

Legal Briefing

Kilker Projects Limited vs Rob Purton t/a Richwood Interiors

[2016] EWHC 2616 (TCC) Mrs Finola O'Farell QC

Ted Lowery
December 2016

The Facts

During June 2014 Kilker Projects Limited (Kilker) engaged Rob Purton, trading as Richwood Interiors, (Purton) under an oral contract to carry out joinery works at the Dorchester Hotel. The works were completed during September 2014. Purton submitted his final account application for payment on 8 December 2014. Purton subsequently commenced adjudication and in a decision dated 12 May 2015 the adjudicator decided that where Kilker had failed to issue either a valid payment notice or a valid payless notice, Purton was entitled to the sum applied for on 8 December.

Kilker's challenge to enforcement of the 12 May decision was unsuccessful (Rob Purton vs Kilker Projects Limited [2015], 16 September 2015). Kilker paid the judgment sum but then commenced a second adjudication seeking a decision as to the "true value" of the final account and an order for repayment of any sums found to have been overpaid.

Purton objected on grounds that the second adjudicator did not have jurisdiction to decide a dispute concerning the value of the final account that had already been determined in the first adjudication.

Having declined to resign, in a decision dated 13 May 2016 the second adjudicator found that the true valuation of the final account was some £55,676.84 less than the amount paid and ordered Purton to refund this sum to Kilker.

In its subsequent enforcement proceedings Kilker accepted that if there had been a failure to issue the required payment notice and/or payless notice, the payer must pay as "the notified sum" the amount stated in the payee's payment notice. However, Kilker submitted that the objective of the 1996 act and the scheme was to regulate cash flow, not to determine entitlement to payment on a conclusive basis.

Kilker therefore argued that as long as it had paid in full the notified sum, it remained entitled to seek a determination through adjudication of the correct valuation of the works.

In reply Purton relied upon ISG Construction Limited vs Seevic College and contended that where the 8 December 2016 application concerned the final payment, then Kilker's failure to issue a payment notice and/or a payless notice meant that the final account was agreed and could be challenged by means of litigation or arbitration, but not via a fresh adjudication.

The issue

Was the decision in the first adjudication determinative of the final account valuation meaning that the second adjudicator did not have jurisdiction to determine the same or substantially the same dispute?

The Decision

The judge accepted that where no payment notice or payless notice is issued in response to an interim payment application, the sum applied for will become the notified sum and there will usually be no contractual basis on which the payee's entitlement to payment of the notified sum can be re-opened. Thus, in line with ISG Construction Limited vs Seevic, if there has been an adjudication decision ordering payment of the notified sum, the payee's right to payment cannot be challenged by means of valuation-based arguments in a subsequent adjudication. However, the judge said the position is different if the absence of payee's notices made the sum applied for the notified sum and this notified sum was to comprise the final payment.

In these circumstances, where the provisions of the 1996 Construction Act and the scheme were not intended to affect the ultimate value of the contract sum, then as long as the notified sum was paid and the contract did not expressly provide that any such final payment made would be conclusive, the judge considered that either party would be entitled to have the ultimate value of the contract sum determined in a subsequent adjudication. Accordingly the decision of the second adjudicator was within jurisdiction and could be enforced.

Commentary

The judgment is not a get out of jail card for those who fail to issue valid payment and/or payless notices in time. Note that to be entitled to claim a repayment through adjudication, Kilker first had to pay a sum in excess of the proper valuation in compliance with the decision of the first adjudicator. The judge noted it was not necessary for the contract to set out any specific mechanism for the final account valuation undertaken by the second adjudicator, rather that determining the final account valuation was a matter of enforcing the contractual bargain made between the parties. However, would Kilker have secured a repayment if any written contract with Purton had expressly excluded negative valuations at the final account stage?

