



LEGAL BRIEFING

Durham County Council v Jeremy Kendall (t/a HLB Architects)

[2011] EWHC 780 (TCC), Mr Justice Akenhead

The Facts

Durham engaged Mr Kendall to be the lead consultant on the design and construction of an extension to Spennymoor Leisure Centre, in County Durham. Mr Kendall submitted his tender for the project, which was split into 4 parts, and the tender was stated to be open for 2 months. Durham sent an email to Mr Kendall after the expiry of this period, advising that it wished to appoint Mr Kendall. Shortly after, the parties met for a meeting, primarily to discuss technical issues, of which Mr Kendall took minutes. Part 1 was already complete, and parts 3 and 4 were dependent on external funding. Therefore, initially Mr Kendall was instructed to proceed with part 2 of the project only. Mr Kendall was subsequently instructed to proceed on parts 3 and 4.

A dispute arose between the parties as to whether a failure of the floor slab and subsequent water penetration, was caused by a design fault of Mr Kendall. Durham commenced an adjudication for loss and damage caused by the alleged design fault, and was awarded £166,930.53. The adjudication was commenced against HLB Architects, yet the enforcement proceedings were commenced against Mr Kendall.

The Issues

- (i) Were all of the terms of the contract made or evidenced in writing?
- (ii) If all of the terms were in writing, was there a single contract, or were there three separate contracts relating to parts 2, 3 and 4 of the project? and
- (iii) Because the responding party named in the adjudication was HLB Architects but Mr Kendall was named in the enforcement proceedings, could the decision be enforced against Mr Kendall?

The Decision

The adjudicator's decision was ultimately enforced by the Judge. The contract was held to be evidenced in writing. Whilst the tender was the first offer to enter into a contract, this offer lapsed following the expiry of the 2 month period. However, the email from Durham was itself a counter offer which referenced the terms of both Durham's brief and Mr Kendall's tender. Further, at the meeting held shortly afterwards, final agreement was reached, and these final terms were recorded in the minutes. Subsequent minor terms were agreed, but were recorded in correspondence.

The Judge decided that there was a single contract relating to the whole project, rather than separate contracts for each part. The fact that parts 3 and 4 were conditional on securing of external funding was merely a condition subsequent. That is, Mr Kendall was appointed for the entirety of the project, but parts 3 and 4 of the contract would only be instructed if the external funding was obtained.

The Judge quickly disposed of the final issue. It was clear to all parties involved that Mr Kendall was HLB Architects, and vice versa. There was no evidence that HLB Architects had any other partners, and had no legal existence apart from Mr Kendall.

Comment

These enforcement proceedings should not have been necessary. On a proper analysis, the points taken by Mr Kendall were hopeful rather than realistic, which is the test set. It is an example of the type of case which is fortunately increasingly rare; the speculative defence rather than one based on one or more objectively realistic arguments. However, with the impending introduction of the amendments to the Construction Act, it is perhaps inevitable that challenges to enforcement proceedings will increase. Whilst it is likely that there will not be quite the volume of cases that passed through the courts in the early years of the Construction Act, there will be a need to obtain judicial guidance on the new principles.

Chris Farrell
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