



LEGAL BRIEFING

(1) William Hare Ltd v Shepherd Construction Ltd
(2) C R Reynolds (Construction) Ltd v Shepherd Construction Ltd
Court of Appeal [2009] EWCH 1603 (TCC)

The Facts

This was an appeal from a Technology and Construction Court (“TCC”) case relating to a “pay when paid clause”. The employer, Trinity Wakefield Ltd, went into administration. Shepherd attempted to rely upon a pay when paid clause in the sub-contracts in order to avoid making payment to several sub-contractors.

The term in the sub-contract followed the requirements of section 113 of the Housing Grants, Construction and Regeneration Act 1996 (“the Act”). That section outlawed pay when paid clauses unless the paying third party was insolvent. Insolvency was defined in the Act of 1996, and those definitions were repeated in Shepherd’s sub-contract.

However, the Enterprise Act 2002 amended the Insolvency Act 1986. Basically, three different types of administration were provided for under the Enterprise Act 2002. Two of those did not require a court order and so became known as “self-certified options”. There was therefore an amendment to section 113 of the 1996 Act substituting the old provisions with the self-certified provisions. This amendment had not been made to the Shepherd’s sub-contract.

The Issue

Could Shepherd rely upon the express wording of the pay when paid clause to avoid payment to the sub-contractors where the employer had adopted a self-certifying insolvency option?

The Decision

At first instance, Mr Justice Coulson in the TCC held that Shepherd could not rely upon the express provision. This was because the wording simply repeated the old requirements of section 113 of the 1996 Act, and did not take account of the new self-certifying option introduced in the Enterprise Act 2002. Shepherd appealed, but all three Court of Appeal Judges agreed with Mr Justice Coulson.

The new self-certifying option had not been included in the express terms of the pay when paid clause: Shepherd could, therefore, not say that the employer was “insolvent” within the meaning of the sub-contract. In order to avoid payment and rely upon a pay when paid clause, the express provisions need to be extremely clear.

Comment

It is somewhat ironic that section 113 of the Act was said to outlaw pay when paid clauses. In some respects, it did entirely the opposite. It made pay when paid clauses legally acceptable where the third party was insolvent. Pay when paid clauses have perhaps become more common since the introduction of section 113. However, they are interpreted extremely strictly and this case demonstrates that where the express provisions failed to take account of the new self-certifying options under the Enterprise Act 2002, the court will not allow the main contractor to avoid payment to a sub-contractor.

Those relying upon, or including pay when paid provisions within their contracts, should now carefully review the wording in order to see whether the express provisions require updating.

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