

Reports from the courts

Our regular round up of court decisions of most interest to construction comes from **Andrew Croft** and **Simii Sivapalan** of **Beale & Company Solicitors LLP** focuses on two disputes over oral contracts; one with major implications for 'smash and grab' adjudications; and the other highlighting the importance of agreeing costs and the basis of their calculation at the start of any construction contract.

Kilker Projects Ltd v Rob Purton (t/a Richwood Interiors)

[2016] EWHC 2616 (TCC); TCC; O'Farrell J

Kilker Projects Ltd (Kilker) engaged Rob Purton (t/a Richwood Interiors) (Purton) to carry out joinery works (Works) at the Dorchester Hotel, London pursuant to an oral contract (Contract).

The Works carried out were subject to variations. A dispute arose between the parties as to the sums due in respect of Purton's final account application dated 8 December 2014 (Final Account).

Kilker failed to issue a payment notice or pay less notice in respect of the sums claimed in the Final Account as required under the Scheme for Construction Contracts (England and Wales) Regulations 1998 (the Scheme). Accordingly, Purton commenced adjudication proceedings pursuant to the Scheme and claimed the full amount of the Final Account (the First Adjudication).

The adjudicator in the First Adjudication, Mr Hough, found in favour of Purton and ordered Kilker to pay Purton £147,223.00 in respect of the Final Account plus Mr Hough's fees and expenses. This was on the basis that Kilker failed to issue a payment notice and/or a pay less notice (the First Award).

Kilker resisted enforcement of the First Award on the basis that there was no concluded construction contract between Purton and Kilker and so the Scheme and the associated payment mechanism did not apply. Purton therefore issued enforcement proceedings in the Technology and Construction Court (TCC), which held that there was an oral construction contract to which the Scheme applied. Kilker was ordered to pay the sum stated in the First Adjudication Award (see our summary of this judgment in *Construction Law*, December 2015 edition).

Kilker paid the First Award and subsequently commenced a second adjudication, seeking a

declaration as to the true value of the Final Account and repayment of any overpaid sums (the Second Adjudication).

The adjudicator in the Second Adjudication, Mr Molloy, decided there had been an overpayment and ordered Purton to repay Kilker £55,676.84 plus VAT, fees and expenses (the Second Award).

Purton did not pay the sum under the Second Award. Kilker issued proceedings in the TCC to enforce the Second Award.

In response, Purton claimed that Mr Molloy did not have jurisdiction. As Mr Hough had already decided the dispute in the First Adjudication, Purton claimed that Kilker could then not re-adjudicate the value and repayment of the Final Account.

Decision

O'Farrell J held that Mr Molloy had jurisdiction and enforced the Second Award.

The TCC noted that the statutory payment provisions of the *Housing Grants, Construction and Regeneration Act 1996* (as amended) (the *HGCRA 1996*) and the Scheme establish a regime for determining stage or periodic payments.

Case law such as *ISG Construction Ltd v Seevic College [2014] EWHC 4007 (TCC)* held that if the 'notified sum' is determined in adjudication in respect of an interim payment, it is not possible to refer the valuation of that payment to adjudication.

However, the court considered that the Scheme is concerned with cash flow, not the contract sum. Whilst entitlement to interim payments may be corrected in subsequent interim or final valuations, this is not possible with final payments.

Accordingly the court concluded that where the 'notified sum' determined in adjudication is in respect of a final payment, unless the payment mechanism in the contract provides that such payment is conclusive, a party could refer the valuation of the final payment to adjudication.

The court emphasised that the final sum due to either party is based on the enforcement of their contractual bargain, and not a value established following a failure to issue a pay less notice.

Significance

This case confirms that parties may refer the valuation issue of a final or termination account to a subsequent adjudicator (but not an interim payment account), unless the contract states that the adjudicator’s decision is conclusive.

This is likely to deter unpaid parties from commencing ‘smash and grab’ adjudications in respect of final payment in order to take advantage of the employer’s failure to comply with the payment notice provisions.

Graham Leslie v Farrar Construction Ltd

[2016] EWCA Civ 1041; CA; Jackson and McCombe LJJ

Graham Leslie (GL) entered into an oral agreement (Agreement) with Farrar Construction Ltd (FCL) in relation to the developments of various properties (the Developments).

In the Agreement, GL and FCL agreed that GL would pay FCL its ‘build costs’ expended on the Developments and that the profit in respect of the Developments would be shared equally. The terms of the Agreement were not recorded in writing and the ‘build costs’ never defined.

As the Developments proceeded, FCL agreed a costs budget and submitted requests for interim payments which were ‘round sums’ unsupported by any supporting information. GL made the payments because they were within budget and appeared reasonable.

GL also did not require and FCL did not produce any form of schedule setting out all the ‘build costs’; the parties simply proceeded on the basis that the ‘build costs’ were the same as the budget. GL was content with this arrangement; his main concern on the Developments was not to exceed his budget to ensure profit was made on each Development.

As and when each Development was completed, the parties agreed what sum was due to FCL in respect of the build costs and profit share. Following the completion of the sale of five completed developments, GL paid £3,579,375 to FCL in respect of the build costs and profit share.

Work continued in respect of new developments.

In early 2013, relations between GL and FCL deteriorated. GL refused to continue funding new developments.

GL commenced proceedings in the TCC claiming repayment of all sums which he considered to have overpaid FCL. FCL counterclaimed for amounts due for the new developments.

The court rejected GL’s claim on the basis that the sums which FCL sought were within budget and GL was content to pay them without any investigation. HHJ Davies therefore concluded that GL owed FCL £139,428.16.

GL subsequently appealed to the Court of Appeal on the grounds he should have been allowed to recover the overpayments on the Developments because the moneys paid by GL were not actually due to FCL and were therefore a ‘mistake’.

Decision

Jackson LJ rejected the appeal.

The court considered that GL’s main concern on the Developments was not to exceed the budget, in order to make a handsome profit.

The court noted GL took a conscious decision to make the payments without investigation to suit his purposes and was therefore not acting on the basis of a mistake or an erroneous assumption. GL could not therefore now argue that he had overpaid FCL.

Jackson LJ reviewed the authorities and concluded that an employer cannot ordinarily recover overpayments other than in cases of fraud or misrepresentation. Sums are not recoverable by an employer at a later stage if it voluntarily made a payment knowing that it may be more than is owed and chose not to ascertain the correct amount due, as GL did.

Significance

The decision highlights the importance of agreeing costs and the basis on which they are calculated at the outset of any construction contract and ensuring that they are complied with; failure to do so will encourage a dispute.

This also case suggests that if an employer makes payments during the course of a contract without challenging the basis that they were applied for, it will be difficult to later recover any alleged overpayment without a clear contractual right to do so.

Parties negotiating contracts should consider whether to include a contractual right to recover moneys which turn out to be an overpayment. **CL**