Briefing

BURGES SALMON

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Don't rely on equitable set-off

In *Redd Factors Limited v Bombardier Transportation UK Limited*, Primarius was supplying Bombardier with train seats for rolling stock for four main rail contracts: London Midland, Chiltern Trains, Stansted Express and London Underground. Primarius ran into cash flow difficulties and was having difficulty paying its trade creditors. In an attempt to help, Bombardier agreed to purchase goods and materials from certain suppliers and provide them as Free Issue Material or "FIM" goods to Primarius to enable them to continue to manufacture the seats.

Terms

Amongst other terms of the agreement between Bombardier and Primarius, clause 7.1 contained a set-off arrangement. It stated that the parties *"shall in good faith agree a variation order"* to their existing contracts whereby Bombardier would provide the goods and materials to Primarius at cost price plus a 5% handling fee, which would be set off against the price payable to Primarius for the manufactured seats supplied under the four main contracts. The case was brought against Bombardier by Redd Factors who was the receivables purchaser in a factoring arrangement and had been assigned the debts due from Bombardier to Primarius. The High Court had to consider the set off arrangement.

Agreement to agree?

One of the issues was whether clause 7.1 was enforceable as a contractual set-off clause, given that the parties did not enter into the variation order. The basic legal position is that 'agreements to agree' are unenforceable because they lack certainty *(Walford v Miles)*. Whether the clause was sufficiently certain to be enforceable had to be looked at in the relevant contractual and factual matrix *(Jet2.com v Blackpool Airport)*. The judge held that clause 7.1 was enforceable on the basis that the material obligations which were to be set out in the variation order had been identified: Bombardier was to provide the FIM goods in sufficient time for the seats to be manufactured and on the basis of an agreed amount to be set off against Primarius' invoices for the price of the deliverables.

Equitable set-off

The parties made a further agreement about the arrangements which meant that clause 7.1 only applied to the Stansted contract. So the court had to go on and consider equitable set-off and, particularly, whether costs of the FIM goods arising under one contract could be set-off against invoices under any of the main contracts. The Judge referred to the leading case of *Bim Kemi v Blackburn [2001]* (in which the Court of Appeal looked at the cases following on from *Hanak v Green [1958]*) and considered the basis for equitable set-off. The key test is whether the cross claim "*flows out of and is inseparably connected with the dealings and transactions giving rise to the claim*". The Judge found that the contracts were "part of the same piece", the scheme under which the parties hoped that Primarius would trade out of its difficulties and return to profit. In those circumstances, the deliveries by Bombardier of FIM goods under one main contract flowed and were inseparably connected with the dealings and transactions giving rise to the claim for set-off under the other main contracts. That meant that FIM under one main contract could be set-off against invoices under others.

Conclusion

A significant amount of the case was taken up with looking at the detail of the arrangements between the parties and the amounts on the various invoices. Although they paid more for the seats than they had originally contracted to do, fortunately for Bombardier that amount was less than it would have been because the Judge agreed with them and allowed their claim for set-off. It would have been better if the parties had recorded and tracked the arrangement properly.

You cannot assume that you can pay a net figure where you have a number of contracts with one party. If you want to be able to pay a net figure against multiple contracts, you should agree an express set-off provision in your contracts. Going to court and having to rely on equitable set-off is less certain and more costly.

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