



LEGAL BRIEFING

Melville Dundas Limited (in receivership) and Others v George Wimpey UK Limited and Others

House of Lords, Lord Hoffman, Lord Hope of Craighead, Lord Walker of Gestingthorpe, Lord Mance and Lord Neuberger of Abbotsbury [2007] UKHL 18

The Facts

On 2 May 2003, Melville applied for an interim payment. No withholding notice was served. The final date for payment was 16 May 2003. Wimpey did not pay, but on 22 May 2003 administrative receivers were appointed.

Clause 27.6.5.1 of the contract, the Scottish Building Contract, with Contractor's Design, as is typical, stated that in these circumstances the parties must wait until the works are finished. Then an account would be taken and any balance paid to the receiver.

In the House of Lords there was limited discussion about the payment provisions of the HGCR. Lord Hoffman noted that the object of these clauses was to introduce clarity and certainty as to the terms for payment and to dictate to the construction industry what those terms should be. He did not feel that section 110 necessarily achieved this, in particular with regard to the notice provisions. He agreed with other commentators that serving a notice under section 110(2) seemed to have no consequences. There was no penalty for doing so. He described its purpose as being "something of a puzzle" and noted that it seemed "to have dropped from heaven into the legislative process on its last day in the House of Commons...".

The Issue

The crux of the issue was the operation of section 111. Was Wimpey entitled to withhold the interim payment when it did not serve a notice before the final date for payment on 16 May 2003? It would not have been possible for Wimpey to serve such a notice by 11 May 2003. The earliest that they could have known they were entitled to withhold the interim payment was when the receivers were appointed on 22 May 2003.

The Decision

Lord Hoffman said the purpose of the section 111 notice is to enable the contractor to know immediately and with clarity why a payment is being withheld. The notice is part of the machinery of adjudication in that it provides information which the contractor can challenge through adjudication if he so wishes. Clause 27.6.5.1 did not extend the final date for making an interim payment. He thought that the problem here had arisen because Parliament had not taken into account that parties would enter into contracts under which the ground for withholding a payment might arise after the final date for payment.

Lord Hoffman decided that here section 111(1) "should be construed as not applying to a lawful ground for withholding payment of which it was not possible for notice to have been given in the statutory time frame". Therefore he allowed the appeal.

Lord Hope of Craighead also allowed the appeal but for slightly different

reasons. He chose to give a purposive construction to section 111(1). The mischief that section 111 addresses is to reduce the incidence of set-off abuse by formalising the process by which the payer claims to be entitled to pay less than that expected by the payee. Therefore, Lord Hope took the view that section 111 should not apply to situations where the employer wishes to exercise right of set-off given by clause 27.6.5.1 when he has determined the contractor's employment under the contract. Thus the view of the majority was that Wimpey could hold on to the money.

Comment

This is the first time that the HGCRA has reached the House of Lords. The dispute here, which related to the payment part of that legislation, highlighted the tension between an employer's payment obligations and the impact on those obligations of the contractor going into administration.

The Scottish Court of Appeal and the minority of the House of Lords were of the view that at the time the receivership was announced, the payment was due as no notice of withholding had been served. If the final date for payment has passed, then the notice requirements of section 111 cannot be applicable as they have to be implemented before the final date for payment. Therefore the monies ought to be handed over to the receivers. In other words, a strict interpretation of section 111, and one that many in the industry had assumed must apply. But this was not the majority decision of the House of Lords. They decided that despite the lack of a withholding notice Wimpey could hold onto the money.

The rational must relate to the insolvency of Melville. When a contractor's employment has been determined and a receiver appointed, two consequences follow. The contractor no longer has any duties to perform and the liability to make interim payment is no longer provisional. While the employer retains the money, he can set it off against his cross claim for non-completion against the contractor. More often than not, that cross claim will exceed any claim the contractor may have for unpaid work. Once the employer has paid the money, it will be gone, swept up by, for example, floating charges. If Wimpey paid the money over, it would never see it again.

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