

Payment provisions in hybrid contracts and the effect of the Construction Act

Published 17 December 2019

In the recent case of *C Spencer Limited v MW High Tech Projects UK Limited* [2019] EWHC 2547 (TCC) the question for the TCC was this:

Where the contract provides for the execution of both construction operations falling within the ambit of the Act¹ and non-construction operations falling outside the Act, does the payment notice have to separately identify the sum due in respect of construction operations and the basis on which that sum is calculated?

The background to the dispute

MW was the main contractor engaged to construct a power plant. By way of a 2015 subcontract, CSL was required to design and construct the civil, structural and architectural works for completion of the facility. The subcontract was worth £35m.

The subcontract was what the parties called a “hybrid construction contract” because it provided for both construction and non-construction operations as defined under the Act.

The subcontract contained one payment mechanism which provided for interim payments based on certain milestones. CSL commenced Part 8 proceedings against MW for £2.6m on the basis that a payment notice failed to set out the sum due in respect of construction operations as distinct from the sum due for non-construction operations.

Previous case law relating to hybrid contracts

Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture [2010] EWHC 1076 (TCC).

In that case, the court found that, absent an agreement to the contrary, the provisions of the Act, and in particular, the statutory adjudication scheme, only applied to the works which were found to be construction operations and not to the other non-construction operations.

Severfield(UK)LtdvDuroFelgueraUKLtd(2015)163ConLR235(TCC)

This case concerned the application of the statutory payment provisions in respect of a hybrid contract. The contract provided for a single payment regime which *did not* comply with the Act. As a consequence, the Court held that the statutory provisions applied only to the construction operations under the contract and a different contractual scheme applied to the other operations.

Decision

The Court summarised the previous case law and agreed that the Act contemplates that separate payment or adjudication provisions may apply to construction operations and non-construction operations under a single, hybrid contract.

Importantly, however, the court found that it does not follow that separate payment and adjudication provisions *must* apply to construction and non-construction operations under a hybrid contract. Parties are capable of agreeing that a single adjudication or payment scheme is applicable to both construction and non-construction operations, and provided those provisions are capable of achieving compliance with the Act, no separate mechanism will apply to the construction operations.

Having reviewed the subcontract between the parties, the Court found that there was only one payment mechanism in the subcontract and this was compliant with the Construction Act. The payment mechanism applied equally to all parts of the work under the Subcontract and there was therefore no need to separately identify the sum due for work done on construction operations. As such, CSL’s application failed.

Comment

The case confirms that, if parties adopt Act compliant mechanisms, they can avoid the likes of the risks found in *Severfield*, where the payment mechanism was not compliant, meaning that two different mechanisms applied.

If parties later consider that their payment mechanism may not be Act compliant, they should take care to separate the sums claimed for work done on

construction operations from work done on other operations so that they can still take advantage of the Act. The Court took the time to assess all of the other defences proffered by MW and found that had the payment mechanism not been compliant with the Act, then MW's payment notice would not have been valid and MW would have been liable to pay the amount applied for by CSL.

Cleveland demonstrates that the same point applies to adjudication. The Act provides a right of adjudication in relation to construction operations only, absent an agreement to the contrary, which can give rise to the potential for parallel dispute resolution procedures and jurisdictional challenges. Parties should consider adopting provisions in hybrid contracts which grant permission for an adjudicator to deal with both construction and non-construction operations.

[1] Housing Grants Construction and Regeneration Act 1996

Authors



Mark Roach

London - Walbrook

+44 (0)20 7894 6314

mroach@dacbeachcroft.com



Harriet Hawkins

London - Walbrook

020 7894 6106

hhawkins@dacbeachcroft.com