

1st Circ. OKs Appeal Of Notre Dame Faulty Construction Award

By Jack Newsham

Law360, New York (July 29, 2016, 6:40 PM ET) -- Two Massachusetts companies found liable by an English arbitrator for shoddy construction work on a University of Notre Dame dormitory in London can appeal a federal judge's ambiguous order confirming the award, the First Circuit ruled Friday.

Friday's decision came in a three-line order that the appeal should proceed "in the usual course," and directed developer TJAC Waterloo LLC and builder ZVI Construction Co. LLC to file a brief arguing why the partial award against them should not have been confirmed. Argument is scheduled to wrap up in October.

TJAC and ZVI have yet to be ordered to pay Notre Dame, but U.S. District Judge Allison D. Burroughs in Massachusetts had confirmed an arbitral ruling earlier this year that found the companies liable for dozens of dorm construction flaws, including fire safety hazards. Judge Burroughs restricted the pair from selling off \$7.2 million in assets that could be used to pay an eventual award.

The companies appealed. But in the lower court, Notre Dame pressed Judge Burroughs to make them reveal where the assets were. The First Circuit said it was unsure it was allowed to hear the appeal, but TJAC and ZVI argued that her decision to confirm the partial arbitral award and attach their assets amounted to a final judgment, even though she asked the parties to come to her with any disputes.

"The so-called 'attachment' effectively operates as an injunction and prohibits TJAC and ZVI from transferring or selling property 'pending further order of the court,'" the companies told the First Circuit in May. "This court, therefore, has jurisdiction of this appeal by virtue of 28 USC Section 1292(a)(1), which permits interlocutory review of orders of a district court 'granting, continuing, modifying, refusing or dissolving injunctions.'"

TJAC and ZVI — whose exact relationship is unclear, although they share an address — face the prospect of a massive arbitral award in connection with their rehab and \$16 million sale of a building near London's Waterloo station in 2011 that now houses Notre Dame students. The companies had sought to subpoena a university employee in Indiana courts to reduce their prospective damages, but were denied.

The dispute began in 2014, when TJAC and ZVI complained they still had not been paid the full purchase price for the building. At that point, the college's London affiliate, University of Notre Dame (USA) in England, said more than 100 defects remained and sought an arbitration-like process known as an expert determination under their contract.

The expert, Tony Bingham, is expected to rule soon. But the English High Court of Justice is also expected to rule on a challenge to his ability to hear the case in September or early October, according to a filing by TJAC and ZVI earlier this month.

An attorney for Notre Dame declined to comment, and lawyers for TJAC and ZVI did not reply to requests for comment.

Notre Dame is represented by Robert B. Lovett, Michael J. McMahon and Elizabeth Trafton of Cooley LLP.

ZVI Construction Co. LLC is represented by Richard Briansky and Amy B. Hackett of McCarter & English LLP. TJAC Waterloo LLC is represented by John W. DiNicola II of DiNicola Seligson & Upton LLP.

The case is the University of Notre Dame (USA) in England v. TJAC Waterloo LLC et al., case number 16-1397, in the U.S. Court of Appeals for the First Circuit.

--Editing by Edrienne Su.