Construction Update: June 2018

This month, as part of our regular updates on interesting legal developments I will be looking at two recent decisions concerning different but relevant issues for the construction industry:

1. Successfully challenging a winding up petition issued to enforce an adjudication award: Victory House General Partner Limited v RGB P + C Ltd [2018] EWHC 113; and

Victory House

This decision relates to a contractor’s failed attempt to wind up an employer company for non payment of a judgment debt following a series of adjudications.

By way of background, the contractor (RGB) pursued the employer (Victory House) for non payment of an interim payment application IA30 of over £800,000 via adjudication. Having obtained a decision in its favour, RGB were faced with a Part 8 application by Victory House challenging the decision and so made an application for summary judgment to enforce the decision.

The Court held that Victory House’s Part 8 application was not suitable for dealing with a substantive claim with disputed facts and so declined to give the order sought. The Court enforced the adjudicator’s award in respect of IA30 in favour of RGB, and so the sum awarded became a judgment debt owed to RGB.

However Victory House did not pay the judgment debt primarily on the basis that a second adjudication had taken place in respect of the next interim payment application (IA31), which incorporated a valuation of the works that were the subject of the IA30 decision. In the IA31 adjudication the adjudicator found that there was nothing due to RGB as the gross and net value of the work done was less than the amount paid on account (which did not include the judgment debt as Victory House had refused to pay i.e. Victory House would have been in an even worse position if the judgment debt had been paid).
RGB then sought to enforce the judgment debt (i.e. the sum the adjudicator found due in respect of IA30) by way of a winding up petition. That petition was met by two defences from Victory House, the main one being that because of the adjudicator's decision in respect of IA31 they had a valid cross claim for the overpayment on account as against the true value of the work done and so there was a bona fide dispute in respect of the debt.

Victory House cited in support the recent decision of Grove Developments Limited v S&T (UK) Limited (to see our article on this case, please click here), which decided a ‘smash and grab’ adjudication could be met by a second ‘true value’ adjudication on the same interim (or later) payment application. In this matter, Victory House argued that the IA31 adjudication amounted to a true value exercise in determining the gross and net value of the work including the work claimed under IA30. That exercise had found that RGB was due no further monies as they had received more on account than the value of the work done and so Victory House had a significant cross claim such that the judgment debt was disputed and the winding up petition should not be granted.

The Court agreed with Victory House and under the principles of Re Bayoil SA [1999] 1 WLR 147 the petition for winding up was dismissed.

This case is interesting for two reasons:

1. Where a bona fide cross claim exists a winding up petition can be resisted. However the party opposing the winding up petition must evidence such a claim; and
2. The importance of the Grove Developments decision is still being played out, but in this case establishing the true value of the work done in adjudication was key to establishing a bona fide cross claim and having the winding up petition dismissed, even though ordinarily the Courts look to enforce adjudication awards.

Rock Advertising

The Supreme Court's decision in Rock Advertising held that where a contract contains a “no oral modification” (NOM) clause, there cannot be an oral variation to the terms of the contract. This appears to be an obvious conclusion but it is one that may impact on how the parties to a construction contract act.

Under previous decisions the position was understood to be that the parties to a contract could agree new contractual terms or vary the existing terms and that such varied terms could be agreed orally in spite of the existence of a NOM clause.

The Court of Appeal decision in this matter followed this position, however this was challenged by MWB before the Supreme Court. They sought to have the
first instance judgment restored, which decided that because of the NOM clause (even though the agreement to vary was supported by consideration) the oral variation was ineffective because it did not follow the contractual requirements for such variations, i.e. had to be recorded in writing and signed by the parties.

The Supreme Court agreed with MWB – albeit that Lord Briggs’ decision was based on different rationale to Lord Sumption (who gave the lead judgment) and the other three judges.

The basis for the Supreme Court’s decision was that the parties had expressly agreed to include a NOM clause and therefore intended that any change/variation had to be done by way of the contractual procedure.

This decision does not mean that there can be no oral variations; it means that such variations must thereafter be recorded in accordance with the applicable contractual procedure (typically in writing signed by both parties) to be effective. This procedure is seen in some standard form contracts in any event.

There are a number of key issues for those involved in the construction industry arising from this case including:

+ Where a NOM clause exists, if the parties want to vary the contract such a variation must be recorded in accordance with the contractual requirements. This may be a further administrative burden but is one that should be undertaken nevertheless.
+ If there is an oral variation, and that variation is not recorded in writing as required by a NOM clause, a party who acts in accordance with it may not be able to enforce that term in a subsequent dispute, for example for additional payment.

However, and as acknowledged by the Supreme Court, in the latter situation it may be that the party who has acted in accordance with the oral variation in good faith can argue that the other party is estopped from relying on the NOM clause to mean that the oral variation is ineffective. This would be particularly so if the other party has gained some benefit from the other acting in accordance with the oral variation. Such an estoppel argument would require sufficient evidence to support it and how it is to be dealt with by the Courts is yet to be seen.

In conclusion, contracts should be checked for NOM clauses. If one exists but the nature of a project means that such a clause may hinder the successful carrying out of the work, the parties can consider a variation in writing removing the NOM clause or ensure adequate administrative support is available such that any agreed variation to the contractual terms are recorded in accordance with the contractual procedure.

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