



LEGAL BRIEFING

Fenice Investments Inc v Jerram Falkus Construction Ltd; Jerram Falkus Construction Ltd v Fenice Investments Inc [2009] EWHC 3272 (TCC), Mr Justice Coulson

The Facts

Fenice Investments Inc ("Fenice") engaged Jerram Falkus Construction Limited ("JFC") to design and construct five residential properties and a commercial unit at a site in Camden, North London. Disputes arose in connection with JFC's interim application No. 19, specifically whether a valid withholding notice was issued by Fenice. JFC issued its application on 6 August 2009, for the net amount of £206,564.74. On 25 August 2009, the employer's agent issued a certificate for payment for the net sum of £71,473, and a withholding notice for the sum of £163,480.

The contract incorporated a JCT Design and Build Contract, Revision 1 2007, as further amended by the parties ("JCT Conditions"), and a set of employer's requirements ("ERs"). Both documents contained different interim payment mechanisms. JFC relied on the JCT Conditions (pursuant to which the withholding notice would not have been issued in time) whilst Fenice relied upon the ERs (pursuant to which the withholding Notice would have been issued in time).

JFC referred the dispute to adjudication, where it was awarded £177,455.94. The adjudicator had agreed with JFC's construction, but reduced the amount claimed because of issues concerned with delay. Fenice did not pay the sum awarded, and subsequently issued Part 8 proceedings requesting a declaration that Fenice's interpretation was correct. JFC subsequently issued enforcement proceedings. The claims were consolidated by the TCC.

The Issues

The issues were:

- (i) whether the payment provisions in the JCT Conditions and the ERs could be read together; and
- (ii) if not, which set of provisions took priority.

The Decision

The Judge decided that the payment provisions fundamentally conflicted with each other and could not be read together. The starting points for calculation of the final date for payment were different.

The Judge then had to consider which of the interim payment mechanisms applied. Clause 1.3 of the JCT Conditions as amended stated that the JCT Conditions would have priority over the ERs, the contractor's proposals and the contract sum analysis and could not be overridden or modified by anything contained in them. Fenice submitted that despite clause 1.3, the payment provisions in the ERs should be allowed to modify the JCT Conditions.

The Judge could find no authority to say that clause 1.3 should be disapplied. He considered that Fenice was simply submitting the argument, without foundation, to suit its commercial needs. The Judge therefore decided that JFC's interpretation of the payment provisions was to be preferred and, accordingly, the part 8 declarations were not granted and the adjudicator's decision was enforced.

Finally, the Judge gave a warning to parties who intend to challenge an adjudicator's decision, on a point of construction or law, by means of a Part 8 application. He considered that, the losing party must still, in the meantime, pay the amount of the Adjudicator's decision. If it did not do so that party should expect to be punished by way of punitive interest, if it is claimed by the opposing party as well as an adverse costs order, including the possibility of indemnity costs.

Comment

When compiling a building contract parties need to ensure that any amendments to the contract conditions are properly incorporated, and that they do not conflict with the technical documents. It is often the case that the preliminaries, in a set of employer's requirements, will contain information that will also be contained in the contract conditions, as highlighted in this case.

Further, parties should be aware that if they do not pay an adjudicator's decision on the basis that they plan to dispute the decision by legal proceedings, the TCC may order punitive interest and/or make an adverse costs order as a result.

Chris Farrell
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