



## LEGAL BRIEFING

### *Able Construction (UK) Ltd v Forest Property Development Ltd*

[2009] EWHC 159, TCC, Mr Justice Coulson

#### **The Facts**

The claimant (“Able”) was engaged by the defendant (“Forest”) to carry out work on a residential development in Harrow under a contract incorporating the JCT 1998 conditions. A dispute arose which was referred to an adjudicator, who found in favour of Able in the sum of 130,927.17 plus VAT and interest, in addition to paying his fees.

After the adjudication, the parties met and entered into a settlement agreement, under which the following was established:

- (i) Forest were to pay Able £150,000 in four instalments, in addition to the adjudicator’s fee which was due immediately;
- (ii) It was in full and final settlement of all claims or liabilities in relation to the work, provided Forest paid in full; and
- (iii) In the event that Forest failed to pay an instalment, Able could enforce the adjudicator’s decision with full costs and interests.

Forest paid the first instalment, however defaulted on the second, and consequently Able commenced proceedings on 7 January 2009 pursuant to CPR Part 8 in the TCC for the sum of £110,000 outstanding under the Agreement. The parties met on site on 15 January 2009, and Forest gave Able a cheque for £10,000 which was honoured. Further to this, Forest alleged that another settlement agreement was made, varying the terms so that the debt would be paid off at a rate of £3,000 a month. Able denied this, stating that this would simply not have been agreed to due to the fact that it was already in debt and this arrangement would take almost three years for the full sum to be paid off.

#### **The Issues**

- (i) Did the settlement agreement affect the enforcement of the adjudicator’s decision?
- (ii) Had there been an agreement to pay at £3,000 per month; or
- (iii) Should the entire unpaid balance of the adjudicator’s decision be paid immediately?

#### **The Decision**

Forest did not attend the enforcement hearing, and neither party could afford the solicitors that had instructed them in the original adjudication. A settlement or compromise agreement may not be a construction contract within the meaning of the HGCRA. However, in this situation, the adjudicator had not been appointed under the settlement agreement itself, and Mr Justice Coulson found the Agreement to be of limited relevance. It merely dictated what should occur should Forest default.

The Judge also had to consider, in Forest’s absence and without their oral evidence, if another settlement agreement had been reached on 15 January 2009. He decided that the court procedures ought to be flexible enough to

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ensure that a point such as this should be addressed straightaway in order to prevent parties from avoiding summary judgment by raising an issue which required oral evidence. Thus, the Judge heard the evidence from Able and held that Forest were indeed in breach of the existing settlement agreement. Therefore, Able were entitled to judgment for the unpaid balance of £100,000 pursuant to the original adjudicator's decision.

Able commenced proceedings to enforce the adjudicator's decision, and obtain payment.

***Comment***

Able were successful in the adjudication, but recognising difficulties with Forest's cashflow, Able agreed to accept payment by instalments. It is of course more sensible to be paid slowly rather than not at all, given the potential risk that Forest could be liquidated.

It is always difficult when a defendant does not attend the hearing. A judge needs to ensure that the defendant's position is considered fairly. Here, the evidence did not support a further delay to any payments of the amount to the adjudicator's decision which had been due for some time.

The initial payment demonstrated Forest's agreement. When they defaulted the adjudicator's decision demonstrated that a specific amount was due and so the Judge ordered immediate payment.

Fenwick Elliott advised, in the adjudication, the successful party Able.

Nicholas Gould  
June 2009

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