



LEGAL BRIEFING

Alan Auld Associates Ltd v Rick Pollard Associates & Anor

[2008] EWCA Civ 655 Court of Appeal, Tuckey L J and Toulson L J

The Facts

This was an appeal from a County Court judgment dismissing Alan Auld Associates Ltd's ("Alan Auld") claim and giving judgment for Rick Pollard Associates ("Rick Pollard") on its counterclaim.

Both Alan Auld and Rick Pollard were chartered engineers. Alan Auld successfully tendered to provide project advice to the United Kingdom Atomic Energy Authority (the "Authority") in relation to the removal of radioactive waste from a power station shaft. The tender contemplated that some advisory work would be carried out by Rick Pollard. The parties entered into an oral agreement for Rick Pollard to provide this advisory work at an hourly rate with invoices to be submitted at the end of each month. Alan Auld would then invoice the Authority.

Although the Authority promptly paid Alan Auld, Alan Auld did not pay any of Rick Pollard's invoices on time. A schedule of invoices showed substantial and increasing periods of delay between one to nine months with more than half of the invoices paid over four months late.

Rick Pollard made a number of complaints about late payment. At the end of May 2006, Rick Pollard refused to carry out any further work for Alan Auld. At the time he was owed £21,000 and this work was his only source of income. Rick Pollard then continued to advise the Authority through another consultant.

Alan Auld brought this action claiming the extra £20 per hour it lost during the remainder of the project which represented its uplift on Rick Pollard's fees. Rick Pollard argued that the agreement was terminated by his acceptance of Alan Auld's repudiatory breach by persistently paying late and with every prospect of continuing to do so in the future.

The Issue

Did Alan Auld repudiate the engineering sub-consultancy agreement by its persistent late and non-payment of amounts due to Rick Pollard?

The Decision

Alan Auld had repudiated the agreement. The Court considered that the context in which the breaches occurred was important in this case. It was not a transaction in which the parties had a raft of mutual obligations to perform. Rick Pollard was to do the work for the Authority through Alan Auld and Alan Auld was to pay him for it. The agreement was therefore analogous to a contract of employment.

The trial judge had found that the term for time for payment lay at the heart of the agreement and the appeal court agreed with this. The breaches of this term were substantial, persistent and cynical. No payments were made on time and there were repeated complaints by Rick Pollard and broken promises by Alan Auld. Rick Pollard was entitled to assume that it would be treated in

the same way for the remainder of the project which had a year or so still to run.

Comment

This is a rare example of when persistent late or non-payment as grounds for repudiation has been successful. The Court was swayed by the fact that the sub-consultancy agreement was similar to a contract of employment and that this provided Rick Pollard's only source of income. As there were persistent late payments, the Court accepted Rick Pollard's evidence that he was being used to fund Alan Auld's business.

Charlene Linneman
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