

NOT A WASTE OF COURT TIME – RECTIFICATION OF A RECYCLING CONTRACT

- ▶ What happens when the parties discover the signed contract does not reflect the final version that they agreed?
- ▶ What are the grounds for seeking rectification of that contract?
- ▶ Will delay or an “Entire Agreement” clause defeat a party’s attempt to rectify?

What’s it about?

In *The Council of the Borough of Milton Keynes v Viridor (Community Recycling MK) Limited (No. 2)* [2017] EWHC 239, Coulson J in the TCC rectified a waste recycling contract on the grounds of mistake.

Pursuant to a contract dated 1 October 2009, the Council engaged Viridor to carry out waste recycling in Milton Keynes for a period of 15 years. In Viridor’s final tender, it proposed (as part of the remuneration for the contract) that there was an Income Generating Payment Mechanism (**IGPM**) in favour of the Council for a fixed payment of £500,000 per year, which was “*indexed for inflation*”.

This tender was accepted by the Council, but subsequently during the process of putting together the contractual documents, the Council’s consultants included an earlier draft of the IGPM that did not include the reference to indexation. It was this version of the contract – with the incorrect IGPM – that was subsequently executed by the parties.

This error only came to light some three years later in 2012 when the Council was audited and it became apparent that the wrong version of the IGPM had been included in the contract. Following this, the Council started proceedings for rectification on the basis of common or unilateral mistake.

What was the outcome?

Coulson J’s Judgment provides a helpful summary of the current law on the grounds for rectification. In that regard, he confirmed:

Common Mistake – requires the party seeking rectification to show that: (i) the parties had a common continuing intention for the contract to be rectified; (ii) that there was an outward expression of accord (in this case, that it was accepted that the fixed payment was part of the tender); (iii) that the intention continued at the time of execution of the contract; and (iv) that by mistake the contract did not reflect that common intention;

Unilateral Mistake – requires that: (i) one party wrongly believed that a contract contained a particular term or provision which it did not; (ii) the second party was aware of the omission/inclusion and that it was due to a mistake on the part of the first party; (iii) that the second party omitted to draw that mistake to the notice of the first party; and (iv) that the mistake was calculated to benefit the second party.

Having considered the law, and on the basis that it was common ground between the parties that the wrong IGPM had been included in the contract, Coulson J found that the Council had “made an overwhelming case” for rectification. The Court applied the test for common mistake (as set out above) and concluded that: there was a common intention between the

parties to contract on the basis of the final tender (i.e. including the provision as to indexation); that they both agreed that the particular payment provision was part of the final tender; that there was no negotiation regarding the IGPM after the final tender was accepted, so indicating the parties continued to intend that the clause would include an indexation element; and that the inclusion of the incorrect IGPM was an obvious mistake.

The Court also considered the alternative argument in unilateral mistake and stated that even if it was wrong in finding common mistake, that the Council would have succeeded on this argument on the basis that if Viridor had known of the mistake prior to execution and not drawn it to the Council's attention, then Viridor would be the ultimate beneficiary of the mistake.

Any defences or arguments against rectification?

The two main defences that Viridor pleaded to the Council's claim were delay and the presence of an Entire Agreement Clause. The Court dealt with these two arguments in short order:

Delay – as rectification is an equitable remedy, it is subject to the “doctrine of laches”, which may prevent relief where a party has delayed in pursuing a remedy. Whilst the Council's case was brought some three years after it entered into the contract, the Court held that the clock only starts to run on a defence of laches when the party with the right becomes aware of the mistake. Therefore, the relevant time period to be considered was not from execution of the contract, but the audit that drew the facts to the Council's attention. On this basis there was no such substantive delay that would merit the claim being barred; and

Entire Agreement – that the parties' intentions were contained within the four corners of the contract and so the Court could not disturb the contents of the agreement as executed. The Court re-affirmed the case law on this issue, which is that the “entire agreement” that has been reached by the parties is not necessarily that found in the paper contract they executed, but rather the contract document that has subsequently been rectified to reflect their true intentions. On that basis, Viridor's Entire Agreement argument is “immaterial” and does not mean that that paper contract is unimpeachable.

So what?

Whilst this case does not create new law, it reminds contractors that, from a:

- ▶ practical perspective, it is worthwhile to thoroughly check the contents of engrossed contracts prior to signature; and
- ▶ legal perspective, rectification – which is generally seen as a difficult argument to run before a tribunal and a real last resort – can be a potent and effective tool in the right circumstances.

It is also a helpful reminder that there are defences open to a party that faces a rectification argument, but that any issue of delay must be judged from the point of the parties' knowledge of the mistake and that any attempt to fight off a rectification claim based on the existence of the Entire Agreement Clause will not succeed.

Coulson J said in his judgment, it “*is perhaps a sad reflection of the fact that modern day contracts of this kind are so complicated that nobody...bothers to check the actual documentation being signed*”, so this case should be a salutary lesson to check documents before signature, but it also highlights that if a mistake is made then there are legal mechanisms open to a party to obtain redress.

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