



LEGAL BRIEFING

Bennett (Electrical) Services Ltd v Inviron Ltd (2007)

TCC Judge David Wilcox [2007] EWHC 49

The Facts

This was a summary judgment application to enforce an adjudication award.

A dispute had arisen between the parties in the course of electrical installation works that the claimant was carrying out for the defendant. The claimant referred the dispute to adjudication, however the defendant asserted that the adjudicator did not have jurisdiction to act in the matter. The adjudicator agreed on the basis that there was no contract between the parties that complied with section 107 of the Housing Grants, Construction and Regeneration Act 1996.

The claimant then commenced a second adjudication in relation to the same dispute. The defendant challenged jurisdiction. It was argued that first, the letter of intent between the parties was not a construction contract, secondly the claim for quantum meruit was a restitutionary remedy not within section 107 and finally, given that the first adjudicator ruled that he had no jurisdiction, a second application was an abuse of process. The adjudicator ruled that he did have jurisdiction and awarded the claimant £253,748 plus VAT and interest. The defendant did not pay the award.

The defendant challenged the enforcement on two grounds, first, that there was no contract, whether in writing or at all within the meaning of section 107 of the Act; and secondly, that the issue of jurisdiction had already been determined in the earlier adjudication.

The Issue

The issue before the court was whether there was a contract in writing within the meaning of section 107 of the Act.

The Decision

The letter of intent was headed "subject to contract". Judge Wilcox determined that save in exceptional circumstances, an arrangement made subject to contract means that exchange of a formal written contract is a condition precedent to legal liability. However, the fact that the parties contemplate the preparation of a formal contract will not necessarily prevent a binding agreement from coming into effect before the formal contract is executed. It is a question of construction whether the term of the contract is a condition or term of the arrangements agreed in a letter of intent or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.

In this case the default provisions, should a contract not be concluded, provided for reimbursement of reasonable and substantiated direct costs only, and expressly excluded any contractual remedies. The parties did not intend that the letter should take any effect. Therefore the adjudicator lacked jurisdiction and the award could not be enforced.

Furthermore, if the agreement had been based on the letter of intent, it would not have complied with the requirements of section 107. For an agreement in writing to come within section 107 (2) (b) the whole contract had to be evidenced in writing, not just part of it. The essential and key matters which were express and material terms were not specifically recorded in the letter of intent. The letter of intent made no provision for price, mechanisms of payment, variations, insurance and health and safety.

Comment

This case is a timely reminder to contractors to ensure that all essential terms are specifically recorded in writing. It is not sufficient to show that all terms material to the issues under the adjudication have been recorded in writing. Contractors will not be protected by section 107 of the Act if they do not cover the key obligations, or where the written terms are incomplete and additional contractual terms have been agreed orally.

***Birgit Blacklaws
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