



LEGAL BRIEFING

Supplementary information

McConnell Dowell Contractors (Aust) Pty Ltd v National Grid Gas Plc (formerly Transco Plc),

Mr Justice Jackson, [2006] EWHC 2551 (TCC)

The Facts

The claimant contracted with the defendants to carry out the construction of a gas pipeline running from Samesbury to Helmshore in Lancashire. The Contract was the NEC Engineering and Construction Contract (second edition) Option A; also, the Priced Contract with Activity Schedule, with certain secondary options and an Appendix 1 dated 21 August 2001.

This case was primarily an application for summary judgment to enforce an adjudicator's decision.

The defendants refused to pay the amount set out in the adjudicator's decision, sought a stay of execution of the summary judgment application RSC Order 47, Rule 1(1) and argued that their counterclaim/preliminary issues should be dealt with during current proceedings.

The Issue

Was a supplemental agreement a separate "construction contract" or, was it just a variation to the main contract?

The Decision

Mr Justice Jackson held that the supplemental agreement was a variation to the main contract because:

- The supplemental agreement varied the main contract sum;
- It identified which matters it covered by the increase to the contract sum;
- Recital C in the supplemental agreement stated that the main contract remained in force, "save to the extent to which the terms of [the] Supplemental Agreement modify, alter or vary the terms contained in the Contract.";
- The Contract and the Supplemental Agreement were mutually entwined; and
- The case of *L. Brown & Sons v Crosby* (TCC 5 December 2006) supported the approach.

The Supplemental Agreement was a variation to the Contract, and so there was one construction contract in writing for the purposes of the HGCR. The claimant was, therefore, entitled to summary judgment on the adjudicator's decision, and the stay of execution application was refused. The defendant's counterclaim was stayed pursuant to s.9 of the Arbitration Act 1996.

Comment

This case is interesting because the court had to consider whether a supplemental agreement between the parties was a new separate stand-alone contract, or just a variation to the original main contract. If the supplemental agreement had been a separate contract, then the adjudication decision might not have been enforced because the supplemental agreement did not contain an adjudication agreement, and it was not a “construction contract” and so adjudication would not have been implied into the supplemental agreement.

More importantly, the guideline set out by the Judge is helpful when considering whether separate agreements are really free-standing contracts, or just variations to a building contract.

Nicholas Gould
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