



LEGAL BRIEFING

Yuanda (UK) Co Ltd v WW Gear Construction Ltd [2010] EWHC 720 (TCC)

The Facts

Yuanda installed curtain walling as a trade contractor to the Park Plaza Hotel, Westminster Bridge. Their contract with Gear contained a number of amendments. They had amended clause 4.11.2 of the JCT Trade Contract to provide for a contractual interest rate of 0.5% above the base rate. The JCT Adjudication Provisions had been deleted and replaced with the TeCSA scheme.

There was also a "Tolent clause". This clause provided that the referring party would always be liable for all of the parties' costs and adjudicator's fees. However, the clause in the Yuanda and Gear contract was not reciprocal. It only applied if Yuanda referred the dispute to adjudication, and in that case the referring party then paid both parties' legal and experts' costs.

The Issues

- (i) Did the "Tolent clause" offend the requirements of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA")? If so, would the clause therefore be ignored?
- (ii) Was the contractual rate of interest a substantial remedy, or would a higher rate apply?

The Decision

Mr Justice Edwards-Stuart held that the "Tolent clause" did not comply with section 108 of the HGCRA. As a result, the entire provisions relating to adjudication were ousted, and instead replaced by part 1 of the scheme. The entire statutory adjudication rules were applicable rather than the contractual rules.

The Judge also held that the contractual interest rate was not a substantial remedy. The statutory rate was 8% above the base rate. 0.5% above the base rate was clearly not a substantial remedy, and so the Late Payment of Commercial Debts (Interest) Act 1998 rate of 8% applied.

Comment

This case is good news for the users of adjudication. Clauses that require the sub-contractor to bear both side's legal fees and experts' costs fall foul of the requirements of the HGCRA and will be void. In addition, very low rates of contractual interest will not be a substantial remedy, and so the higher rate provided for in legislation will apply.

Note that the Judge considered that an interest rate of 5% above the base rate might be a substantial remedy. This will relieve many who are using JCT forms of contract, as they by default provide for 5% above the base rate. Nonetheless, that point was not finally decided by the Judge in this case, and so it is still open for a more detailed argument on another occasion.