



LEGAL BRIEFING

When a contract does not comply

Aveat Heating Limited v Jerram Falkus Construction Limited

TCC, HHJ Harvey QC, [2007] EWHC 131

The Facts

Jerram engaged Aveat to carry out plumbing and mechanical works pursuant to a contract incorporating the GC/Works subcontract conditions (the “Contract”). The adjudicator gave his decision for Aveat on 17 November 2006. Jerram resisted enforcement on the basis that the terms of the Contract were not compliant with the Housing Grants Regeneration and Construction Act (the “Act”).

Clause 38A.5 of the Contract provides:

The adjudicator shall notify its decision to the Contractor and the Sub-Contractor not earlier than 10 and not later than 28 days from receipt of the notice of referral, or such longer period as is agreed by the Contractor and the Sub-Contractor after the dispute has been referred. The adjudicator may extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred. The adjudicator’s decision shall nevertheless be valid if issued after the time allowed. [emphasis added]

The referral notice was dated 11 October 2006 and the time was validly extended by seven days so that the decision had to be reached, it was argued by Jerram, by 15 November 2006. However, the decision was not reached until 17 November 2006.

The Issues

1. Was clause 38A.5 compliant with the Act?
2. Was the adjudicator’s decision made out of time?
3. Had Aveat validly consented to extend the time for the decision until 17 November?
4. Was there a dispute? If so, was it sufficiently identified in the Notice?

The Decision

Judge Havery QC, for the same reasons as *Epping Electrical Limited v Briggs and Forrester*, held that clause 38A.5 was not compliant with the Act because of the last sentence of the clause (emphasised in the quote above). Sections 108(2)(c) and (d) of the Act were mandatory rather than directory. Therefore the provisions of the Scheme applied.

The Judge decided that the date of the referral notice mean the date of its receipt by the adjudicator. The adjudicator had received the referral on 13 October and therefore his decision was in time.

The adjudicator’s decision was not made out of time. Jerram argued that as the adjudicator had acknowledged receipt of the referral by faxed letter dated

13 October 2006 at 16.24 he therefore had to reach his decision by 16.24 on 17 November. The Judge stated that no account was to be taken of fractions of a day and the adjudicator reached his decision on 17 November, within the time allowed.

Although the Notice did not comply with paragraphs 1(3)(b) or (c) of the Scheme, the Notice was sufficient for the purpose of selecting a suitable adjudicator. Judge Havery did not think that compliance with all the requirements of paragraph 1(3) of the Act was a condition of enforcement of an adjudicator's award. The Scheme's requirements of a notice of adjudication must be regarded as directory rather than mandatory.

Judge Havery then considered whether there was a dispute and if so whether it was sufficiently clearly identified in the notice of adjudication. Jerram relied on *Edmund Nuttall Ltd v RG Carter Ltd* as they alleged that Aveat had relied on information that was not previously relied upon and therefore could not be the subject of the dispute. Judge Havery analysed the monetary claim and concluded that the claim referred to the adjudicator was substantially the same as that made previously. It was clear that there was a dispute over application no. 7 and exactly the same dispute was the subject of the notice of referral. There was "not the slightest doubt" that Jerram knew what the dispute was. Therefore the adjudicator had jurisdiction to make his decision.

Further, the adjudicator was not deprived of his jurisdiction by failing to give notice under clause 38A.3.2 of the Contract. Its only effect would be that the adjudicator was not appointed under clause 38A and this had been found for other reasons.

Comment

This decision relates to the GC/Works contract. In this decision, Judge Havery decided that the provisions of clause 38.5 of the Contract were not valid. Similarly, Judge Havery had earlier decided, for the same reasons, in *Epping Electrical*, that the provisions of paragraph 16 of the CIC adjudication provisions also were not valid. Therefore the provisions of the Scheme for Construction Contracts applied. There have been a number of cases recently involving decisions that are given out of time. If acting as an adjudicator, all decisions should be both made and communicated within the time frame allowed for the decision.

Charlene Linneman
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