Winding up petitions - Breyer Group Plc v RBK Engineering Limited 2017 Petition No: CR-017-003348

Published 5 September 2017

Executive summary

A Winding-Up Petition is rarely appropriate as a method to recover monies due under a construction contract.

Here the Judge struck-out the winding-up petition as an abuse of process as it amounted to unfair commercial oppression.

The background

This was another attempt by a creditor to sidestep the adjudication process and effectively proceed to enforcement.

RBK had issued a winding-up petition for £258,729.16 alleging that this sum was due to it under its sub-contract with Breyer. Breyer contended:

- they were solvent;
- they disputed the terms of the sub-contract; and
- they alleged there were defects in RBK's works.

This was sufficient for Daniel Alexander QC (sitting as a deputy judge in the Chancery Division) who decided RBK were not a creditor because there was a substantial dispute as to the entirety of the petition debt.

However this is unlikely to be the last attempt by a creditor to pursue a debt under a construction contract by way of a winding-up petition.

The facts

On 28 May 2015 RBK entered into a sub-contract with Breyer to supply labour, plant and materials to carry out kitchen, bathroom, W/C and OT Shower Room refurbishment works at a project in Sutton.

By 2016 it became apparent to Breyer that more work would be wanted from RBK. A new sub-contract was proposed but never agreed. However RBK continued working for Breyer and the interim payment regime under the 2015 sub-contract was retained and adhered to by both parties.

The sub-contract contained detailed payment provisions included in Clause 8 whereby RBK was to submit its application for payment at least three working days before the Payment Due Date and Breyer were obliged to serve a payment notice not later than five days after the Payment Due Date. Breyer had to pay the amount in the Payment Notice subject to any Pay Less Notice.

In the case of the interim application for the final period 10 RBK made its application for payment on 3 February 2017 and Breyer did not serve its Payment Notice until 1 March 2017.

RBK contended that Breyer's payment notice was late and no appropriate pay less notice was served so that in effect RBK's application for payment should stand as the amount due in relation to final period 10.

Breyer contended that there was a dispute as to which terms of the sub-contract applied. They referred for example to an email sent on behalf of RBK which stated after reviewing the "new terms" that:

> *"The terms are onerous and we have not signed your order."*

Breyer also contended that they did not owe the amounts allegedly due because:

- there were defects in RBK's works;
- that some of RBK's works had failed audits undertaken by the employer;

- that some of RBK's works had not been properly certified; and
- that RBK's works had not been properly tested.

Following such "smash and grab" cases as *ISG Construction Ltd v Seevic College RBK* alleged as the Judge stated:

> *"... it was suggested [to me] that under the contractual scheme, if Breyer was out of time in serving its Payment Notice, that would automatically mean that a debt arose at the point that the time expired for the whole sum claimed in RBK's application for payment."*

The Judge could not accept this allegation, and had difficulty grappling with the payment provisions in the sub-contract which he described as:

> *"... a complex structure of payments and interim payments with conditions to be satisfied before payments should be made."*

The payment provisions also contained an Appendix which the Judge described as a somewhat "puzzling document" and that:

> *"... some of the columns and the descriptions of them [were] not easy to reconcile with the payment structure provisions of clause 8."*

This was not surprising as you had a Chancery Judge (not a TCC Judge) looking at these construction payment provisions probably for the first time.

He could not accept that Breyer's failure to serve a timeous payment notice meant RBK's application became a debt due from Breyer.

In effect the Judge concluded that there was a substantial dispute which meant that RBK the petitioner had failed to establish itself as a creditor entitled to present the winding-up petition.

The Judge considered there was a dispute as to whether the relevant notices had been served on time. He also considered that there was a dispute as to the "merits" due to Breyer's allegation regarding the defects in RBK's works. Further Breyer had as a preventative measure paid the whole of the disputed sum to its solicitors to show it was not insolvent and provided evidence of the same so they could say this was not a "can't pay case" but a "won't pay case".

The Judge also considered that payment disputes of this nature should have been dealt with by way of adjudication or litigation.

He was also not happy with Petitions of this type because a company in such circumstances:

> *"may feel pressurised into paying simply to avoid the petition being advertised which may itself have a range of serious commercial consequences on banking and other contractual relationships."*

In fact during the course of the case he acceded to Breyer's request for the hearing to be private:

> *"to avoid the risk that publicity about the petition may cause the injustice that the application was intended to avoid."*

He concluded that the petition should be struck-out as an abuse of process.

Commentary

This is a useful reminder that winding-up proceedings are not the place for resolving genuinely disputed debt claims which arise out of construction contracts that ought to be dealt with in adjudication or court proceedings.

However we do not consider this will be the last attempt to pursue such claims by way off winding-up petitions.

We suspect that where the contract terms are indisputable and an employer has failed to serve appropriate notices it is likely that a solvent contractor may well try to pursue such a "debt" by way of a winding-up petition.

Authors

Mark Roach
London - Walbrook
+44 (0)20 7894 6314
mroach@dacbeachcroft.com