



LEGAL BRIEFING

Avoncroft Construction Ltd v Sharba Homes (CN) Ltd

HHJ Kirkham, [2008] EWHC 933, Technology and Construction Court

The Facts

This was an application to enforce an adjudicator's decision awarding Avoncroft Construction Ltd ("Avoncroft") £56,380. Avoncroft applied for summary judgment. Sharba Homes (CN) Limited ("Sharba") resisted this application on the basis that it was entitled to set off LADs. Alternatively, Sharba sought a stay of execution, or an order that the money be paid into court and not distributed until the outcome of a second adjudication.

The parties had entered into a JCT 1998 Private Without Quantities form of building contract (the "Contract") in September 2006. The contract was terminated on 14 September 2007. The Contract did not provide for sectional completion. However, evidence was presented that Sharba did take partial possession of some of the work. Sharba serving a withholding notice on 15 February 2008 for the LADs on the basis that the final date for payment of the sum awarded by the adjudicator was 21 February 2008.

The Issues

There were four issues for the Court to decide:

- (i) Was Sharba entitled to LADs?
- (ii) Was Sharba entitled to set off its claim for LADs against the sum due pursuant to the adjudicator's decision?
- (iii) Was Sharba's withholding notice valid?
- (iv) Should the monies be paid into court?

The Decision

Sharba was not entitled to claim LADs on the basis of the principle in *Bramall & Ogden v Sheffield City Council*. In *Bramall & Ogden* there was a discrepancy in how to calculate LADs (the clause provided for the rate of £20 per week for each uncompleted dwelling) since as they were expressed to be per dwelling this could not be reconciled with partial possession as it related to the Works and therefore the clause failed. As this Contract did not provide for sectional completion, this principle applied.

Sharba was not entitled to set-off its claim for LADs from the adjudication sum as the adjudicator did not decide the question of entitlement to LADs but whether Avoncroft was entitled to an extension of time for completion. Sharba had not made a claim for LADs in the adjudication. Further there was no express provision in the contract enabling Sharba to deduct LADs from an adjudicator's decision. Instead the contract obliged the parties to comply with an adjudicator's decision. Therefore, even if Sharba was entitled to be paid LADs, it was not entitled to set these off against the sum which the adjudicator had awarded.

As it was not served 7 days before the final date for payment, Sharba's withholding notice was ineffective. Although Sharba also sought to rely upon a withholding notice served in September 2007, this was expressed to be stated to apply to sums to be withheld from Avoncroft's Application for Payment No 13. As there was no real prospect of success, summary judgment was given.

Although it was not necessary to consider whether the monies should be paid into court, the Judge did so. Evidence was presented that Avoncroft had had a number of county court judgments registered against it. Sharba also wished to wait until the outcome of a second adjudication in which Sharba was claiming in excess of £800,000. There was no entitlement to a stay on this ground. Further the Judge was not convinced that Avoncroft would probably not be able to repay the judgment sum.

Comment

This case reinforces the Court's reluctance to allow parties to set-off LADs against an adjudicator's decision. Sharba did not fall within the principles set out by Mr Justice Jackson in *Balfour Beatty Construction Ltd v Serco Ltd* namely that:

- (i) where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of LADs, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision; and
- (ii) where the entitlement to LADs has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set off LADs against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case.

Therefore, Sharba were not entitled to set-off the LADs.

Charlene Linneman
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