



LEGAL BRIEFING

Enterprise Managed Services Ltd v East Midland Contracting Ltd

[2007] EWHC 727 (TCC), HHJ Stephen Davies

The Facts

The claimant sought to reverse the decision of an adjudicator, by which the adjudicator had decided that the claimant was obliged to pay the defendant the sum of £1,131,668.29 as damages for breach of contract.

The parties to the sub-contract continued to place orders and undertake work under the sub-contract after the expiry of the main contract completion date.

The defendant issued an application seeking (1) a declaration under CPR Part 11, that the court had no jurisdiction to decide the claim or, if it does, that it should not exercise its jurisdiction to do so, and (2) an order striking out the claim as disclosing no cause of action under CPR Part 24 or, an order for summary judgment against the claimant.

Both limbs of the application relied on clause 15 of the Sub-Contract which provided:

“...The parties shall not commence any action or proceeding other than adjudication arising out of or in connection with this Sub-Contract until such time as the Main Contract Works have been certified substantially or practically complete.”

It was the defendant’s case that the proceedings were brought at a time when the condition precedent to commencing proceedings, other than adjudication, has not been satisfied and that this prevents the court from having jurisdiction and operates a substantive defence to the claim asserted.

The Issues

The court was required to reach a final decision on the jurisdiction point and resolve the Part 3.4 and Part 24 applications. In doing so the court was required to determine what was meant by “Main Contract Works” and what clause 15 required by way of certification.

The Decision

Despite the fact that the terms of the main contract were not incorporated into the sub-contract, it was apparent that the terms of the main contract were an important part of the relevant factual matrix against which clause 15 must be construed. It was held that the expression “Main Contract Works” means work under any project performed by the claimant under a contract order issued under the main contract in respect of that project or in respect of which work was also ordered by the claimant from the defendant under the terms of the sub-contract.

The certificate of substantial or practical completion of the “Main Contract Works” means a project completion certificate as defined under the main contract. It is clear from the definition that no particular form of certificate is required and that the critical requirement is the authorisation by the manager

rather than the issue of the certificate.

On that basis, the defendant failed to make out its challenge to the jurisdiction. It was held that the claim did have a reasonable prospect of success and would not be struck out nor would the defendant be successful in having summary judgment on the claim.

Comment

The commercial purpose behind such a clause works so as to prevent the main contractor or sub-contractor from litigating disputes in relation to a main contract project in respect of which some or all of the works have been sub-contracted unless and until the project has been certified as practically complete under the main contract. This also prevents the parties from litigating disputes covering more than one or all projects under the sub-contract until all such projects have been certified under the main contract as practically complete. Note however, that this does not prevent either party from litigating disputes where, even though the individual project is complete, or even though the sub-contract as a whole has come to an end, the main contract continues with the main contractor performing all works himself or using new sub-contractors.

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