



LEGAL BRIEFING

Pay your dues

Pierce Design International Limited v Mark Johnston & Another

TCC Judge Peter Coulson QC [2007] EWHC 1691

The Facts

The defendants, Mr and Mrs Johnston, engaged the claimant contractor, Pierce Design International Limited, to carry out construction works at the property. The contract incorporated the JCT Standard Form of Building Contract (With Contractor's Design), 1998 Edition.

During the contract the defendants failed to make interim payments to the claimant in accordance with clause 30.3.3 of the contract. The unpaid sums totalled £93,460.33 plus interest.

The works were not completed by the contractual completion date and the defendants complained about defective and incomplete works. They served a notice of default, pursuant to clause 27.2.1 of the JCT conditions, notifying the claimant that it was not proceeding regularly and diligently with the construction work. The defendants alleged that the default was not remedied and purported to determine the employment of the claimant. That determination was disputed.

Before the court, the claimant contended that clause 27.6.5.1 of the JCT contract, which allowed the employer not to pay a sum due despite the absence of a withholding notice, fell outside section 111 of the Housing Grants, Construction and Regeneration Act 1996 and that the case of *Melville Dundas Ltd (In Receivership) v George Wimpey UK Ltd (2007) UKHL 18, WLR 1136*, should be limited to its facts. Even if the clause was in accordance with section 111, the proviso in it operated to prevent the defendants from resisting the claimant's application for sums due under the contract on the basis that they had been "unreasonably not paid" as there had been no appropriate withholding notice.

The Issues

Two issues arose:

1. Whether, on the facts of the case, clause 27.6.5.1 fell foul of section 111 of the 1996 Act, because it purported to allow sums to be withheld without the serving of a withholding notice; and
2. Whether, assuming clause 27.6.5.1 was in accordance with section 111, the proviso in clause 27.6.5.1 operated to prevent the defendants from resisting the claimant's application for the sums due under the contract on the basis that those sums have been "unreasonably not paid" by the defendants.

The Decision

Judge Coulson QC held that he was bound by the House of Lords decision in *Melville*, and it was not open to the court to restrict the consequences of that decision. The argument that on one set of facts a clause in a standard JCT

contract complied with the Act, whilst on another set of facts, it did not, was not attractive and was a recipe for uncertainty. Accordingly, the first basis of Pierce's application failed.

In relation to the second issue, the sums were properly due and had accrued a sufficient time before the determination of the contract. As a matter of interpretation, the non-payment by the defendants amounted to a breach of the JCT contract, and the clause operated and prevented the defendants from relying on their cross-claim to defeat the claimant's claim for sums due. The claimant was therefore entitled to summary judgment.

Comment

Under the terms of the contract a sum due by way of an interim payment under clause 30.3.3 would reasonably have not been paid by the employer if there was a valid withholding notice in respect of that sum under clause 30.3.4. Conversely, if there was no withholding notice, the sum would unreasonably have not been paid by the employer.

This decision meets many of the concerns which have been expressed with the approach adopted in *Melville Dundas* to the effect that the decision might allow an unscrupulous employer to use determination as a way of avoiding his responsibility to make interim payments. Judge Coulson's construction does not cause any permanent prejudice to the defendant. It is not a determination of their rights; all it does is require them to pay, on an interim basis, the sums which, pursuant to the contract, ought to have been paid months ago.

Birgit Blacklaws
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