The restriction of new issues being raised at trial (Re Fundão Dam Disaster)

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Dispute Resolution analysis: This case serves as a reminder that proportionality and the overriding objective remain key in respect of case preparation and in terms of the issues that the parties may advance at trial. In particular, parties will not be allowed to raise new issues at the eleventh hour that have not been adequately brought to the attention of the other side, certainly where an opportunity to consider the same would be required by the opposing party, and where this would risk derailing the trial timetable. The power to exclude such issues from consideration is expressly provided for pursuant to CPR 3.1. Further, where a party seeks to appeal a case management decision prior to the handing down of a substantive judgment, it is prudent to consider the making of that application to the judge seised of the case. At the very least, it is important to ensure that the judge in question is made aware of the application and promptly so. Written by Georgia Whiting, barrister, 4 King's Bench Walk.

Re Fundão Dam Disaster [2020] EWHC 2471 (TCC)

What are the practical implications of this case?

This case makes very clear that, while skeleton arguments are not pleadings, it will be rare for courts to allow arguments to be made at the eleventh hour that have not been previously raised within a party's skeleton argument (or pleadings). This is particularly so where to allow such arguments would require the opposing party to be afforded the opportunity to respond, such that the trial timetable would be likely derailed.

It also serves as a reminder to parties that an application to appeal should be made promptly, and that it is also prudent to inform the judge whose decision is being appealed, especially where judgment is yet to be handed down. In such circumstances, the trial judge is likely to be in the best position to consider any application for permission to appeal, having been seised with the facts and having heard the oral evidence.

Further, the judgment in this instance clearly shows the need to keep the volume of documents and skeleton arguments to a minimum, and parties risk losing favour from the court through attempts to subvert directions to do so through the introduction of additional notes, merely seeking to add to the volume of written submissions already made. A comment by the judge that the procedural history of this case did not make for happy reading clearly evidences the importance of case preparation in a matter such as this; proportionality and the overriding objective are always at the heart of such litigation.

What was the background?

On 5 November 2015, the Fundão dam in south eastern Brazil collapsed, resulting in 40 million cubic meters of iron ore mining tailings being released into the Doce River. The consequential pollution made its way to the Atlantic Ocean, causing devastation on its way. Nineteen people died and hundreds of thousands were affected and suffered loss.

The underlying proceedings in this case related to individual, corporate and institutional claimants contending that the defendants were liable to compensate them for the losses suffered as a result of the disaster. The defendants sought to argue that the legal liability to the claimants did not fall upon them, but instead on others including the owner and operator of the dam, Samarco Mineração SA (Samarco), a Brazilian mining company. The corporate structure of Samarco was complex, but one of the defendant companies (forming part of the corporate structure) was a company incorporated in England.

During the course of submissions, counsel for the claimants, Mr Hollander QC, sought to ventilate an argument concerning an issue as to Samarco's financial position but which had not been included in his skeleton argument and to which there had been no previous reference in any other context (save that, while initially pleaded, it had expressly been withdrawn in correspondence). In the exercise of his

case management powers, the judge had ruled that it was not open to Hollander J to bring the question of Samarco's solvency into consideration.

The judge began writing the substantive judgment on 3 August 2020, but was subsequently informed that the claimants (without informing the court) had sought to appeal the decision to disallow the claimants to rely upon the newly raised issue in respect of solvency. No permission to appeal had been sought at the hearing by Hollander J. Instead, the claimant had expected a single judge of the Court of Appeal to adjudicate on the merits of an appeal without the input of the trial judge seised with the facts of the case and having heard oral evidence.

Having belatedly been made aware of the issue, the trial judge invited the parties to make submissions to him concerning the order in which the determination of the application for permission to appeal and the handing down of his substantive judgment should proceed. Newly instructed counsel for the claimants proposed that the judge accept that he was wrong to disallow the insolvency issue to be argued, which would negate the need for an appeal.

What did the court decide?

While acknowledging that there were circumstances in which it may be appropriate for a judge to change their mind after giving judgment, the judge was not persuaded that his judgment was wrong. He addressed the various grounds of appeal for ease of reference.

One key argument related to the assertion that the judge treated the skeleton argument of the claimants as akin to a pleading. The judge instead considered that, while a skeleton argument of course is not a pleading, it does not mean that a party enjoys a 'carte blanche to introduce issues at the eleventh hour which had been entirely omitted from its skeleton argument'. For the purposes of achieving the overriding objective, the judge noted that the court has the power pursuant to CPR 3.1(2)(k) to exclude an issue for consideration where it had not been adequately identified (or identified at all) in the skeleton argument of the party purporting to raise it.

Furthermore, the judge considered that, if as the claimants contended, the issue was of considerable significance, the importance of the same ought to have been fully articulated by Hollander J at the time he was seeking to introduce it. In any event, if the issue was of such significance, the failure to raise it earlier was all the more egregious.

Having declined to reconsider his decision, the judge turned his mind to the question of whether he should decline to hand down his substantive judgment until the application for permission to appeal had been considered. He preferred the defendant's approach that the Court of Appeal should determine the application for permission to appeal before the substantive judgment was handed down. If the permission to appeal application were to fail, the substantive judgment could be handed down promptly thereafter. If permission were granted, then the claimants would retain the option, at that stage, of seeking to persuade the Court of Appeal, contrary to his own view, to postpone its substantive adjudication on the appeal until after he had handed down his judgment.

Case details

- Court: Queen's Bench Division, Technology and Construction Court (Manchester District Registry), High Court of Justice
- Judge: Mr Justice Turner
- Date of judgment: 18 September 2020

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