

## Construction Law Update

### Contract Interpretation and Repudiatory Breach

In the recent case of *Optimus Build Ltd v Southall & McManus*, the Technology and Construction Court (TCC) considered a dispute in which the contractor believed the contract was a fixed price contract and the employer believed it to be a cost-plus contract. Both parties claimed the other committed a repudiatory breach before the works had been completed, but who really committed the repudiatory breach?

#### Background

In March 2017 Mr Southall and Ms McCanus (the “Employers”) purchased a property in Worsley, Manchester and engaged Optimus Build Ltd (the “Contractor”) to undertake wide-ranging improvements, including a three-storey extension and structural alterations.

The contract between the Employers and the Contractor was formed during the course of a series of meetings and documentary exchanges. The documents included various versions of what was described as a budget estimate, as well as a number of emails. The works progressed until the third valuation, at which point a dispute arose.

#### What was the claim?

The Contractor commenced proceedings claiming that the Employers had wrongfully repudiated the contract and that the Contractor was entitled to the balance of the fixed contract price for the works undertaken, plus loss of profit on the remaining works.

The Employers argued that the contract was a cost-plus contract and the Contractor had wrongfully repudiated the contract, that the Contractor’s claim for the balance was made on the wrong contractual basis and was overstated and that the Contractor was not entitled to claim for loss of profit. The Employers claimed an entitlement to delay related losses arising from the repudiation.

#### What type of contract was it?

The judge noted that the Employers lacked experience and knowledge of the construction industry and therefore stated that he was prepared to accept that they might mistakenly have believed that the contract was cost-plus, in part because the pricing document was headed “budget estimate”.

However, the judge considered that Contractor would not have produced a budget estimate if cost-plus had clearly been agreed. Furthermore, on the Employers’ version of events, they ought to have noticed and queried that the budget estimate did not specify the Contractor’s percentage addition for profit. As a result, the judge concluded that the contract was on a fixed price basis.

#### Where it all went wrong

The trigger for the dispute was the submission of the third interim valuation submitted on 26 September 2018. Mr Southall responded asking for a breakdown into each individual item and the parties attended a site meeting to discuss matters. The site meeting became contentious and Mr Southall stated that the Contractor should not carry out any further work until they provided an itemised breakdown of the next month’s work.

#### Repudiatory breach

On 5 October 2018 the Contractor sent an email which, amongst other things, stated that the Contractor believed the best approach was for three things to occur:

1. valuation 3 to be paid in full;
2. the full scope of the Contractor’s remaining works to be established; and
3. a mutually acceptable payment plan to be put in place to cover the remaining works.

At the end of this email, the Contractor suggested arranging a meeting to try and agree a way forward and

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stated “Until we feel comfortable with the situation we will not be carrying out any further works”.

The Employers argued that this email amounted to a repudiatory breach of contract because the Contractor had no contractual right to suspend the works for non-payment or otherwise. Further, the Employers said that the Contractor’s demand for immediate payment of the third valuation in full whilst there remained a genuine dispute as to its amount and for an agreed payment plan were both unjustified from a contractual perspective.

The Contractor submitted that the email was not repudiatory because, even though the Contractor did not have a contractual right to suspend the works, the concerns which they raised were justified in the context and unless matters were resolved they could not proceed with the works anyway (given the uncertainty as to what works they were required to undertake).

The judge found that the Employers were not entitled to treat the email as repudiatory. The Contractor were not saying they would not carry out any further work until the three points in the email were agreed; rather, they were asking for a meeting to resolve those issues. The judge also stated there was no basis for the Employers to conclude that the offer of a meeting was entirely empty and so they should not have treated the email as repudiatory.

However, the Employers had treated the email as a repudiatory breach and proceeded to have the remaining works costed by other contractors. They had explained to the Contractor that they planned to appoint an independent quantity surveyor to inspect the works and they would subsequently contact the Contractor for a meeting. The judge considered this to amount to a clear communication of acceptance of the Contractor’s alleged repudiation.

On 12 October 2018, after the Employers refused to meet the Contractor to resolve the matter, the Contractor emailed the Employers stating that by

refusing to meet and by insisting that the Contractor remove their equipment from site and not return, the Employers were in repudiatory breach and that this was accepted by the Contractor.

The judge held that the Employers were in repudiatory breach of contract and awarded the Contractor the amount of £23,628.36 for work done and £19,422.96 for damages for breach of contract.

### Analysis

This decision is a stark reminder that wrongful acceptance of a purported repudiatory breach can itself be a repudiatory breach of contract with costly implications. It also highlights the important point that a wrongful suspension of performance does not in itself necessarily amount to a repudiatory breach that would justify the other party as treating itself as discharged from any further obligation to perform its obligations under the contract.

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