Ted Lowery considers a dispute over contracts and concrete

Universal Sealants (UK) Ltd (t/a USL Bridgecare) v Sanders Plant and Waste Management Ltd [2019] EWHC 2360 (TCC)

Before Mrs Justice Jefford DBE

In the Technology and Construction Court

Judgement delivered 8 August 2019

The facts

In 2016 USL were engaged to carry out bridge expansion joint replacement works on the A1 viaduct in Gateshead. During 2017 USL made enquiries of Sanders for the delivery and supply of the concrete required for the expansion joints.

There was a telephone conversation on 21 February 2017 but the contents of this discussion were disputed and in particular, Sanders did not accept that during this conversation, USL had specified M50 grade concrete. That this grade was required was however confirmed in an e-mail from USL to Sanders issued the following day. Sanders said that they telephoned in reply to the e-mail to explain that they could not provide M50 but could provide ST5 grade concrete, which was of a lesser strength.

On 23 February 2017 USL issued a sub-contract order to Sanders which specified M50 concrete and proposed a price per cubic meter and a delivery charge. There were some further telephone discussions that did not touch upon the specification of the concrete but Sanders did not issue any written response to the sub-contract order. On 7 March Sanders delivered the concrete to the site and USL's foreman signed a delivery note that set out Sanders' terms and conditions. The method of delivery involved the concrete being poured direct from the concrete mixer lorry into the channel which formed the expansion joints.

Neither USL's sub-contract order nor Sanders' delivery note included express provisions for adjudication.

The concrete delivered was ST5 grade which was found to be unfit for purpose and the expansion joints had to be broken out and replaced. USL commenced adjudication and in a decision issued during April 2019, the adjudicator found that there had been a breach of contract by Sanders and awarded USL some £52,529 in damages.

Sanders did not pay and raised two jurisdictional objections. First, they contended that the adjudication was commenced under the wrong contract, where, absent any written response to USL's 23 February sub-contract order, there was no acceptance and thus no concluded agreement on USL's terms. It followed that Sanders' delivery note comprised an offer to supply ST5 grade concrete which was accepted upon delivery when the delivery note was counter-signed by USL's foreman. Secondly, Sanders argued that the HGCRA did not apply because delivery of the concrete did not comprise "construction operation" in accordance with s.105(2) where s.105(2)(d) excluded agreements for the delivery to site of components equipment, materials, plant or machinery, unless the agreement also provide for their installation. Sanders said there had been no installation and pointed out that the sub-contract order did not include any reference to installation or a rate or price for installation.

The issue

Should the adjudicator's decision be enforced?

The decision

The judge had little hesitation in finding for USL on the contractual question. She said it was entirely clear that USL's sub-contract order had been accepted by conduct through the delivery of the concrete to site. Although Sanders' delivery note did include different terms, it was produced too late to stand as a counter-offer given the unchallenged evidence from USL that the note was presented to their foreman after the concrete had been discharged from the mixer lorry.

Regarding Sanders' second point, the judge said it was clear that roadworks per se would fall within the definition of "construction operations" as described in s 105(1) of the HGCRA. The question to be determined was whether or not the sub-contract made between USL and Sanders fell within the exception set out in s.105(2)(d) as being an agreement for delivery only. Whilst accepting that in order to avoid the concrete setting, the act of delivery and the pouring of the concrete are usually simultaneous, the judge rejected USL's submission that if delivery and installation were indivisible, pouring must have involved some element of installation. The judge found that the word "also" within s.105(2)(d) required some separate act and accepted Sanders' argument that

the pouring of the concrete was part of the delivery and did not amount to an additional and discrete act of installation involving work on or related to the concrete itself.

As a delivery only agreement the sub-contract order did not encompass "construction operations" and the HGCRA did not apply.

Commentary

It is surprising that this issue has not arisen before. Albeit concerning concrete delivery, the judge's conclusions include the general principle that when considering the s.105(2)(d) exception, the word "installation" need not be given a narrow construction but must involve some form of work done to the materials after delivery.

Ted Lowery
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