

Legal Briefing

Ted Lowery on the complications caused by an unexecuted amendment

Amey LG Ltd v Aggregate Industries UK Ltd [2019] EWHC 3488 (TCC)

Before His Honour Judge Eyre QC

In the Technology and Construction Court

Judgement delivered 17 December 2019

The facts

Under a contract dated 31 July 2012 Amey engaged Aggregate Industries UK Ltd ('AIUL') to carry out repair and resurfacing works to the road network in Sheffield. The contract was a framework arrangement for five years, terminable on 6 months' notice. AIUL was required to provide a final statement within one month of completion of their works but the contract included no sanction if AIUL failed to do so nor made any provision for Amey to provide its own final statement.

From commencement of the works in 2012 AIUL began to encounter high levels of hazardous tar within the road surfaces. During 2013 the parties began negotiating a deed of variation allowing for the unexpected additional costs of disposing of the contaminated materials. The proposed deed included provision for some 48 monthly payments of £66,000 to AIUL commencing in May 2014 together with a pain/gain costs sharing mechanism for dealing with the contaminated materials. The parties implemented the arrangements for additional payments to AIUL, but the remaining terms were not agreed and the deed was never formally executed.

The framework contract was terminated by AIUL on 31 July 2017 and the final monthly payment was made in April 2018. In a letter dated 1 June 2018 Amey asserted that AIUL was in breach of contract, having failed to provide a final statement within one month of termination, and requested that a final statement and full substantiation now be provided.

Amey subsequently commenced Part 8 proceedings seeking certain declarations in connection with AIUL's continuing failure to provide a final statement. At a hearing during April 2019 the court decided that the bulk of the declarations sought by Amey could not be determined on a Part 8 basis and made directions for a Part 7 trial, which took place October 2019.

Amey claimed four declarations: (i) that AIUL was required to provide a final statement within one month of termination on 31 July 2017 but subject to an acknowledged estoppel so that the final statement was required within one month of Amey's letter of 1 June 2018; (ii) that AIUL was in breach of its obligation to provide a final statement; (iii) that from 1 July 2018 AIUL's only remaining right was to apply for payment for the true value of the works to be calculated on the basis of a final statement; and, (iv) that AIUL was entitled to only one opportunity to adjudicate in relation to the true value of their works.

The issue

Was Amey entitled to any of the declarations?

The decision

Where the parties' conduct was not consistent with all of the terms of the unexecuted deed the judge accepted with some reservations the position that Amey was estopped from demanding a final statement until the payments for the contaminated materials had been discharged. He rejected AIUL's contention that the arrangements between the parties created an indefinite and/or reasonable deadline for the final statement. The judge concluded that Amey's letter of 1 June 2018 confirmed that Amey was no longer prepared to postpone the deadline for the final statement and the deadline therefore became one month thereafter. Accordingly, he granted the first declaration.

Regarding the second declaration, the judge observed that AIUL's failure to provide a final statement was largely as a result of a commercial decision, in anticipation of the parties settling the claims. Although the judge found that AIUL could not show any other compelling reasons for delaying the final statement he declined to grant a declaration that AIUL was in breach of contract on the grounds that this risked giving Amey an entitlement and/or imposing a sanction on AIUL that was not provided for in the contract.

The judge noted that the third declaration had been sought in order to preclude further interim applications. Given AIUL's acknowledgement that its payment entitlement would be confined to the final statement and Amey's confirmation that the declaration was not intended to provide a technical defence based upon the methodology employed in AIUL's final statement, the judge granted the third declaration.

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Finally, the judge declined to grant the fourth declaration on grounds that this would fetter AIUL's right to adjudicate, contrary to the HGCRA.

Commentary

Amey's options for forcing progress with the final statement were evidently limited by the terms of the framework contract but the declarations granted should at least have put some pressure on AIUL to get moving.

The timetables for final account processes are often disregarded, hence the importance for the employer of retaining a default mechanism to force the pace if for whatever reason the contractor lags behind.

Ted Lowery
January 2020