



LEGAL BRIEFING

Profile Projects Ltd v Elmwood (Glasgow) Ltd [2011] CSOH 64, Lord Menzies

The Facts

Elmwood (the main contractor) engaged Profile (the sub-contractor) to carry out the design and installation of partitions and other works for NHS Lothian. The adjudication clause in the sub-contract provided that:

- Either party could refer a dispute to adjudication;
- The Scheme for Construction Contracts (Scotland) 1998 would apply to the adjudication except where inconsistent with the adjudication clause in the sub-contract;
- The adjudicator would be agreed between the parties and failing agreement would be nominated by the Scottish Branch of the RICS;
- The referring party would be responsible for the whole costs of the adjudication including the adjudicator's fees and the both parties' legal fees (a Tolent clause); and
- Finance charges associated with the matters being pursued by way of adjudication would not be recovered as part of the adjudication.

A dispute arose on Profile's third interim application which they referred to adjudication. The parties did not agree an adjudicator and so Profile applied to the Scottish Building Federation to appoint an adjudicator. Elmwood challenged the adjudicator's jurisdiction. This challenge was rejected and a decision given in favour of Profile.

Elmwood failed to honour the decision and Profile started enforcement proceedings.

The Issues

On enforcement the court had to consider 3 issues:

- (i) Did the Tolent clause render the adjudication clause ineffective on the basis it was incompatible with section 108 of the Construction Act 1906 (the right to refer a dispute to adjudication)? Further, did the restriction on claiming finance charges by way of adjudication have the effect of limiting the scope of disputes that could be referred to adjudication meaning that the adjudication clause did not comply with section 108?
- (ii) If the adjudication clause did conflict with section 108 then was the whole of the Scheme for Construction Contracts (Scotland) 1998 implied into the sub-contract instead?
- (iii) Had Profile applied to the wrong nominating body?

The Decision

In respect of the first question the court held that the Tolent clause did not render the adjudication clause ineffective. Whilst the clause may have discouraged Profile from starting the adjudication, it did not prevent them. The court held that the restriction on claiming finance charges was not compatible with section 108. Given the sub-contract permitted the recovery of finance charges (as part of a loss and expense claim) any dispute in relation to those charges should be referable to adjudication.

In respect of the second question, the court held that the adjudication could be governed partly by express terms and partly by the Scheme. There was no reason why only part of the Scheme could not be implied into the sub-contract in respect of those parts of the sub-contract that were not compliant with section 108.

In respect of the third question the court held that Profile had applied to the wrong nominating body. If the Scheme applied in respect of the parts of the sub-contract that were not compliant with section 108 then the Profile should have applied to the Scottish RICS (paragraph 2(1) of the Scheme). Even if the whole of the adjudication clause was non-compliant the court held that the sub-contract still referred to the Scottish RICS and so this was the nominating body Profile should have approached.

The adjudicator's decision was not enforced on the grounds the adjudicator did not have jurisdiction. Profile had approached the wrong nominating body whether under the sub-contract or the Scheme.

Comment

Whilst this is a Scottish decision (and so not directly binding on English courts) it is interesting for two reasons. First, the court refused to follow the English decision in *Yuanda (UK) Co Ltd v WW Gear Construction Ltd*. Second, the court held that part only of the Scheme can be implied into a contract to remedy those parts of the adjudication provisions that are non-compliant with section 108.

In *Yuanda*, the court held that a Tolent clause in the contract conflicted with section 108 because it fettered the main contractor's right to refer a dispute to adjudication at any time. This was because it required the main contractor to pay the costs of the adjudication if it referred a dispute but there was no equivalent obligation on the employer. On this basis the clause was not compliant with section 108 and all of the contract's adjudication provisions were replaced by the Scheme for Construction Contracts 1998.

The court in the present case held that the Tolent clause was not incompatible with section 108 and when passing the Construction Act it would have been open to parliament to deal clearly with the allocation of costs but it chose not to. Whilst such a provision has been introduced by way of the amendments to the Construction Act (due to come into force in October 2011) this did not apply in the current case and indeed, at least in the opinion of Lord Menzies it does not amount to a total bar on Tolent clauses. As such, the parties were free to agree the cost allocation in their sub-contract.

Further, the court refused to adopt a purposive approach to section 108. The wording in section 108 requires that a contract shall "enable a party to give notice at any time of his intention to refer a dispute to adjudication". The court held that whilst the costs allocation may act as a discouragement or disincentive it does not amount to a disablement. Profile's argument would require section 108 to be construed as "the contract shall not offer any discouragement or disincentive to a party" which goes further than adopting a purposive approach.

In respect of the implication of the Scheme, the court held that there is "nothing unworkable about a result which incorporates the Scheme provisions only in respect of those contractual provisions which are non-compliant with the requirements of section 108". This result was perhaps even more of a surprise as it has generally been regarded under English law that if any part of an adjudication clause fails then all of that clause is replaced by the Scheme for Construction Contracts 1998 rather than just the non-compliant elements. Whether the decision is followed remains to be seen.

David Bebb
August 2011
