



LEGAL BRIEFING

R and C Electrical Engineers Ltd v Shaylor Construction Ltd [2012] EWHC 1254 (TCC),

This case concerns a claim for Part 8 declaratory relief in relation to an adjudicator's decision. Whilst the application was declined, the adjudicator's decision was upheld as binding until such time as the dispute was finally resolved by litigation or arbitration.

The Facts

R&C Electrical Engineers Ltd ("R&C") was engaged as sub-sub-contractor by Shaylor Construction Ltd ("Shaylor") to undertake mechanical and electrical works in respect of a LIFT (NHS Local Investment Finance Trust) project in Walsall (the "Subcontract"). In November 2011, a dispute arose between the parties concerning R&C's financial entitlements under the Subcontract. On 15 November 2011 R&C referred the dispute to adjudication. Mr Eric Mouzer was appointed as adjudicator (the "Adjudicator").

During the adjudication R&C claimed time was at large and sought damages for delay together with determination of its final account. Shaylor's position was that R&C had failed to complete by the date for completion and sought to recover damages by way of a counterclaim for delay.

The Adjudicator determined that time was at large and that the 39 weeks taken by R&C to complete the works was not a reasonable time, as R&C were responsible for at least 4 weeks of delay. Shaylor's cross claim for delay was based on the provisions in the Subcontract for delay, rather than as if time was at large. Therefore the Adjudicator found that Shaylor had failed to demonstrate any identifiable loss attributable to the 4 week delay for which R&C was responsible. The final Subcontract sum was £1,495,034, leaving a balance of £196,963 (plus VAT) due to R&C in respect of final payment.

In essence, the Adjudicator found that R&C had an entitlement to £196,963 and that this sum, although not payable immediately, was payable in accordance with clause 21.8(b) of the Subcontract, clause 21.8 being a "pay when certified" provision.

By way of a Part 8 application, R&C sought a declaration for immediate payment of the sum found due by the Adjudicator despite the fact that the Adjudicator had directed that it was not to be paid forthwith. R&C contended that the contractual machinery relating to certification in the Main Contract had broken down so that it was no longer possible for the Contractor, Ashley House, to issue a final certificate. Under the terms of the Main Contract the issue of a final certificate was a pre-condition of R&C's right to payment. However, R&C submitted that since the pre-condition was a nullity it was entitled to immediate payment of the sum found due by the Adjudicator.

The Issues

- (i) Had the contractual machinery in relation to certification in the Main Contract broken down with the result that it was no longer possible to issue a final certificate?
- (ii) If so, were R&C entitled to immediate payment of the final certificate as determined by the adjudicator?
- (iii) If the contractual machinery had not broken down, was R&C entitled to final payment without any deduction or set off?

The Decision

Mr Justice Edwards Stuart held that in the absence of evidence before the Court regarding the position between Shaylor and the Contractor, it could not be inferred that the contractual machinery of the Main Contract had broken down. The question of whether R&C were entitled to immediate payment of the final contract sum as determined by the Adjudicator did not therefore arise.

As to whether Shaylor was entitled to withhold money against the sum determined by the Adjudicator, the Judge found that in the circumstances there was nothing to prevent Shaylor setting off against the sum found due by the Adjudicator any sum that it would have been entitled to set off under clause 21.8 of the Subcontract.

In reaching this decision the Judge referred to the case of *Shimizu Europe Ltd v LBJ Fabrications Ltd*¹ which the Judge stated applied a similar reasoning to the current proceedings. The Adjudicator had not determined whether Shaylor had a valid claim for delay in a time at large situation as Shaylor's delay claim was not advanced on this basis. Therefore Shaylor was not seeking to exercise a right of set off or counterclaim in the enforcement proceedings. Rather it was seeking to exercise its contractual right that in the Judge's view had been expressly preserved by the Adjudicator's decision itself.

Comments

This case reaffirms the principle that in limited circumstances a party may set off against an adjudicator's decision, i.e. as the final date for payment had not arrived Shaylor would be in a position to issue a withholding notice against those sums. The Judge did however make clear that this did not affect the Adjudicator's decision which was binding on the parties until the dispute was finally resolved by litigation or arbitration.

Lucy Goldsmith
May 2012

¹ [2003] BLR 381
