

Construction Law Update

Adjudication Enforcement – “Subject to Contract” and Determination by Agreement

In the recent case of *Aqua Leisure International Limited v Benchmark Leisure Limited*, the Technology & Construction Court (TCC) considered an application for summary judgment to enforce an adjudicator’s decision in circumstances where there was an alleged determination “by agreement” for the purposes of s108(3) of the Housing Grants Construction and Regeneration Act 1996 (as amended).

Background

Benchmark Leisure Limited (“**Benchmark**”) was the site developer of a waterpark in Scarborough. Benchmark engaged Aqua Leisure International Limited (“**Aqua**”) pursuant to a standard form JCT Design and Build Contract dated 13 July 2015 (the “**JCT Contract**”).

Following practical completion, Aqua submitted a final interim application for payment on 7 September 2016. No pay less notice was served and only £20,000 of the application was paid. Aqua commenced an adjudication and the adjudicator decided that Benchmark would have to pay £143,411.13 plus VAT, interest, and the adjudicator’s fees (the “**Decision**”).

Following the adjudication, the parties discussed settlement of the entirety of their dealings. Aqua contended that it was owed monies awarded in the Decision, together with additional sums including retention. Ultimately, the parties agreed to a “*payment resolution*”, under which some sums were paid by Benchmark to Aqua. Aqua’s solicitors then sent Benchmark a draft settlement and payment guarantee for review and completion and sent numerous reminders asking Benchmark to sign the documents.

However, sums due under both the Decision and the “*payment resolution*” were not paid in full. Thereafter, in April 2019, Aqua issued proceedings seeking to enforce the Decision. Benchmark defended on the basis that the Decision was superseded by agreement.

The parties’ positions

Aqua contended that the compromise arrangement devised by the parties was expressly made in the context that it would not become binding until it was reduced to writing (i.e. “*subject to contract*”). It was not reduced to writing and therefore was not binding, even though payment of sums and works were carried out thereunder. Alternatively, Aqua contended that if the agreement was not “*subject to contract*”, it was in any event conditionally binding upon the provision of a guarantee; such a guarantee was not given.

On the contrary, Benchmark argued that the “*subject to contract*” proviso was waived and that it would not be appropriate to grant summary judgment. Benchmark submitted that both parties considered themselves bound by the “*payment resolution*” and conducted themselves on a common understanding that the Decision was no longer applicable.

The TCC’s reasoning

Highlighting the discussions and correspondence exchanged between the parties (i.e. calls and emails), the TCC considered that there was a common understanding that the agreement would not be binding until reduced to writing and signed as a contract. Until that time, communications were clearly made without prejudice.

The TCC noted that the key question was whether the parties agreed to enter into a new contract without the need for all terms to be reduced to writing.

Considering all the circumstances of the case, the TCC held that there was no evidence to suggest that a new contract was made, noting in particular:

- i. the “*payment resolution*” was intended as a compromise of issues that had arisen under the JCT Contract;

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- ii. sums were still due and accepted under both the JCT Contract and the Decision;
- iii. works were carried out;
- iv. an impartial observer would conclude that Aqua wanted the compromise agreement to be finalised, and did not intend to enter into a new contract; and
- v. the Parties clearly envisaged that an agreement would not be enforceable unless and until formalities had been observed. It was clear that payments would be made, and works would be carried out prior to the agreement becoming binding.

Accordingly, Benchmark's case that the parties waived the "*subject to contract*" proviso by performing part of the agreement had no prospect of success at trial. The TCC decided that there was no agreement which barred the right to enforcement of the adjudicator's Decision. The Decision was therefore binding and enforceable.

Analysis

This case highlights the importance of "*subject to contract*" provisos being expressed during the course of negotiations to resolve a dispute.

This case was stated by the TCC to be "*a paradigm example of why the court will not lightly hold that a condition that negotiations and agreements are 'subject to contract' has been superseded.*" This is applicable in cases where payments have been made, and construction works have been carried out, under any such agreement expressed to be "*subject to contract*".

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