Held to Ransom

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A question for all of you who work for contractors. How often have you been discussing an extension of time claim with the Architect or the Engineer and been told that they are willing to grant you the extension of time that you have claimed provided you agree in writing that you will not claim any associated costs of prolongation? Similarly, how often has a sub-contractor refused to carry out disputed works until you agree that such works are a variation necessitating valuation?

Both scenarios are remarkably common and contractors generally provide such agreements, even though they may privately feel that they have been held to ransom.

Is this just part of the fair negotiation process? Are the 'agreements' reached, either not to claim prolongation costs or that certain works are a variation to be valued, valid and binding?

Well very often such agreements are not binding because they lack consideration. Consideration is one of the necessary ingredients for a promise to become a binding agreement. It is the other half of the bargain or as defined in Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd [1915] AC847) 'the price for which the promise of the other is bought'.

Therefore a mere promise by the contractor (say) not to claim prolongation costs if an extension of time is granted is not a binding agreement because the Architect or the Engineer has not 'paid a price' for the promise. In this respect, the granting of the extension of time is not a price because it is a contractual entitlement.

However, sometimes there is consideration present or sometimes the agreement is formalised and executed under seal (negating the need for consideration). In such cases it would normally be considered that the agreement would be binding.

But now the case of Carillion Construction Ltd v. Felix UK Limited (TCC 6 November 2000) appears to raise doubts as to the validity of such an agreement.

Carillion was the main contractor for the construction of an office building and they had sub-contracted the manufacture and supply of the cladding panels to Felix UK Ltd. Felix commenced work in September 1998.

As is very common on construction projects, disputes arose during the carrying out of the works as to whether instructions given were variations which entitled Felix to additional payment, or whether they were part of the original sub-contract works.

In particular, Felix argued that an instruction regarding low-level panels was a variation and claimed payment of an additional £4,160. Carillion took the view that the work was part of the original sub-contract works. Felix refused to carry out the work until Carillion had agreed in writing to pay this additional amount. Carillion felt that it had no alternative but to agree because no ground floor cladding had been delivered and the project was at a crucial point.

Further, by the end of 1999, there were significant delays to the delivery of cladding units. Felix's quantity surveyor, following a similar approach to that he had previously adopted for the low-level panels, indicated that further delivery of materials would be dependent upon agreement of the final account and in particular dependent upon Carillon's agreement to various disputed variation orders. Carillion considered this to be a serious threat because if the project completion date were not achieved, it would

be liable to the employer for liquidated and ascertained damages of £5,000 per week.

By the end of February, Carillion was still waiting for deliveries and subsequent trades were being held up, and it was coming under pressure from the employer. Carillion and Felix met to discuss the final account and after much argument and discussion Carillion agreed a final contract sum of 2 million, which was the full amount being claimed by Felix. This agreement was incorporated into a Settlement Agreement which was executed under seal (thus negating the need for consideration). The agreement stated that the final account was ?.2m in respect of "any actual or potential claims of either party arising from the sub-contract and was in full and final settlement of those claims".

Carillion, however, expressed its displeasure at having been compelled to enter into such an agreement.

After the final delivery was made, Carillion reverted to the original sub-contract, and commenced proceedings seeking to have the Settlement Agreement rescinded on the grounds of economic duress.

The court considered this case having regard to the principles necessary to establish duress. These are set out in DSND Subsea Ltd v Petroleum Geo-Services ASA and PGS Offshore Technology AS, [2000] 37 BLISS 8, and are to the effect that there must be pressure whose practical effect is that there is a lack of practical choice for the victim. The pressure must be illegitimate and it must be a significant cause in inducing the victim to enter into the contract.

On the evidence available the court held that:

- Felix had indeed made threats about the deliveries unless the final account was agreed.
- The threat was clearly illegitimate and without justification in that it was a threat to commit a clear breach of contract. Felix made its threat at a time when it knew that there were a number of trades dependent upon the supply of the materials.
- Carillion had no practical alternative to submitting to Felix's threats. Felix argued that it could have explored other avenues, for example, threatening or commencing adjudication. However, as it was impossible to say whether the court would have granted an injunction against Felix and because of the time scale involved, the court considered that it would not have been a reasonable course to take. Adjudication would have taken six weeks, and Carillion could not wait that long.

Accordingly, the court concluded that there was economic duress and it set aside the Settlement Agreement leaving the final account to be settled in accordance with the terms of the sub-contract.

This case should be a salutary lesson for those who may be tempted to overstep the mark when negotiating with another party from a position of overwhelming strength.

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