



## LEGAL BRIEFING

### *Norwest Holst Ltd v Carfin Developments Ltd*

[2008] CSOH 138, Outer House, Court of Session, Lord Glennie

#### **The Facts**

The claimant building contractor, entered into a contract with the defendant on or about 1 November 2006 for the construction of certain works in connection with the stabilisation of an abandoned coal mine beneath a site in Carfin.

The contract incorporated the ICE Conditions of Contract, 5th edition dated June 1973 (January 1979 Revision) subject to various bespoke amendments agreed between the parties (“the contract”). Clause 60 of the contract dealt with “Certificates and Payment”. This clause was amended by the parties and provided for interest on overdue payments.

The claimant contended that they issued a monthly statement in the form of an application for payment dated 31 August 2007. Thereafter the Engineer issued a certificate, certifying an amount of £1,136,525.00. The claimant’s claimed payment of that amount, less payments previously made, leaving a balance of £216,860.00. They also claimed interest on that sum.

The defendant disputed the claimant’s case. They said the document issued by the Engineer was not a valid certificate and maintained that even if it was a valid certificate that prima facie triggered the obligation to make payment, the defendant was entitled to withhold payment pending the resolution of their claims for breach of contract. In particular they alleged that the claimant was in breach by reason of their delay in carrying out the works. They also argued that any application for payment had to contain supporting information which was objectively sufficient.

In response, the claimant argued that the defendant had not served a valid withholding notice in terms of section 111(1) of the Housing Grants Construction and Regeneration Act 1996 (“the Act”) and was therefore not entitled to withhold payment of sums which they were due to pay in terms of the contractual mechanism.

#### **The Issues**

There were a number of issues before the Court:

- (i) was the claimant’s application for payment valid and was the Engineer’s certificate valid?
- (ii) was the failure to send the certificate to the correct party a failure which resulted in prejudice; and finally
- (iii) the Court was asked to consider whether or not there were any points which could be said to raise a real dispute or difference so that the case should be sisted for arbitration.

#### **The Decision**

Lord Glennie held that it was incorrect to say that the application had to contain supporting information which was objectively sufficient. It was up to the Engineer to decide what information was appropriate and whether or not

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he should grant a certificate.

In relation to the Engineer's certificate it was held that this was a valid certificate; it identified the amount due and required payment of that amount less any amounts paid. Furthermore, it was in precisely the same form as the previous Engineer's certificates.

The certificate was not sent or received by the defendant. However, it was held that if there was a failure to send the certificate to the correct party, it was a failure that did not result in any prejudice and no remotely arguable case had been put forward that the defendant was misled or prejudiced in any way.

It was accepted by Lord Glennie that where there is a binding reference to arbitration, the proper course is to sist the case until it has been settled by arbitration. The defendant has a right to such an order whenever an action has been brought by someone who is a party to an arbitration agreement. However, the formulation adopted was that the jurisdiction of the arbiter should only be ousted by the court if there is no basis upon which a two sided dispute can be identified.

Lord Glennie formed the view that the defendant did not raise any points which could be said to raise a real dispute or difference so that the case should be sisted for arbitration.

#### ***Comments***

This is another timely reminder to all that there is no entitlement to withhold payment of a sum that is due unless effective notice has been given. This is a strict requirement of the Act. If no notice is given at all there is no right to withhold payment. If a notice is given but is defective in some way, for example being out of time, again there is no right to withhold payment.

Birgit Blacklaws  
November 2008

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