



LEGAL BRIEFING

Redwing Construction Ltd v Mr Charles Wishart [2010] EWHC 3366 (TCC), Mr Justice Akenhead

The Facts

Mr Wishart engaged Redwing to refurbish a property at Lyall Mews in Westminster, London. The building contract was an amended JCT Prime Cost Building Contract 2006. Redwing was essentially entitled to be paid the prime cost of the works, plus a contract fee, plus any entitlement to loss and/or expense.

A dispute arose over Redwing's entitlement to an extension of time, which Redwing referred to adjudication ("Adjudication 1"). Redwing submitted that because it was entitled to the extension of time, it was entitled to the contract fee for the extended period. Mr Wishart defended on the basis that the contract fee was a fixed sum, only payable for the original contract duration, but not for any extension.

The adjudicator decided largely in favour of Redwing. In coming to his decision, the adjudicator had queried, and purported to decide, whether Redwing was also entitled to an adjustment in the contract fee, to reflect an increase in the prime cost. When this arose during the adjudication, Mr Wishart responded stating that any dispute about the adjustment of the contract fee had not crystallised, had not been referred to the adjudicator and was accordingly outside of his jurisdiction. Nevertheless, the adjudicator went on to make a direction on this issue in his decision. Following the issue of the decision, Redwing then wrote to the adjudicator stating that they believed it had not referred the contract fee issue, and it was not within his jurisdiction.

Subsequently, Redwing commenced a second adjudication over the assessment of the final account ("Adjudication 2"). Part of Redwing's claim was that it was entitled to an adjustment to the contract fee, to reflect the uplift in the prime cost. Mr Wishart submitted, amongst other objections, that the issue had already been decided in the first adjudication, so it could not be decided upon in this adjudication. On this issue, the adjudicator decided in Redwing's favour, entitling Redwing to an uplift of the contract fee which was proportionate to the uplift of the prime cost. However, the adjudicator made an error by including the contract fee in the estimated prime cost, when calculating the uplift. This was pointed out by Redwing's solicitors and the adjudicator agreed and amended the decision. This resulted in an increased balance owed by Mr Wishart.

The Issues

- (i) Was the contract fee issue decided in Adjudication 1, so that it could not be decided on in Adjudication 2? and
- (ii) In Adjudication 2, did the adjudicator's amendment come within the definition of the 'slip rule'?

The Decision

Adjudication 2 was valid and it was enforced. Mr Justice Akenhead decided that Redwing had not referred the issue of the contract fee to the adjudicator in Adjudication 1, and the parties had not given the adjudicator jurisdiction to consider this during the adjudication. In fact both parties expressly submitted that the contract issue fee was not a part of Adjudication 1. The Judge decided that that aspect of the adjudicator's decision was "a wholly unnecessary part" of the decision and was not crucial to his substantive decision.

With regards to the slip rule, the Judge held that the adjudicator's amendment in Adjudication 2 was legitimate. Once he had realised that the inclusion of the contract fee in the estimated prime cost was wrong, it was a simple arithmetical amendment to remove it and recalculate the adjusted contract fee. At no point did the adjudicator's reasoning change.

Comment

This is the first case we are reporting on in 2011 and the TCC still remains steadfast in its approach to enforcement of adjudicators' decisions. Here, the court focussed on what the adjudicator had actually been asked to decide and took a restrictive approach in relation to issues which fell outside of that remit. Parties should also note that the court paid close attention of their submissions made during the adjudication. Remember that you will be bound by these original submissions in any enforcement hearing. In this instance, what those submissions showed was that the first adjudicator had taken a broader view of the original dispute than both the parties, and subsequently the TCC, thought was appropriate.

The second issue is a good example of the benefit of the slip rule, and its inclusion in the amendments to the Construction Act can only be positive. The rule prevents decisions being ruled a nullity on the basis of a technicality.

Chris Farrell
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