition of buildings in a conservation area but, because the façade was to be retained, the consultants took the view that no CAC was required, and none was obtained. A tussle with the council ensued resulting in a notice to cease work or risk criminal prosecution. Works stopped for a little over a year until the CAC was obtained.

At the first hearing in 2016, the judge held that in the absence of a provision in the contract, it would be implied that the Employer was responsible for obtaining the CAC. The Court of Appeal refined this test slightly.

The present case takes us back to the TCC to apply the Court of Appeal's judgment. The key findings were as follows:

- Whether or not a CAC was required turned on whether "substantial demolition" was to take place. Waksman J found that the project did involve substantial demolition and a CAC was required.
- There was a breach of the Court of Appeal's implied term. Mr Clin's architects should have applied for the CAC and this omission was imputed to Mr Clin. The architects failed to use due diligence in seeking consent as a CAC was required on the basis of the original plans drawn up by the architect.
- Walter Lilly was entitled to an extension of time as well as compensation for loss and expense. Mr Clin had no claim for liquidated damages.

Taking a step back, what are preliminary issues hearings and why have one?

A preliminary issue is a discrete issue which, if resolved, is likely to reduce the time and/or costs of proceedings. Used appropriately, a preliminary issues hearing reduces the amount of work required by removing the need for the parties to argue in the alternative, narrowing the issues or eliminating the need for a full trial altogether.

Preliminary issue hearings are a common feature of litigation in the TCC and according to the TCC guide, should be considered at the first case management conference (CMC). The TCC guide lists the following common types of preliminary issues:

- The existence of a contract between the parties.
- Construction of contracts and, in particular, exclusion clauses.
- Disputes as to the existence/scope of a statutory duty.

The guide further explains that a suitable preliminary issue is one that is capable of:

- Resolving the whole proceedings or a significant element of it.
- Significantly reducing the scope of the main trial.
- Significantly improving the possibility of a settlement.

The main drawback of a preliminary issues hearing is that it may not achieve any of these aims. Two trials are more expensive and time consuming than one, so the usefulness of a preliminary issues hearing must be thoroughly weighed against the risks before proceeding.

Should you do it?

Aside from the considerations listed in the TCC guide, thought should be given to the following questions:

- Will a preliminary issues hearing cause needless delay? Parties should weigh up the chance of the hearing leading to settlement or earlier resolution of the dispute against the delay that it may cause to the main trial. In *Walter Lilly*, the main trial was unnecessarily delayed.

- Is it possible to determine the preliminary issues accurately? At the time of framing the preliminary issues it may not be clear what the key questions are. In *Walter Lilly*, when drafting the preliminary issues, the parties assumed that one or the other's approach must be right. However, the judge decided on an implied term that differed from the parties' versions, meaning that some of the follow-on issues could not be addressed. Further, the Court of Appeal declined to answer all the questions, considering them to be too numerous and too hypothetical. The fact that there were an unusually high number of preliminary issues (six) should perhaps have alerted the parties that a preliminary issues hearing was misconceived.

- Have the necessary underlying facts been settled? If not, a judgment on the preliminary issue may be of limited assistance. This was noted both at the first TCC hearing and by the Court of Appeal, who refused to answer some of the preliminary issues due to the "factual vacuum". Another case concerning preliminary issues, in which the TCC declined to order a preliminary issues hearing is *Midal Cables Ltd v AMEC Foster Wheeler Group Ltd*. The defendant requested a preliminary issues hearing to determine which parties' standard terms governed the contract. However, Fraser J held that this question could not be decided on the basis of agreed or assumed facts, and that too much factual evidence would need to be heard. The defendant suggested evidence would take one day but Fraser J felt it was likely to take two or three, which was too long.

- Is duplicate evidence likely? In *Walter v Clin* two witnesses gave evidence twice, before different judges. This overlap added unnecessary cost and expense. In the first TCC hearing, the judge noted that the witness evidence and cross examination was of limited relevance to the preliminary issues. When preparing for a preliminary hearing, consider whether witness evidence is really necessary – if it is, this may indicate that the matter is inappropriate to be heard as a preliminary issue.

- Can the preliminary issues be agreed on quickly and uncontroversially? It is rare that the parties agree on the preliminary issues as they did in *Walter Lilly*. This is because the phrasing of the issues often benefits one party more than the other. If the parties do not agree, they may

incur additional time and costs in protracted negotiations and may end up in an additional hearing, as in *Midal Cables*.

- Does a preliminary hearing fit into the timeline? If the main trial has already been scheduled, consider whether the judgment on the preliminary issue will be received in good time. If received too late, parties would have to prepare for alternative outcomes, removing the benefits of a preliminary hearing.
- Would an alternative process be more appropriate? Parties may consider using the Part 8 procedure instead. Part 8 claims are normally heard and disposed of on written evidence and, like preliminary issues hearings, should not involve substantial factual disputes. The main benefit of using the Part 8 procedure is that it tends to be faster, and therefore cheaper.

Concluding thoughts

The idea of a preliminary issues hearing is attractive in the abstract. Practically, however, achieving a useful result from a preliminary issues hearing is trickier than it looks. As always, the devil is in the detail. Parties considering a preliminary issue hearing are well advised to carefully weigh up the likelihood of reaching resolution more quickly and cost-effectively against the risk of getting stuck in the mud.

This article first appeared on the Practical Law blog on 29 May 2019

RELATED CAPABILITIES

- Construction Disputes

MEET THE TEAM

Shy Jackson

London

shy.jackson@bclplaw.com
+44 (0) 20 3400 4998

James Clarke

London

james.clarke@bclplaw.com
+44 (0) 20 3400 3507
