



LEGAL BRIEFING

Reinwood Limited v L Brown & Sons Ltd

Court of Appeal, Mummery LJ, Arden LJ and Dyson LJ [2007] EWCA Civ 601

The Facts

This appeal raised a point of interpretation of a standard JCT Form of Contract on which there appears to be no previous authority. The point turned on the relationship between clauses 24 (damages for non-completion), 25 (extension of time), 28 (determination by the Contractor) and 30 (certificates and payment).

The subject contract was between L Brown & Sons as contractor in these proceedings and Reinwood Ltd as employer. The contract was for the construction of 59 Apartments in Manchester and was in the form of a JCT Standard form of Contract, 1998 Edition, With Quantities incorporating Amendments 1 of 1999, 2 of 2000 and 3 of 2001.

There were considerable delays on the on the project and on 14 December 2005 the contract architect issued a certificate of non-completion under clause 24.1. On 11 January 2006, the architect issued interim certificate number 29 showing the net amount for payment as £187,988, with a final date for payment of 25 January 2006.

On 17 January 2006, Reinwood issued two notices: one stated that Reinwood had the “intention to deduct from monies due to you under Interim Certificates issued after 14 December 2005 liquidated and ascertained damages...” and the second confirmed Reinwood’s intention to withhold £61,629 LADs from monies due under interim certificate 29.

Reinwood made no further payment before 26 January 2006, when Brown gave notice of specified default under clause 28.2.1.1. The next day, Reinwood advised Brown that it would pay the sum of £49,303 by 2 February and accordingly did so.

Then, on 8 June 2006, Reinwood was due to pay £39,981 pursuant to interim certificate 34. That sum was not paid and on 4 July 2006, Brown served a termination notice relying on, amongst other things, the 26 January notice as specifying the previous default. Brown stopped work and left site. Reinwood then wrote to Brown on 6 July and advised that it considered Brown’s actions in leaving the site and refusing to return amounted to a breach of contract. Reinwood confirmed its acceptance of that breach of contract and contended that Brown had no right to terminate the contract.

The trial judge found that Brown’s termination of the contract was valid. On appeal, Reinwood sought declarations that Brown unlawfully terminated the contract and was in repudiatory breach. Brown on the other hand sought declarations that it lawfully determined its employment under the contract.

The Issue

On the basis that it was common ground that as at 17 January 2006, the 3 conditions for deduction from interim certificate 29 of the LADs specified were satisfied, the Court considered that only one issue arose on this appeal:

whether the cancellation of the certificate of non-completion under clause 34.1 by the grant of an extension of time meant that the subsequent grant of an extension of time should defeat the right to deduct the amount of LADs specified in a valid notice.

The Decision

The court held that Reinwood had paid the amount properly payable in respect of the interim certificate and Brown had not been entitled terminate the contract. The cancellation of the certificate of non-completion by the grant of the extension of time did not have the effect of defeating the right to deduct the amount of LADs specified in a valid notice. Where the conditions for the giving of a notice of intention to deduct were satisfied, the right to deduct the amount of LADs specified crystallises on the giving of the notice. If it had been intended that a subsequent grant of an extension of time would defeat the right to deduct LADs specified in a valid notice, it is likely that it would have been expressed in the contract. The court emphasised that whilst the contract makes express provision for a certificate of non-completion to be cancelled upon the fixing of a later date of completion, there was no equivalent provision for cancellation of a notice under clause 30.1.1.4 where a certificate of non-completion has been cancelled.

Further, it does not follow from the fact that the contract contains no provision to the effect that an employer's entitlement to deduct LADs at the final date for payment depends on, or must be calculated by reference to the completion date fixed at any time other than that fixed at the date of the notice that, because a change in circumstances defeated one pre-condition for the giving of notice, the entitlement to do what the notice provided was also defeated.

Comment

The court has thankfully clarified what has previously been regarded as a grey area. It is now clear that a valid notice to deduct does not cease to be effective when a certificate of non-completion is cancelled. This decision will perhaps come as a surprise to some; it is easy to see how a contractor might consider that the cancellation of a certificate of non-completion by the employer would affect a previously accrued right to deduct LADs. The court's interpretation of the provisions is however a logical one, and means that an employer's right to deduct LADs for poor performance previously is preserved, even when the contractor picks up its game and the tables are turned.

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