



LEGAL BRIEFING

Application for payment: Caledonian Modular Ltd v Mar City Developments Ltd

[2015] EWHC 1855 (TCC), Mr Justice Coulson

The Facts

By a letter of intent dated 19 December 2013 Caledonian Modular Ltd ("*Caledonian*") engaged Mar City Developments Ltd ("*Mar City*") to carry out construction works at Colindale in North London. It was common ground that the letter of intent comprised a construction contract and that the payment and adjudication provisions of the HGCRA applied.

During early 2015, Caledonian commenced adjudication in respect of its interim application number 12 dated November 2014. On 11 March 2014 the adjudicator awarded Caledonian £642,394.23. Mar City made two payments totalling £200,000.

On 30 January 2015, Caledonian issued application number 15 seeking a net payment of £1,518,260.12. Mar City issued a payless notice on 5 February indicating a net payment of £6,317.07.

On 13 February 2015 under cover of three e-mails, Caledonian issued some documents to Mar City, including a further copy of application number 15 prefixed with the words "*Final Account*" with the net payment claim increased to £1,524,903.37.

Caledonian did not substantially respond to Mar City's subsequent requests for clarification other than to describe the 13 February submission as an "*update*".

On 19 March 2015 Caledonian issued an application for payment and Mar City responded with a payless notice dated 25 March.

Caledonian subsequently claimed that its 13 February submission had been application for payment number 16 and that in the absence of a payless notice they were entitled to the sum claimed. In a second adjudication, the adjudicator agreed with Caledonian.

In the following enforcement proceedings Mar City contended that the 13 February submission was not an application.

The Issues

The two main issues were as follows:

- (i) Did Caledonian's 13 February submission amount to an application for interim payment? and
- (ii) In an enforcement application, could the court decide for itself an issue that was before the adjudicator, for example, the status of the 13 February submission, or was the court restricted to either enforcing or not enforcing the second adjudication decision?

The Decision

On the first issue, the Judge had little hesitation in finding that Caledonian's 13 February submission was not an application for payment or a valid payee's notice where:

- None of the emails or the documents sent on 13 February stated that this was an

application for interim payment;

- Caledonian's subsequent application on 19 March 2015 did not state that it was a default notice or indicate that a payee's notice had been sent on 13 February 2015; and
- Between 13 February 2015 and 19 March 2015, Mar City repeatedly asked Caledonian what the 13 February documents were. In response Caledonian did not state that the documents of 13 February were an application for payment.

Having noted the draconian consequences of the employer's failure to serve a payless notice in time, the Judge stated that the employer must be put on notice by the contractor that time has begun to run hence interim payment claims must be set out with proper clarity.

The Judge was unimpressed with the suggestion that a contractor can "update" an application by a few thousand pounds when the overwhelming bulk of that application had already been the subject of a valid payless notice. He said this would defy common sense and be contrary to the purpose of the notice provisions in the Housing Grants, Construction and Regeneration Act 1996.

The Judge observed that this could lead to contractors regularly applying every few days with "updated" applications in the hope of gaining windfall through the employer slipping up by failing to serve a payless notice.

On the second issue, the Judge stated that at the enforcement stage the court could deal directly with an issue decided by the adjudicator, if as here, the issue was short, self-contained, and required no oral evidence or any other elaboration beyond what was capable of being provided during a short interlocutory hearing. Therefore the second issue could be decided by way of a declaration by the court.

Commentary

Following the judgments in *ISG v Seevic College* (2014) and *Galliford Try Building v Estura Ltd* (2015), this case again emphasises how crucial it is that the employer issues valid payment notices and payless notices within the time limits imposed.

Equally, however, if documents are an application for payment then this must clearly be stated and contractors must respond to reasonable questions from the employer concerning the status of submitted documents.

The Judge's approach to the second issue will no doubt have resulted in considerable costs savings. However, as the Judge observed, given the requirement that the issue be closely confined only in rare cases will the court be able to determine a substantive point in issue in the adjudication at the enforcement hearing.