

A warning to the users of Letters of Intent

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In an effort to preserve the integrity and purpose of the adjudication process as an expedient means of resolving payment disputes, it is rarely seen that the Courts will find grounds not to enforce an award made by an adjudicator based on arguments concerning jurisdiction.

OD Developments & Projects Limited v Oak Dry Lining Limited [2020] EWHC 2854 (TCC), is a useful - further illustration of the problems with Letters of Intent as the basis for a contract.

Facts

OD was the Employer/Main Contractor and Oak was the sub-contractor engaged to carry out dry-lining works. It was accepted between the parties that the basis for the engagement was a binding Letter of Intent (“LOI”), which recorded the parties intention to enter into a formal contract based on the standard JCT 2011 Design and Build subcontract. Notably, the LOI also specifically included the provision that any dispute arising out of the LOI would be determined by adjudication under the current Scheme for Construction Contracts.

No JCT sub-contract form was completed and/or executed. Notwithstanding the absence of an executed JCT subcontract, the parties largely followed the JCT procedures.

The dispute between the parties revolved around a series of documents concerning interim and final payments which culminated with two exchanges:

(i) OD serving a Final Payment Notice on 26 September 2019 claiming the sum of £625,00 was due from Oak to it. Oak in turn served a Pay Less Notice on 14 October 2019 in which it claimed £765,00 from OD.

(ii) Oak claimed OD’s Final Payment notice was invalid and so on 14 October 2019 also sent its own Default Payment Notice again claiming £765,000 from OD. In response OD served a Pay Less Notice dated 16 October 2019 again claiming £625,000 was due from Oak to it.

On 8 November 2019, Oak referred the matter to adjudication. The adjudicator proceeded on the basis that the Conditions of the JCT Design and Build Sub-contract were incorporated and applied, notwithstanding the absence of an executed contract form. It was held that the Final Payment Notice served by OD was invalid and instead assessed the true value of the works on the basis of an earlier Payment Application (No.21) submitted by Oak. This resulted in the Adjudicator placing a lower valuation on the total value of the works than had been assessed by Oak and awarding Oak a balance of £431,291.81.

The Part 8 Proceedings that followed, issued by OD, formed the subject of this judgment. In short, OD challenged the adjudicator’s jurisdiction arguing that the adjudicator’s appointment was invalid because:

(i) it was not in accordance with the adjudication provision in the LOI, which OD averred included the JCT subcontract terms; and

(ii) its Final Payment Notice was conclusive such that there was no true dispute.

In response to OD’s Part 8 proceedings, Oak issued an application for summary judgment to enforce the adjudicator’s decision. The applications were then heard together.

Decision

The matter came before Waksman J who held that in relation to the issue of Jurisdiction, Oak had served the Notice of Adjudication in accordance with the terms detailed in the LOI. With respect to the conclusiveness of OD’s Final Payment Notice, the principle in *Marc Gilbard 2009 Settlement (trustees of) v OD Developments and Projects Ltd* was followed. Specifically, if the JCT sub-contract terms were incorporated and the final payment notice issued, Oak would have been unable to adduce evidence to dispute the figures claimed.

In relation to the issue of contract issue, the Judge held that the JCT terms did not apply and was fatal to Oak’s application for summary judgment. This finding meant that the adjudicator should have valued Oak’s payment application under the terms of the LOI and not the JCT sub-contract conditions, which the adjudicator had assumed were incorporated. The adjudicator’s decision could not be enforced.

Comment

This decision serves as a further warning as to the risks of relying on Letters of Intent, which do not always have clear contract terms, or incorporate Standard Forms of Contract.

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