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Legal Briefing

Ted Lowery on the perils of indifference to contract formation

Everwarm Ltd v BN Rendering Ltd [2019] EWHC 3060 (TCC)

Before Mr Alexander Nissen QC sitting as a Deputy High Court Judge

In the Technology and Construction Court

Judgement delivered 18 November 2019

The facts

During 2014 the Scottish Government established a programme for installing external wall insulation to domestic premises. Everwarm, a company specialising in energy efficiency advice, engaged BNR Rendering ('BNR') to provide labour for the insulation installation works. The works consisted of fixing insulation boards to a building's external surfaces and applying a spray-on coating.

At a meeting in December 2013 Everwarm tabled and BNR signed a sub-contract for the first batch of insulation installation works. Thereafter Everwarm engaged BNR to provide labour at several sites across Scotland but it was not until December 2015 that Everwarm began to issue written sub-contract orders, by which time BNR had already carried out some £8m of work.

During early 2016 BNR first raised concerns about alleged underpayments. In subsequent discussions it became clear that a significant proportion of the discrepancies between the parties' valuations concerned what were known as "ingoes", which it was common ground concerned the application of insulation to external window and door reveals. BNR suspended all works in March 2017 and during May 2017 gave notice that the works under each of the 38 discrete sub-contracts were complete and that the retention release, in an aggregate sum of £406k, was now due. In response, Everwarm contended that significant overpayments had been made and, relying upon clause 4.9 in its written sub-contract terms, contended that it was entitled to make an assessment of the value of the works and recover as a debt within 7 days, any overpayments.

During 2018, Everwarm commenced proceedings claiming some £798k in overpayments as a debt due together with interest, pursuant to clause 4.9. In its defence, BNR maintained that clause 4.9 did not apply to the majority of the 38 sub-contracts which had been made verbally and therefore did not include Everwarm's standard terms. Alternatively, if clause 4.9 was included in any agreed sub-contract terms, it was void and/or unenforceable. BNR therefore rejected Everwarm's case and counter-claimed the retentions.

The issue

What terms were included in the sub-contracts? Was Everwarm entitled to a refund or BNR to a further payment?

The decision

The judge found on the facts that the very first sub-contract included oral and written conditions, but the latter, as set out in the document signed by BNR in December 2013, did not include Everwarm's sub-contract standard terms. The judge noted that the following 25 sub-contracts made during 2014 and 2015 were all agreed on a verbal basis only. Since none of these sub-contracts included any due and final dates for payment nor any mechanism for payment notices, the Scheme applied to import the necessary provisions.

Although Everwarm had provided BNR with its standard terms on 21 December 2015, the judge decided that that the next two sub-contracts entered into in early 2016 did not incorporate these terms, as there was no evidence to suggest this. The judge considered that the final 10 sub-contracts did incorporate Everwarm's standard terms albeit that different versions had been used.

The judge found there was no agreed method of payment for the ingoes meaning that BNR were entitled to be paid a reasonable sum for any additional work, to be determined by reference to expert evidence, if there could be no agreement.

The judge rejected BNR's submission that clause 4.9 should be construed to preclude any assessment after completion of the works. The judge however concluded that Everwarm's case on clause 4.9 failed as on the facts and contrary to an express/implied term, Everwarm's assessments had been carried out arbitrarily and capriciously.

Finally, the judge decided that where no evidence of an alternative substantive valuation had been offered by Everwarm, no set-off could be applied and BNR was therefore entitled to retentions release in the sum of £406k plus £81k in interest.

Commentary

Given the parties' consistently casual approach to the contractual arrangements, the judge was required to undertake a forensic analysis of the background facts and circumstances particular to several of the individual sub-contracts in order to establish basic principles. This was before going on to consider more mundane questions such as whether those payment terms that were in place complied with the Construction Act. As noted the valuation of the ingoes remained undecided.

As the judge observed early on in the 65 page judgment, given the informal approach and the volume of work undertaken it was obvious that the parties would find themselves in dispute over the amounts to be paid. This judgment demonstrates on multiple levels the unfortunate repercussions of contractual uncertainty

Ted Lowery
December 2019