



LEGAL BRIEFING

Construction Industry Training Board (aka CITB-Construction Skills) v Beacon Roofing Ltd [2011] EWCA Civ 1203, Mr Justice Longmore, Mr Justice Rimer and Mr Justice Warren

The case concerned an appeal on the question of whether Beacon was still liable to pay the levy imposed by CITB in respect of members of Beacon's workforce who were employed through a services company.

The Facts

The Construction Industry Training Board ("CITB") imposes a levy on employers across the construction industry to fund training.

Beacon Roofing Ltd ("Beacon") is a roofing contractor. A number of Beacon's roofing operatives are self employed sub-contractors and therefore the provisions of the Construction Industry Scheme (the "CIS") apply. Compliance with CIS involved significant paperwork and various administrative duties.

On 21 February 2007, Beacon entered into a contract (the "Contract") with Hudson Contract Services ("Hudson"). Effectively the Contract enabled Hudson to engage Beacon's operatives so that it was liable under the CIS for the provision of the operatives' services to Beacon. This relieved Beacon of the administrative clerical work in complying with the CIS, although Beacon retained responsibility for insuring the operatives and complying with health and safety legislation. The Contract did not alter the way in which Beacon recruited its roofing operatives or the levels of pay.

Within 6 weeks of entering into the Contract, 28 workers swapped to Hudson. By 2010 Hudson had engaged 95 workers under the Contract.

In April 2009, CITB issued its levy assessment against Beacon requiring it to pay £18,446. Part of the levy, £3,235, related to sums due for employees on Beacon's own payroll. The remainder, £15,211, was 1.5% of the sums paid to Beacon's self employed workers i.e. its roofing operatives. The relevant statutory framework was the Industrial Training Levy (Construction Industry Training Board) Order 2009 (the "Order"), in particular the "labour only agreements" which appear at articles 8(1) and 2(1)(h) of the Order.

The Employment Tribunal ("Tribunal") held that Beacon was not liable to pay the levy for the roofing operatives engaged by Hudson. In its reasoning the Tribunal acknowledged that services, i.e. the labour of the operatives, were provided by Hudson to Beacon under the Contract. However, it also noted that Beacon had entered into the Contract with Hudson so that it would be relieved of the administrative and clerical work involved in complying with the requirements of CIS, and since that had been the reason why Beacon entered into the Contract that was the main purpose of the Contract.

CITB appealed to the High Court. In allowing the appeal and reinstating the levy assessment notice, Justice Keith held that the Tribunal had erred in law because "*the reason why a party enters into a contract is not necessarily the purpose of the contract*". The Judge noted that this did not mean that the parties' subjective intentions had no part to play in ascertaining the purpose of the contract. Beacon appealed to the Court of Appeal.

The Issue

The key issue before the Court of Appeal was whether Beacon were still liable for the levy in respect of the roofing operatives or whether, as the Employment Tribunal had held, the change had resulted in Beacon no longer being liable for the levy.

The Decision

In dismissing the appeal and upholding the decision of the High Court, the Court of Appeal considered the meaning of the Contract. In seeking to discover the reason why Beacon entered into the Contract, the Court found that the Tribunal had asked itself the wrong question and thus erred in law by departing from the statutory wording. The High Court Judge was therefore entitled (and bound) so to hold and, if appropriate, answer the right question namely what was the sole and main purpose of the Contract pursuant to which Beacon agreed to pay for Hudson's services.

The Court of Appeal held that with regard to the purpose of the Contract, the inquiry must focus essentially on the terms of the Contract and must therefore be an objective inquiry determined by reference to the terms of the Contract and the relevant background.

In conclusion, the Court of Appeal found that as the Tribunal had asked itself the wrong question, the findings of fact made in answering that question could not be decisive. The High Court Judge had asked the right question and was able to say that it was the only conclusion open to the Tribunal on the primary facts. The answer which the High Court Judge gave was that the main purpose of the contract between Beacon and Hudson was the provision of the services of the operatives. The Court of Appeal agreed that this was the only conclusion properly open to the Tribunal and the appeal was dismissed.

Comments

The issue as to whether the purpose of an agreement or arrangement between an employer and another person was wholly or mainly the provision of services within the definition of a labour only agreement (as provided at article 2(1)(h) of the Order) is to be determined objectively by reference to the terms of the Contract and the relevant background, not by reference to the reasons of the parties for entering into the contract.

The decision reached in this case is not unexpected and demonstrates that contractors cannot avoid standard industry levies by using intermediary service contracts.

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