

Mailbox (Birmingham) Ltd v Galliford Try Construction Ltd [2017] EWHC 67 (TCC)

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Executive Summary

The employer, Mailbox, sought to enforce an adjudication decision which had been decided in its favour. The contractor, Galliford Try ("GT"), attempted to resist the enforcement on the basis that Mailbox has assigned its rights under the Construction Contract and therefore was not the right party to commence the adjudication. Whilst Mrs Justice O'Farrell DBE held that the rights had been reassigned so that Mailbox was the correct party to the adjudication, the decision reminds parties of the importance of ensuring the correct party commences an adjudication to avoid costly enforcement litigation.

The Facts

The Adjudicator's decision was for GT to pay Mailbox nearly £2.5 million together interest under the Late Payment Act and 75% of the adjudicator's fees.

GT resisted the enforcement proceedings it on the basis that Mailbox was not the correct party to the adjudication, as it had assigned its rights under the construction contract (including the right to sue) to the Security Trustee.

In May 2011, Mailbox executed a debenture in favour of the Security Trustee as a condition precedent to a loan. The issues for the Court, in deciding whether or not the assignment had been valid and legal (as opposed to equitable), were:

- 1.1 Did the assignment satisfy the requirements under s.136 Law of Property Act for a legal assignment to have taken place?
- 1.2 Was the construction contract the type of contract which fell within the scope of rights capable of being assigned to the Security Trustee?

Decision

The Court decided as follows:

1. The assignment was absolute (the wording of the assignment was clear and used the word "absolutely"); the assignment was in writing, and express notice had been provided to GT. The assignment therefore satisfied the legal requirements.

2. As to number (2),

2.1 The rights under the construction contract were capable of being assigned because it fell within the clause which allowed assignment of rights under "*any agreement to which [Mailbox] is a party*".

2.2 Despite the construction contract not existing at the time the assignment, the Court was satisfied that the words in the debenture "*[Mailbox]...assigns ...its right, title and interest from time to time*" showed that the parties intended for both existing and future rights to be assigned.

Once the Court had decided a legal assignment of the rights had taken place, it was necessary to consider whether the rights had been re-assigned. The relevant wording in the debenture stated "*[Mailbox] is entitled...to exercise all rights assigned... and the Security Trustee will reassign any such rights to the extent necessary to enable [Mailbox] to do so.*"

The deed of re-assignment was dated 19 August 2016. In addition, the Notice of Adjudication was also served on 19 August 2016. Written notice of the re-assignment was not received by GTC until 26 August 2016.

Accordingly, it was agreed that a legal re-assignment had not taken place before the Notice of Adjudication was served. However, the Court held that an equitable assignment had taken place. As the general rule is that the equitable assignee has the right to sue (*Bexhill v. Razaq*), Mailbox had the right to commence adjudication.

In dealing with the issue that the re-assignment and the Notice of Adjudication were dated the same date, O'Farrell J stated:

"The contract and the scheme for adjudication specify dates by which and periods within which actions are required to be done, but do not attach any significance to the time by which any particular action is required to be done. On that basis,

even if the deed of re-assignment was not executed until 19 August 2016, the re-assignment was effective on the same date that the adjudication proceedings were commenced.”

Accordingly, the right to sue had been reassigned just in time, Mailbox was the correct party to commence the adjudication, and the adjudicator’s decision was enforced.

On a final note, the adjudicator had awarded interest at 8% on the sums due by way of liquidated damages under the Late Payment of Debt Act. It was agreed between the parties that the monies due were not a qualifying debt for the purposes of the Act (as this sum was not *“a debt...to pay the whole or any part of the contract price”*). Accordingly, the Court awarded interest at the commercial rate of 2%.

Comment

At a time when jurisdictional arguments to resist enforcement of adjudicator’s decisions are becoming less and less likely to succeed, parties are seemingly becoming more creative in their arguments. Simple acts of ensuring you have the right party to the adjudication and that the Notice of Adjudication is served at the right time, can ensure that parties looking to resist enforcement proceedings have even fewer avenues to pursue.

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