

Mass. Co. Can't Ax Liability Finding In Student Housing Row

By **Caroline Simson**

Law360, New York (August 2, 2016, 8:28 PM ET) -- An English judge on Tuesday nixed a bid by a Massachusetts construction company to prevent the University of Notre Dame (USA) in England from enforcing an expert's liability determination, the first step in ending a dispute over the renovation of student housing in London.

Mr. Stephen Furst QC, sitting as deputy high court judge, rejected arguments from ZVI Construction Co. LLC that the expert had no jurisdiction to resolve issues relating to the company's liability arising from a contract between UND and TJAC Waterloo LLC, which had sold the property designated for student housing to the university.

Instead, ZVI impliedly agreed that the expert would have jurisdiction since the company took an active part in the procedure. As a result, that finding is final, the judge said.

"There is nothing unfair or illogical about this," the ruling stated. "ZVI had every opportunity to argue these points, but for whatever reason it either chose not to deploy those arguments or did not consider them."

The judge declined to issue a declaration stating that ZVI was not party to an arbitration agreement with UND, saying such a declaration would be superfluous since there is no application to refer the dispute to arbitration.

He also would not say whether ZVI owes UND any substantive obligations under the development agreement between UND and TJAC. The expert determination proceeded on the basis that there was no dispute that ZVI did owe TJAC substantive obligations under the agreement, so it would not make sense to issue a declaration stating the opposite.

The dispute has raised concurrent separate proceedings in Massachusetts initiated by UND, which is asking the court to preclude ZVI and TJAC from dissipating their assets before the damages determination. In April, the court had awarded UND a \$7.2 million attachment after determining that the expert liability was an arbitral award, though the decision is currently on appeal before the First Circuit.

ZVI had been asking the English court to prevent UND from enforcing an expert determination in their dispute arising out of a contract relating to the purchase and renovation of a former hospital in London, which was to be converted into student housing by ZVI. The property was being sold by TJAC, and the

judge noted in Tuesday's ruling that the two companies have "a close connection."

The contract between the university and TJAC provided for the refurbishment the hospital before it was sold to UND, but UND said that certain serious and critical safety defects came to light soon afterward. Thereafter, the university enlisted an expert to determine the companies' liability in the matter, as outlined in their contract.

UND obtained an "expert determination" against TJAC and ZVI in England in July 2015 in which the Massachusetts-based companies were found to have breached their contract. The expert must still decide how much TJAC and ZVI owe for the breach, according to the opinion.

UND estimates that the recoverable amount will be around \$9 million, though TJAC and ZVI had suggested the number will be much lower.

Attorneys for the parties did not immediately respond to requests for comment outside normal business hours in London.

ZVI is represented by Alexander Nissen QC, who was instructed by Sheridan Gold LLC.

The University of Notre Dame (USA) in England is represented by Laurence Harris of Cooley (UK) LLP.

The case is ZVI Construction Co LLC v. The University Of Notre Dame (USA) In England, case number HT-2016-000094, in the High Court Of Justice, Queen's Bench Division Technology and Construction Court.

--Editing by Edrienne Su.