



LEGAL BRIEFING

YCMS Ltd (t/a Young Construction Management Services) v (1) Stephen Grabiner and (2) Miriam Grabiner

[2009] EWHC 127, TCC, Mr Justice Akenhead

The Facts

YCMS applied for summary judgment to enforce the decision of an adjudicator against the Employer, Mr and Mrs Grabiner. By a building contract in writing which incorporated the JCT Intermediate Form (including all amendments up to and including 2005), Mr & Mrs Grabiner employed YCMS to carry out extensive works at their property.

Interim certificates were issued by the architect on a regular basis. Two versions of certificate no. 13 were issued. One was entitled “draft” and certified as due, exclusive of VAT, for the sum of £50,984.14. The other version certified as due, exclusive of VAT for the sum of £50,013.14. Certificate no. 13 was not paid. A dispute arose as to whether or not either sum was payable to YCMS pursuant to certificate no. 13 and also as to whether or not there was any justification for withholding earlier sums certified as due and VAT sums.

YCMS referred the dispute to adjudication. Mr & Mrs Grabiner claimed that certificate no. 13 was a draft certificate and was not itself valid and enforceable. Their defence included the assertion that certificate no. 14 was enforceable and represented in effect the sum due to YCMS. Certificate no. 14 had been paid and therefore no monies were due.

The adjudicator found in favour of YCMS. On receipt of the decision, YCMS informed the adjudicator that he had made an arithmetical error and that in fact a greater sum was due. The adjudicator decided that both his and YCMS’ calculations were wrong and amended his decision by inserting an even greater sum due, which he calculated by a different method.

The sum said to be due under the first or revised first decision was not paid. YCMS commenced a second adjudication. The adjudicator made a second award in YCMS’ favour, which Mr & Mrs Grabiner paid.

A further dispute arose between the parties in relation to the final certificate. The adjudicator made a third award, this time in favour of Mr & Mrs Grabiner.

YCMS issued court proceedings seeking the recovery of sums in relation to the first decision (as revised). Mr & Mrs Grabiner opposed enforcement on four grounds: (1) the first award was outside the adjudicator’s jurisdiction because it purported to include certificate 14 which had not been included in the Referral; (2) the purported revision of the first award was not valid; (3) the second award had duplicated the first award; and (4) they should be permitted to set off sums awarded to them under the third award against any sums to be paid to YCMS under the first award.

The Issues

Issues were raised as to:

- (i) the jurisdiction of the adjudicator;

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- (ii) whether the adjudicator was entitled to revise his decision;
 - (iii) whether the revision should have been made without giving Mr & Mrs Grabiner the opportunity of being heard;
 - (iv) whether a second award effectively duplicated the decision in the first award; and
 - (v) whether Mr & Mrs Grabiner could set off sums awarded in their favour under the third award.

The Decision

Certificate 14 had not been included in the Referral to the adjudicator but because of Mr & Mrs Grabiner's defence, the adjudicator had been bound to have regard to the certificate. The mention of certificate 14 in his decision was no more than a factual observation that was material to determining how much had been paid by Mr & Mrs Grabiner at the time he made his decision.

Mr Justice Akenhead held that an adjudicator can only revise a decision if it is an implied term of the contract by which adjudication is permitted to take place that permits it. If there is such an implied term, it can and will only relate to patent errors. A patent error can certainly include the wrong transposition of names or the failing to give credit for sums to have been paid or simple arithmetical errors. The slip rule cannot be used to enable an adjudicator who has had second thoughts and intends to correct an award. It would usually be something that could be corrected relatively simply and speedily. In the instant case, the adjudicator had gone further than just correcting his error and had decided to make a recalculation using different figures. Mr & Mrs Grabiner were therefore materially prejudiced by the amendment. Therefore the revised first award was not valid.

It was held that Mr & Mrs Grabiner had not begun to establish an arguable case on the facts to support their argument that the second award duplicated the first. In relation to the third award, the decision was only recently issued and it was possible that YCMS might take a jurisdictional objection in any enforcement proceedings by Mr & Mrs Grabiner. There is nothing in the Housing Grants Construction & Regeneration Act 1996 (the "Act") which legislates for setting off one adjudicator's decision against another. Mr Justice Akenhead granted summary judgment for YCMS in the sum of £28,675.44 inclusive of VAT.

Comment

It is necessary to analyse with some care what has been referred to adjudication. Binding adjudicator's decisions are to be enforced, even if the adjudicator is wrong on the facts or the law, because the contract or the Act makes the decisions binding until and unless the final dispute resolution process decides otherwise. If the adjudicator assesses the evidence wrongly or misappreciates the law, the resulting award or judgment will be erroneous but it cannot be corrected.