Construction and Compliance of Contract Amendments in the Manor!

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The law regarding the Housing Grants, Construction and Regeneration Act 1996 ("the Act") is well known, but often bears repetition. The Act requires that all construction contracts contain adequate mechanisms for valuation and timeframes for interim and final payments. If no such payment mechanism exists in the construction contract, then the Scheme's payment timeframes apply to that contract. It has been a longstanding trope of the Scheme and the provisions of the Act that if the contractual payment mechanism is *part* compliant, then the *relevant* payment provisions of the Scheme is either implied into and/or replaces those non-compliant terms in the contract.

What happens if the contract payment mechanism is *part* compliant, but implying the relevant payment provisions from the Scheme does not remedy the payment mechanism to make it compliant with the Act? One may think that the entire payment provisions of the Scheme would then replace all of these payment terms, however this is not the case.

Manor Asset Ltd v Demolition Services Ltd (Rev 1) [2016] EWHC 222 (TCC) dealt with a hearing for summary judgment by Demolition Services Ltd (DSL), who was attempting to enforce an adjudicator's decision; and CPR Part 8 proceedings brought by Manor Assets (MA), which claimed that the adjudicator's decision was unenforceable due to breach of natural justice and sought to determine the correct deadline for submitting a final date of payment.

The contract was a JCT Minor Works Contract (2011), later amended to provide payment at percentage milestones of the contract value-after the first milestone of 60% occurs and invoice issued, payment would occur within 72 hours of receipt of invoice. The first milestone occurred and the invoice submitted on the 23 October 2015. A 'pay less notice' was served on 28 October 2015 and the full invoiced amount was not paid. The adjudicator decided the final date for payment being 3 days after receipt of the invoice was the 26 October 2015. He considered the amended term as compliant with the act as it provided for when the sum would be due (s110) and the invoice was a valid payee's notice (s110A). The latest date the pay less notice should have been served was 5 days before the final due date, as stated in the contract. This meant that the pay less notice was served late.

According to Edward-Stuart J, there was no breach of natural justice as the adjudicator had considered all evidence and the Employer had sufficient time to comment about the timing of the pay less notice. He agreed with the adjudicator's decision that the pay less notice was late and the final due date was 72 hours after receipt of invoice; however there was an error by the adjudicator in reaching his conclusions. The court noted that even though the amended provisions complied with s 110 (1) and s 110A (1) of the Act, a contract payment mechanism is prohibited to have a deadline for a pay less notice before the date of invoice submission (s 111(5) of the Act).

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By implying the Scheme's payment provision for pay less notices into the contract, this would not overcome the prohibited action as the prescribed period for the pay less notice would fall 7 days before final due date. This would also seem to be in contravention to the parties' intention. The "only solution" appropriate for the "prescribed period" of the payless notice to ensure compliance with the Construction Act and the express amendment would be that the parties "impliedly agreed" this period to be nil or zero. Then the pay less notice could have only been served from receipt of invoice until expiry of the 72 hours. The adjudicator was correct that no valid pay less notice was given and his decision was enforceable. Therefore, DSL were successful in their application for summary judgment.

The Court's duty is to interpret and apply the contract as the party would themselves. The court has no power to improve the contract, but sometimes an implication would be "necessary to give business efficacy to the contract or to put it another way, it is necessary to imply the term in order to make the contract work as the parties must have intended." It could not have been the parties' intention to create an amended clause that would later become ineffective. By impliedly making the prescribed period nil, bearing in mind the rest of the contract, amendment, the Act and the industry, this would make the amendment compliant, 'practical' and in line with the parties' intention.

Many possible solutions were present by the parties to the court to correct this compliance issue and suggested afterwards by commentators. One possible interpretation that I considered a strong argument was the parties "impliedly" waived their right to give a pay less notice as this is not necessary to confirm the notified sum. However, the court did not like any of the multiple options presented by the parties, as an appropriate solution for this may seem to lack "clarity". The court regarded the express amendments as important terms to the parties and the Scheme when implied should not change these express conditions of the contract. The Court's solution is surprising and may be followed in rare occasion. The court would be minded to keep in line with the parties' express terms and intentions and if implying a term, outside the contract, the Scheme and the Act, can remedy the non-compliance with the Act rather than striking the term as ineffective and replacing with the relevant payment provisions of the Scheme, then this is a sensible solution.

Update: In Bougues (UK) Ltd v Febrey Structures Limited (2016), the judge Mr Jonathan Acton Davis QC, sitting as deputy High Court judge, found that the contract fell foul of s111(5) and the payment notice and pay less notice was not served in time. Here the court agreed that there was a "clear and obvious" error. The court did not follow Manor Assets, as the court was not in a position to imply terms that would contradict the express terms.