



## LEGAL BRIEFING

### *Witney Town Council v Beam Construction (Cheltenham) Ltd*

[2011] EWHC 2332 (TCC, Mr Justice Akenhead)

#### *The Facts*

In early 2010, Witney Town Council ("the Council") engaged Beam Construction (Cheltenham) Ltd ("Beam") to design and construct the new Madley Park Community Hall in Witney, Oxfordshire for the Contract Sum of £749,726. The contract required the works to be complete by 7 November 2010; however, the works were late. Eventually, the Contract Administer awarded a three-week extension of time such that the new completion date would be 26 November 2010.

On 6 January 2011, the Council took possession of the building so that it could be used in a public election. Beam argued that Practical Completion occurred at this point, but the Council claimed that whilst it did use the building, it was by arrangement and the works were given back to Beam to complete the works after the election. Beam submitted its draft final account on 21 January 2011 and its final account on 2 March 2011. On 11 March 2011, the Council purported to terminate the contract on the basis that Beam was not proceeding regularly and diligently and on 23 March 2011 Beam arrived on site to find that the locks had been changed.

In April 2011 Beam served its Notice of Adjudication and Referral Notice which identified that a dispute had arisen and the questions to be decided by the Adjudicator were:

- 35.1 *What value is due to [Beam] from [the Council]?*
- 35.2 *What value is due to [Beam] from [the Council] under and in connection with the account dated 21 January 2011?*
- 35.3 *What value is due to [Beam] from [the Council] under and in connection with the account dated to March 2011?*
- 35.4 *What is the time or times for payment?*
- 35.5 *What sum is due to the Referring Party as interest?*
- 35.6 *Is [Beam] entitled to recover the costs of the action?*
- 35.7 *Is [Beam] entitled to any such further or other sums from [the Council] as the Adjudicator decides?*

The Council made it clear that it considered that more than one dispute had been referred to the Adjudicator and therefore reserved its position. At trial, the Council argued that there were effectively four disputes referred: (1) the draft final account submitted by Beam on 21 January 2011; (2) the final account submitted by Beam on 2 March 2011; (3) a claim for interest on underpayment of retention; and (4) a claim for the payment of the whole retention based on repudiatory breach.

Ultimately, the Adjudicator awarded some £70,500 to Beam. When the Council failed to pay, Beam commenced proceedings for enforcement of the Adjudicator's decision whilst the Council claimed declarations that the Adjudicator's decision was not enforceable.

#### *The Issue*

Did the adjudicator have jurisdiction in the circumstance where the Council argued that more than one dispute was referred to him?

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### **The Decision**

Mr Justice Akenhead first reviewed the relevant case law of *Amec Civil Engineering v Secretary of State for Transport*, *Cantillon Ltd v Urvasco Ltd*, *Fastrack Contractors v Morrison Construction Ltd* and *Bothma v Mayhaven Healthcare Ltd* and drew the following conclusions:

- (i) A dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted.*
- (ii) A dispute in existence at one time can in time metamorphose in to something different to that which it was originally.*
- (iii) A dispute can comprise a single issue or any number of issues within it. However, a dispute between parties does not necessarily comprise everything which is in issue between them at the time that one party initiates adjudication; put another way, everything in issue at that time does not necessarily comprise one dispute, although it may do so.*
- (iv) What a dispute in any given case is will be a question of fact albeit that the facts may require to be interpreted...*
- (v) The Notice of Adjudication and the Referral Notice are not necessarily determinative of what the true dispute is or as to whether there is more than one dispute. One looks at them but also at the background facts.*
- (vi) Where on a proper analysis, there are two separate and distinct disputes, only one can be referred to one adjudicator unless the parties agree otherwise...*
- (vii) Whether there are one or more disputes again involves a consideration of the facts... A useful if not invariable rule of thumb is that, if disputed claim No 1 can not be decided without deciding all or part of disputed claim No 2, that establishes a clear link and points to there being only one dispute."*

After considering the facts in light of the above, the Judge held that there was only one dispute between the parties by the time of the Notice of Adjudication and only one dispute which was referred to adjudication. That dispute was as to what was due and owing to Beam. Judgment was in favour of Beam and the Adjudicator's decision was enforced.

### **Comment**

As discussed above, Mr Justice Akenhead summarises the relevant case law and provides helpful guidance as to whether or not a dispute referred to an Adjudicator constitutes one or more disputes. His approach was based on his view that construction contracts are commercial contracts and parties, at least in most cases, can be taken to have agreed that a sensible interpretation will be given to what the meaning of a dispute is. This is likely to be of great assistance to both Adjudicators as well as those referring a dispute to Adjudication.

**Stacy Sinclair**  
**October 2011**

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