



LEGAL BRIEFING

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Thomas Vale Construction Plc v Brookside System Limited

TCC HHJ Frances Kirkham [2006] EWHC 3637

The Facts

The claimant, Thomas Vale, sought a declaration that a withholding notice was invalid. The contract was a JCT Standard Form of Building Contract with Contractor's Design 1998 Edition incorporating Amendments 1/5 and further amendments set out in the Employer's Requirements. The works comprised the construction of 24 apartments. A dispute arose as to the date of completion, and both parties made claims against each other. Cross-adjudications were commenced. In April 2006, the parties resolved some of their differences in a written supplemental agreement. Clause 7 provided:

Neither party shall be obliged to make any payment to the other, whether by way of payment for the Works, damages for late completion or the release of retention until such time as the Final Account is either agreed between the parties or determined pursuant to the Building Contract.

The supplemental agreement also provided for an expert to determine the date for practical completion and the outstanding snagging works. The appointed expert concluded that practical completion was achieved on 22 May 2006, and that there were over 600 snagging items. The final account was progressed, but was not agreed. An adjudicator determined the amount of the final account. Irrespective of a claim for a final payment Brookside issued a withholding notice.

The Issue

The issue was whether the final account should now be paid, and whether the withholding notice was valid.

The Decision

Her Honour held that on the true construction of the contract (in other words the building contract and the supplemental agreement read together) the parties had not agreed that payment would become due as soon as the final account had been determined. Clause 30.5 of the original contract dealt with the final account. It provided that the final account and final statement were due at the latest of either the end of the defects liability period, the day named in the notice of completion and making good defects, or the date of submission of the final account. The supplemental agreement did not amend these terms, and the latest of those three events had not yet occurred. Payment was therefore not due.

Nonetheless, the contractor was entitled to make an application for payment under clause 30.3.5 and Brookside was entitled to serve a withholding notice. Four arguments were raised in connection with the withholding notice:

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1. The grounds for the withholding notice were Thomas Vale's failure to use reasonable endeavours to remedy the defects, but the damages were calculated on the basis of engaging others to carry out the work. Her Honour rejected the distinction, on the basis that it was inappropriate to "apply fine textural analyses to a notice which is intended to communicate to the other party why a payment is not to be made" [para 43].
 2. The notice contained a small number of items that were not contained within the expert's snagging items. Her Honour concluded that a small number of de-minimus items would not invalidate a notice.
 3. The contractor argued that the final account procedure determined the amounts paid, so any deductions should have been raised during that process. It was not open to the employer now to set off against the final account once that process had been concluded. Her Honour held that the determination of the final account did not trigger an obligation to make a payment, and therefore the employer could serve a withholding notice providing it was served within the timescales of the contract.
 4. Finally, Thomas Vale argued that the employer was in effect attempting to set off a disputed and liquidated counterclaim against a sum found to be due by an adjudicator. Her Honour rejected that argument. The adjudicator determined the final account amount, but did not identify a precise payment that was to be made. Further, the expert had found that there were many snagging items, and the contractor had not completed those items. Clearly it would be inequitable to make a payment that disregarded the failure of the builder to carry out the defects work that had been identified by the expert.

Thomas Vale was therefore not entitled to a declaration that the withholding notice was invalid.

Comment

This is an interesting case dealing with the effect of a supplemental agreement on the contract, and also with withholding notices. The parties had agreed that no further payment would be made until the final account was resolved. An adjudicator determined the amount of the final account, and then the employer served a withholding notice. The contractor argued that the amount should be paid regardless of any withholding, because of the terms of the supplemental agreement. The Judge made it clear that the supplemental agreement needed to be read with the contract (so that the contract was being read as a whole). The payment terms in the main contract still applied, because they had not been amended by the supplemental agreement. Therefore, the withholding notice was valid.

Care is therefore needed when negotiating supplemental agreements. If the supplemental agreement is to deal with future payments, then the original payment terms in the main contract must be expressly superseded.

Nicholas Gould
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