



LEGAL BRIEFING

Mr S G Hart t/a D W Hart & Son v Mr Dennis Smith and Mrs Jacqui Smith

[2009] EWHC 2223 (TCC) HHJ Toulmin CMG QC

The Facts

The Smiths engaged Hart to convert three barns into four houses, at a site in Somerset. The contract was a JCT Standard Building Contract 2005 without Quantities. In November 2008, Hart issued application 21, of which the Smiths paid all but £9,514.04, and in March 2009 issued application 24 for £70,386.38, of which the Smiths paid none. The Smiths issued a withholding notice after the relevant date set by the Contract but this did not specify which of Hart's applications the withholding notice referred to. On 26 May 2009 the contract administrator issued certificate 25 ordering a repayment of £7,381.20 by Hart to the Smiths. Three days later the Smiths issued a further notice of withholding for £138,185.79 stating that that amount was payable by Hart in respect of Liquidated and Ascertained Damages "LADs", damage to a collapsed wall, refinancing charges and legal costs.

On 20 May 2009 Hart commenced adjudication ("Adjudication 1") for the outstanding amounts of applications 21 and 24. On 16 June the Smiths commenced an adjudication seeking repayment of certificate 25, payment of the £138,185.79 and a declaration that they were entitled to a certificate of non-completion in respect of each barn ("Adjudication 2").

Hart were awarded the full amount claimed in Adjudication 1. In Adjudication 2 the Smiths were awarded the amount of certificate 25 and a payment of £4,112.04 for the collapsed wall. The adjudicator made a declaration that the Smiths were entitled to certificates of non-completion in respect of all three barns, but did not allow the claims for LADs, refinancing charges or legal costs. He stated that until the certificates of non-completion were issued, and therefore any delays were confirmed, Hart could not be required to pay LADs or the refinancing charges.

Following the decision in Adjudication 2, the contract administrator issued certificates of non-completion stating that the deduction of LADs was at the Smiths' discretion. The Smiths then wrote to Hart claiming £71,314.29 in LADs pursuant to the certificates of non-completion but in doing so differentiated between this claim and the amounts awarded in Adjudication 2.

Hart commenced enforcement proceedings for Adjudication 1 and offered to set-off the specific sums awarded against Hart in Adjudication 2 of £11,835.31. However the Smiths contended that they were entitled to set-off their claim for LADs against the decision in Adjudication 1, which they submitted was a natural consequence of (i) the declaration made by the adjudicator that they were entitled to non-completion certificates; (ii) the issuance of non-completion certificates by the contract administrator; and (iii) the notification of the claim for LADs made by the Smiths to Hart.

The Issue

Could the Smiths set-off their claim for LADs against the decision in Adjudication 1?

The Decision

The effect of section 111 of the HGCRA 1996 is generally to exclude a right of set-off from an adjudicator's decision. It is fundamental to the process of adjudication that in multiple adjudications each decision should be capable of enforcement separately.

Judge Toulmin CMG QC held that the sum claimed did not follow logically from the adjudicator's decision and consequently could not be set-off. The only issue that did logically flow was the issue of the non-completion certificates and no more. In his opinion, he thought it relevant that the sum now claimed for LADs was different to the amount claimed for LADs in Adjudication 2.

Accordingly, the decision in Adjudication 1 was enforced, subject to the specific sum of £11,835.31 awarded in Adjudication 2 being deducted.

Comment

The intention of Parliament is that the decision of an adjudicator should be given effect in a way which is consistent with providing a quick and effective remedy on an interim basis and without consideration of the arguments relating to other provisions in the contract. There are only very limited ground for refusing to enforce immediately an adjudicator's award setting out sums which have been found by the adjudicator to be due to a party in an adjudication.

Here the judge decided that an amount could be set-off against the decision because the specific amount was easily ascertainable and the LADs related directly to the claim.

Nicholas Gould
October 2009
