



## LEGAL BRIEFING

### *The Trustees of the Marc Gilbard 2009 Settlement Trust v OD Developments and Projects Ltd*

[2015] EWHC 70 (TCC), Mr Justice Coulson

#### *The Facts*

The Trustees of the Marc Gilbard 2009 Settlement Trust (“the Trustees”) employed OD Developments and Projects Ltd (“OD”) under a contract which incorporated the JCT Standard Building Contract, Without Quantities, Revision 2 (2009) (the “Contract”) to carry out works in Mayfair, London.

Clause 1.9.3 of the Contract provided that the Final Certificate would be conclusive save in relation to the matters raised in any proceedings commenced within 28 days of the date of issue of the Final Certificate.

On 3 December 2013, the Contract Administrator issued a Final Certificate showing a sum due from OD to the Trustees of £232,153.54 plus VAT.

On 20 December 2013, OD issued Part 7 proceedings in the Technology and Construction Court (“the TCC”) disputing the validity and correctness of the Final Certificate.

OD subsequently indicated that it would commence an adjudication against the Trustees to challenge the Final Certificate. The Trustees objected and issued Part 8 proceedings in the TCC for declaratory relief as to the proper interpretation of clause 1.9.3.

The Trustees accepted that the Final Certificate was not conclusive evidence in any proceedings issued within 28 days of the Certificate (such as OD’s Part 7 proceedings) but argued that the Final Certificate was conclusive and could not be challenged in any adjudication commenced after the expiry of the 28 day period.

OD argued that because clause 1.9.3 contained a saving provision in respect of those matters to which the Part 7 proceedings related, this meant that any subsequent adjudication relating only to those same matters could proceed. Further, if OD could not do that, then that would be a fetter on OD’s right to adjudicate ‘at any time’, as provided for by the Housing Grants (Construction and Regeneration) Act 1996.

#### *The Issue*

Having commenced Part 7 proceedings in time, was OD entitled to commence an adjudication challenging the Final Certificate after expiry of the 28 day period?

#### *The Decision*

The Judge concluded that OD could not commence an adjudication challenging the Final Certificate outside the 28 day period, for the following three reasons:

- (i) The proper construction of clause 1.9.3 of the Contract did allow OD to first commence adjudication, and then commence protective court or arbitration proceedings if necessary (all within the 28 day period), but not otherwise;
- (ii) The business common sense interpretation of clause 1.9.3 was that following the issue of the Final Certificate, the Contract envisaged only one set of proceedings to challenge the Final Certificate, within the 28 day period; and

- 
- (iii) Applying clause 1.9.3 in this way did not fetter OD's right to adjudicate 'at any time' as OD could still adjudicate but would find that the Trustees could rely on the Final Certificate as conclusive evidence of the matters it addressed.

The Judge therefore invited the parties to agree the wording of a declaration which effected that the Final Certificate was conclusive evidence in any proceedings which were not commenced within 28 days of the Final Certificate.

#### ***Commentary***

As noted by the Judge, while there are cases regarding Final Certificates and adjudication where a party had commenced adjudication during the 28 day period and some other issue then arose (such as in *Cubitt Building and Interiors Ltd v Fleetglade* [2006] EWHC 3413 and *University of Brighton v Dovehouse Interiors* [2014] BLR 432), there are no reported cases in which a party (like OD here) was dissatisfied with the Final Certificate and originally issued court proceedings and then, much later, wanted to commence adjudication proceedings.

This decision not only considers the specific application of conclusivity clauses to Final Certificates issued under JCT standard form contracts but also the purpose and scope of such clauses generally which are to provide parties with contractually agreed limits on the scope and timing of disputes once a project has been completed.

The submissions made by OD's Counsel raised key issues regarding Final Certificates and adjudication but ultimately, it was the plain interpretation and business common sense intent of the clause that was applied.

David Toscano  
January 2015

---