

THE SCOPE OF A REFERENCE TO ARBITRATION IS NOT LIMITED BY THE PLEADINGS

By Richard Bamforth & Liz Williams

The Technology and Construction Court took a "broad view" of the factual background when determining whether an additional claim fell within an arbitrator's terms of reference and hence within the arbitrator's jurisdiction. The court held that, if the claim fell within the "factual matrix" underlying the terms of reference, then it did not matter that neither the claimant's statement of case nor the terms of reference mentioned the specific clause under which the additional claim was brought.

Factual background

In *Bond v Mackay & Others* [2018] EWHC 2475 (TCC), Mr Bond and British Gas plc entered into a deed which allowed British Gas to run a pipeline under Mr Bond's land. British Gas was later succeeded by Southern Gas Network (Southern).

The agreement provided that if Mr Bond wished to work any minerals on the land, he had to give 30 days' notice of his intention to do so. Southern was then entitled to serve a counter-notice preventing Mr Bond from starting or continuing the work, and would have to pay Mr Bond compensation to the value of the minerals he was unable to work, referred to as "sterilized minerals". In a separate provision, Southern was required to take reasonable precautions to avoid interfering with Mr Bond's use of the land.

Disputes arose as to whether or not Southern had properly complied with the counter-notice procedure and as to the amount of any compensation payable.

Procedural background

Mr Bond referred the disputes under the compensation procedure to arbitration. The arbitrator identified the terms of the reference

to arbitration as "to determine the dispute between the parties concerning the compensation payable in respect of the sterilization of minerals".

Mr Bond later sought to add a claim for compensation on the basis that Southern had not taken reasonable precautions to avoid interfering with his use of the land to extract minerals. The arbitrator determined that the new claim was not within the initial reference to arbitration and that he therefore had no jurisdiction to decide it.

Mr Bond applied to the Technology and Construction Court under Section 67 of the Arbitration Act 1996 to confirm that the arbitrator did have jurisdiction.

The Technology and Construction Court decision

Mr Jonathan Acton Davis QC (sitting as a Deputy High Court Judge) found that the arbitrator had jurisdiction over the second claim. In his reasoning, he stressed the importance of taking a "broad view" of the factual background when determining the scope of the reference to arbitration. In his view, since the second claim sought compensation under the same deed as the first, it was within the scope of the reference to arbitration despite the fact that it did not expressly refer to the obligation to take reasonable precautions. Nor did it matter that Mr Bond did not refer to that obligation in his statement of case. The scope of the reference to arbitration could not be reduced by the pleadings.

The court set aside the award in respect of the second claim and the arbitrator's costs order in favour of Southern.



Comment

This case illustrates the importance of paying close attention to the tribunal's terms of reference when conducting an arbitration. A party wishing to avoid the risk of additional claims being added to the same arbitration should request that the arbitrator specifies the claims with which he is dealing with as much particularity as possible. Otherwise, it may be difficult to resist a later attempt to add additional claims arising out of the same factual background.

Likewise, claimants should consider at an early stage whether their case should be pleaded on two or more alternative bases in order to preserve a fallback argument in the event of being unsuccessful on their primary case. Had Mr Bond included his claim for compensation for interference with his use of land at the outset, the costs and delay of the application to the TCC might have been avoided.

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