



LEGAL BRIEFING

Working Environments Ltd v Greencoat Construction Ltd [2012] EWHC 1039 (TCC)

In this case the Judge looked at whether there was a crystallised dispute in circumstances where the Notice of Adjudication had been issued before the due date for payment. He also examined the extent to which the certain issues fell within the adjudicator's jurisdiction and, if they did not, whether it was possible to sever the adjudicator's decision to exclude those issues which fell outside of the crystallised dispute.

The Facts

The Defendant, Greencoat Construction Ltd ("Greencoat"), was a main contractor employed to carry out fitting out works at an office in Shaftesbury Avenue, London. Working Environments Ltd ("WE") were engaged as a subcontractor to carry out the mechanical services installation for the project. The adjudication clause incorporated the statutory scheme.

On 24 November 2011, WE submitted Application 10 to Greencoat as a result of which they claimed a total amount of £488,153.45 was due to them. On 2 December 2011, Greencoat issued its "Payment Certificate and Notice of Withholding Payment" in which it claimed that only £16,686.36 was due to WE. In a breakdown headed "Notification of items being withheld from this Valuation" a number of items were listed including "liquidated damages – tbc."

Payment was due under the Subcontract on 14 January 2012. On 8 December 2011, WE's claims' consultant wrote to Greencoat stating that there had been an undervaluation of WE's work and that a Notice of Adjudication would follow. The Notice of Adjudication was duly issued on 14 December 2011. Greencoat argued that the adjudicator had no jurisdiction because no dispute had crystallised as the date for payment had not yet accrued.

On 5 January 2012, Greencoat issued a withholding notice which listed a total of 12 items within it. This included liquidated damages of £120,000 as well as two other items which had not been raised previously. Greencoat expressly refused to extend the jurisdiction of the adjudicator to consider the withholding notice.

The adjudicator rejected Greencoat's jurisdiction arguments and found that "the amount due for payment on 14 January 2012 (excluding VAT) equals £277,378." This figure was later amended downwards (via the slip rule) to £250,860.

We sought to enforce the decision. Greencoat maintained that either no dispute had crystallised or that no dispute had crystallised that could enable the adjudicator to require payment and at best there could be a declaratory decision. Greencoat further argued that as it was entitled to issue a withholding notice on 5 January 2012, the adjudicator had no jurisdiction to deal with any of the twelve items within it or at least no jurisdiction to deal with the last three items (including the liquidated damages) as they were not part of any crystallised dispute.

The Issues

- (i) Had a dispute crystallised prior to the Notice of Adjudication being issued?
- (ii) Did the adjudicator have jurisdiction to deal with all the issues contained within his decision and, in particular, the 12 items within the withholding notice? and
- (iii) If not, could parts of the adjudicator's decision be severed?

The Decision

The Judge held that there was a crystallised dispute at the time the Notice of Adjudication was served. It was illogical to say that there cannot be a dispute about an interim valuation of work unless, until and after the valuation falls due for payment; there was a dispute about the interim valuation and that was referable to adjudication. Further *"there is some practical advantage in seeking adjudication before the due date for payment so that the dispute can be resolved in time before payment is due or shortly thereafter."*

In relation to whether the adjudicator had jurisdiction to deal with all of the issues within the withholding notice, Mr Justice Akenhead noted that there were only two items within the withholding notice which were not within the confines of the dispute as it had crystallised as *"they had not been mentioned before they emerged 22 days into the adjudication process"*. The adjudicator did however have jurisdiction to look at liquidated damages as this had been identified as a cross claim in the original Payment Certificate.

In light of this, the Judge then considered whether it was possible to sever the adjudicator's decision so that the reference to the two items which were not within the confines of the dispute could be removed. He decided there was no reason why the substance of the adjudicator's decision should not be enforced albeit that the amended decision relating to the sum of £250,860 plus VAT should be reduced by £21,149 plus VAT producing a net sum of £229,711 plus VAT due as at 14 January 2012.

Comments

It is worth noting Mr Justice Akenhead's comments on the practical advantages of serving a Notice of Adjudication prior to the due date for payment. However, in circumstances where a withholding notice has not yet been served, the referring party runs the risk of excluding from the adjudication items of withholding within that notice if these issues have not been raised before the adjudication began and do not form part of the dispute referred.

Claire King
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