



LEGAL BRIEFING

HS Works Ltd v Enterprise Managed Services Ltd

[2009] EWHC 729 (TCC) Mr Justice Akenhead

The Facts

HS Works Ltd (“HSW”) was employed by Enterprise Managed Services Ltd (“Enterprise”) to carry out construction work which involved repair, reinstatement and re-surfacing of highways at various locations in and around Greater London. Following the completion of the Sub-Contract Works or the termination of the Sub-Contract, issues arose between the parties in relation to the evaluation of the final account and to a number of contra charges said to be due to Enterprise. There were two different adjudications involving two different adjudicators.

In the first decision, the adjudicator decided that £1,835,252.26 interest plus VAT and the adjudicator’s fees should be paid by Enterprise. In the second decision the adjudicator decided that the proper valuation of the Sub-Contract Works allowing for contra charges was £23,253,931.09. The effect of the second decision could mean that all or part of the sum decided to be due under the first decision should be repaid, if paid at all. Each party argued that the decision which was adverse to its interests was an invalid decision on the grounds of jurisdiction or natural justice.

Both parties issued its claim to enforce the relevant adjudication decision. Both parties also issued summary judgment applications. Directions were given so that the hearing of both applications was heard at one hearing.

The Issues

There were four issues before the court:

- (i) in the first adjudication, did the adjudicator exceed or fail to fulfil his jurisdiction in failing to address the merits and quantum of the contra charges? Did he in that respect fail to comply with natural justice? How, if at all, should the decision in the second adjudication impact on the first adjudication decision?
- (ii) in the second adjudication, did the adjudicator have jurisdiction to issue his decision? Did the adjudicator fail to apply the rules of natural justice?
- (iii) if both decisions are valid, how should they be given effect to? ; and
- (iv) finally, should the court decide the substantive issue as to whether new withholding notices needed to be issued by Enterprise after the submission of the final account, and, if so, what is the answer to that issue?

The Decision

The first area the court looked at was how, if at all the court deals simultaneously with two adjudication enforcements which decided different things but which might or do impact on each other. These are the cases in which one or other of the other decisions is invalid on jurisdictional or natural justice grounds. This class of case gives rise to no problem as an unenforceable decision can be ignored for all practical purposes in connection with the enforcement of a valid decision.

The more difficult case arises when there are two enforceable decisions which might or do impact on each other. In the Honourable Justice Akenhead’s opinion, the following steps need to be considered before one can consider whether in effect one can permit a set off of one decision against the other:

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- a) It is necessary to determine at the time when the court is considering the issue whether both decisions are valid; if not or if it cannot be determined whether each is valid, it is unnecessary to consider the next steps.
 - b) If both are valid, it is then necessary to consider if, both are capable of being enforced or given effect to; if one or other is not so capable, the question of set off does not arise.
 - c) If it is clear that both are so capable, the court should enforce or give effect to both of them, provided that separate proceedings have been brought by each party to enforce each decision. The court has no reason to favour one side or the other if each has a valid and enforceable decision in its favour.
 - d) How each decision is enforced is a matter for the court. It may be wholly inappropriate to permit a set off of a second financial decision as in such circumstances where the first decision was predicated upon a basis that there could be no set off.

It was held that both adjudication decisions were valid and enforceable. Therefore the parties and the courts are required to give effect to both decisions. The court was left in a difficult position as to how to deal procedurally with what has happened. On the one hand, Enterprise in breach of contract failed to pay HSW without set off or at all what it should have done in February 2009.

However as from March 2009, Enterprise would have been entitled to the return of the money since there would have been an overpayment (based on what the two adjudicators decided) if it had paid what was due pursuant to the first decision. The court has a discretion however as to how any order or orders on judgment should be drawn.

On balance, it was held in this case that the orders should be drawn to reflect the facts that HSW was entitled to be paid as per the first adjudication together with continuing interest, that HSW was bound to pay £12,411.69 towards the adjudicator's fees, that shortly before the court hearing, Enterprise paid some money to HSW to reflect what it considered to be the balancing effect between the two decisions and that, assuming that both decisions were to be given effect to, apart from the belated payment, there would have been a balance due to HWS. It would be pointless, at least on an administrative basis, it was held, for Enterprise to hand over a net sum due pursuant to the first adjudication direction followed by HSW having to hand back all or the bulk of what had just been paid to it by Enterprise.

Comment

The court also considered how and when a dispute crystallises. It was held that negotiation and discussion are likely to be more consistent with the existence of a dispute, albeit an as yet unresolved dispute. It was suggested by the Honourable Justice Akenhead that the court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or adjudication.

The common term 'dispute or difference' is less hard-edge than 'dispute' alone. In the Judge's opinion, commercial good sense does not suggest that the clause should be construed with legalistic rigidity so as to impede the parties from starting timely arbitration proceedings. The whole clause should be read in this light, leading the Judge in favour of an inclusive interpretation of what amounts to a dispute or difference.