



LEGAL BRIEFING

PETER MAIR V MOHAMMED ARSHAD

[2007] Sheriffdom of Tayside, Central & Fife at Cupar, A538/04, Sheriff Derek O'Carroll, October 2007

The Facts

The pursuers were seeking the sum of £8,730 from the defender, together with interest and expenses. The parties agreed that there was a contract within the meaning of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") and that the first invoice for £1,000 had been paid. The pursuer argued that two further invoices had not been paid. In addition, the defender brought a counterclaim for £40,000.

Section 110 of the HGCRA requires construction contracts to contain an "adequate mechanism for determining what payments became due under the contract, and when". The parties could not agree on whether the basic payment mechanisms in the contract were adequate and complied with the Section 110 requirement. If the payment process in the contract was not adequate then the Scheme would apply, incorporating monthly payments due on a certain date, and to be paid within a defined period. It was argued that, as a matter of law, the contract was unclear and so the Scheme should apply.

The Issue

Was the contractual payment mechanism "adequate"?

The Decision

Sheriff Derek O'Carroll held that in his view the question as to whether a contractual mechanism was "adequate" was a question of fact not law. He stated at paragraph 21:

"What will be adequate in some cases will be inadequate in others. Large complex construction operations will no doubt require complex highly structured mechanisms. Equally, simple, straightforward construction operations may be satisfactorily served by a very simple mechanism. I do not accept that I can determine as a matter of law whether the contractual mechanism in this case is adequate, whether by reference to the Scheme or otherwise. The adequacy of the mechanism, is a question of fact though, no doubt, some assistance may be gained in the final assessment by reference to the Scheme."

He concluded that he could not determine the final question at this stage in the proceedings. That could only be done after proof.

Comments

This case is interesting because it is one of the very few cases that deals with Section 110 of the HGCRA. The cases that deal with payment mostly focus on Section 111, which deals with withholding notices. One might have thought that the question as to whether the operation of the contract payment terms were "adequate" was simply a matter of legal interpretation. However, in this case the Judge concluded that it the factual operation of the payment

provisions that is important. So, the Judge was not willing to come to a conclusion until the parties had set out the factual evidence, as well as their legal arguments.

Nicholas Gould
April 2008
