



LEGAL BRIEFING

Aedas Architects Ltd v Skanska Construction UK Ltd

[2008] CSOH 64 Lord McEwan

The Facts

This dispute arose out of works done on contracts to renovate some schools in Midlothian. The claimant sought periodical payments but was met with refusal because the defendant claimed that it had large and on-going contra set-offs which were much more than what the claimant was pursuing.

The claimant argued that while the withholding notices had been issued, they failed to specify an amount, grounds and then an attribution to each ground. Therefore, the “counter-notices” were ineffective under section 111 of the Housing Grants, Construction and Regeneration Act 1996 (“the Act”).

The defendant claimed that none of the counter-notices should be subjected to fine textual analysis. They were not addressed to lawyers but to contract managers and others who were aware of what was happening on site in an ongoing contract concerning several places. The defendant argued that the grounds and amounts had been specified and that was enough.

The Issue

The issue before Lord McEwan was whether or not the withholding notices specified in sufficient detail, the grounds for set-off.

The Decision

While the *Melville Dundas* case was referred to, it was held that the case was not relevant for present purposes. However, Lord McEwan accepted that the case did stress the need for clarity when interim payments are to be withheld. That however must be set against the background of the machinery of adjudication. Section 111 of the Act was intended to strike at “set-off abuse”.

The main principle on interim payments is that parties should know in advance where they stand.

Having considered the withholding applications in detail, Lord McEwan held that the notices were couched in the most general terms and sought payment for “professional services”. The problem to both sides was appreciated by the court. The claimants wished the clarity demanded by the Act whereas the defendant said that they have a substantial and on-going set-off did want to part with any money.

Given that this was an application for summary judgment, the Judge was unable to say that the defence was bound to fail. He did not think that the matter could be properly disposed of, only on the counter-notices. Issues of fact could arise and this would allow evidence of meetings and conversations to explain the letters and the events surrounding the notices. For example, the defendant would be entitled to explain why they were unable to make any financial attribution against particular terms. In any event, it was held that the documents themselves were effective under section 111. Sufficient attribution was made against five grounds. That in itself was enough to find that it could

not be said that the defence was bound to fail.

Comments

In any commercial matter there is always the risk of insolvency, delays and cash flow difficulties. However, it is essential that parties always know in advance where they stand.

A key requirement of withholding notices is that they are clear and specify how much is to be withheld and why.

Although in this case it appears that the Judge was allowing the defendant to submit further evidence as to why they were unable to make any financial attribution against particular terms, it is important to remember that he also found that the notices were effective in any event. Construction professionals should not rely on being afforded the opportunity to submit further evidence after the date for a withholding notice has passed.

Birgit Blacklaws
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