



LEGAL BRIEFING

Malcolm Goldsworthy, Graham Goldsworthy & Paul Goldsworthy (t/a Goldsworthy Builders) v John Harrison & Catherine Harrison

[2016] EWHC 1589 (TCC) Mr Andrew Bartlett QC

The Facts

During 2012 Goldsworthy Builders ('Goldsworthy') submitted a number of quotations for works to the home of Mr and Mrs Harrison ('the Harrisons'). Goldsworthy started work in late October 2012.

During November 2012 and January 2013 the contract administrator appointed by the Harrisons referred Goldsworthy to the possibility of entering into a JCT Minor Works form of contract. In February 2013 Goldsworthy drew together their previous quotations and proposed a total price of £526,689.21 plus VAT. The work continued with Goldsworthy submitting invoices at the end of each calendar month.

On 22 October 2013, the contract administrator issued a JCT Intermediate form of contract. Goldsworthy responded that they had tendered on the basis of the Minor Works form. The contract administrator replied that the Minor Works form should be used but on 19 November 2013, he proposed different payment terms namely that he would issue a certificate within seven days of Goldsworthy's valuation with the Harrisons paying within fourteen days.

In January 2014 the contract administrator issued a complete draft Minor Works form which included LADs and a defects rectification period of twelve months for the M&E works. Goldsworthy refused to sign and stated that they wished to continue the ad hoc arrangements set out in the contract administrator's e-mail of 19 November 2013.

On 17 June 2014, the contract administrator issued a certificate of Practical Completion which required the Harrisons to pay the amount certified on 20 May 2014 and half of the retention, "as set out in the JCT Minor Works Contract ...". Goldsworthy responded that their original quotations for the works formed the basis of the contract, not the Minor Works form.

In March 2016, Goldsworthy commenced adjudication claiming payment of the amount certified on 20 May 2014 and the first half of the retention. On 22 March 2016 the contract administrator issued a Final Certificate which showed a sum due to the Harrisons. In reply, on 24 March Goldsworthy issued a payless notice and a final account valuation which showed they were due £8,661.46.

Having rejected the Harrisons' submission that because they had never agreed to the Minor Works form and were residential occupiers, there was no enforceable adjudication agreement, the Adjudicator issued a decision on 17 April 2016 in favour of Goldsworthy.

On 24 May 2016 the contract administrator issued a revised Final Certificate showing just over £5k due to Goldsworthy. On 25 May 2016 Goldsworthy commenced enforcement proceedings. Goldsworthy argued that the Minor Works form had been fully incorporated into the contract and relied on the parties' conduct, including that the contract administrator had referenced the Minor Works form on interim certificates and followed the Minor Works form mechanisms for retention, completion and the Final Certificate.

The Harrisons contended that no final agreement had been reached on the Minor Works form and that the works had proceeded under an informal agreement which did not include an adjudication clause. Secondly, the Harrisons contended that the Adjudicator had no jurisdiction to decide a dispute concerning interim payments where that dispute was overtaken during the adjudication by the issue of a Final Certificate.

The issue

Were either of the grounds advanced by the Harrisons sufficient to prevent enforcement of the Adjudicator's decision?

The Decision

In rejecting the second ground, the Judge noted that if a Final Certificate was issued during an adjudication then depending on what the Adjudicator had been asked to decide, the Final Certificate might have to be taken into account, particularly if unchallenged. Here, where Goldsworthy had immediately disputed the contract administrator's figures the Adjudicator was entitled to attach little weight to the Final Certificate dated 22 March 2016. The Judge also found that Goldsworthy's 24 March valuation did not negate or reduce the claims they had advanced in the adjudication.

Regarding the first ground the Judge reviewed the exchanges and noted that there were a number of evidential gaps with e-mails missing and telephone conversations not accurately recorded. He observed that the evidence that was available was equivocal so that for example fixing retention at a commonly applied 5% was not determinative of the application of the Minor Works form. The Judge also thought that various references in the exchanges to the Minor Works form were too fragile a basis for a definite finding. Therefore the Judge found it impossible to say that there was not a triable issue on the question of whether or not the parties did at some stage come to agreement as to the application of the Minor Works form and he declined to enforce the Adjudicator's decision on a summary basis.

Commentary

The issue of the Final Certificate will rarely have any bearing on adjudications which usually take place during or shortly after completion of the works. Albeit unusual, the circumstances of this case reinforce the importance of promptly challenging the Final Certificate.

Otherwise, this case is a classic example of what can go wrong when there is prevarication over the contract terms: it was only when disputes arose that each party began to scrutinise the earlier exchanges and as the Judge noted, in the adjudication and in court, each party advanced a case directly contrary to their previously stated positions. As happened here, contractual uncertainty may create particular problems for builders working with residential occupiers. In the absence of a written contract that includes an express adjudication clause, adjudication will not be available.

Ted Lowery
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