Directors: personal liability under contract with suppliers?

Robert McDiarmid, partner, Stronachs LLP

THERE'S a Latin phrase – 'if you want peace, prepare for war'. I won't quote the original words, everyone's had quite enough of lawyers quoting Latin. It's an old phrase but the sentiment is more true than ever in today's business world, especially in those areas of particular contractual and legislative complexity like the construction industry.

A recent case before the High Court, London (Donald Insall Associates Limited v Kew Holdings Limited [2019] EWHC 384 (TCC)) provided a timely reminder of the need to make sure you've got your contractual ducks firmly in a row, otherwise you could be in for some surprising and unpleasant results.

This was a construction dispute in which an architects business (DIA) raised adjudication proceedings under the Housing Grants, Construction and Regeneration Act 1996 seeking payment from the company who instructed them (Kew). The two companies battled through the adjudication process with DIA coming out successful; obtaining an order for payment against Kew for in excess of £200,000.

Notwithstanding the result, Kew still failed to pay. DIA therefore sought enforcement of the adjudicator's award by the court. One of the two key grounds of challenge, both in the adjudication and at court, was the argument that DIA's claim was misconceived because the contract had in fact been entered into by the director of Kew personally and not with Kew itself. Therefore DIA had sued the wrong entity.

The parties burned through time and money arguing over this. Documentary evidence included contemporaneous letters and emails along with the contractual fee proposal. There were witness statements which referred to a verbal conversation in which it was alleged that it was agreed that the contract would be personal to the director. That of course was refuted.

In the event, and somewhat fortunately for the director, the court agreed with DIA and found that it was not the director who had entered into the contract.

However, this is a good example of the kind of 'out of nowhere' argument that might turn that simple debt claim into an expensive, time-wasting and even sleep-ruining experience. DIA managed to at least mitigate this by making sure that its paper records were sufficiently clear to win the day and overcome the allegations of verbal agreements and save themselves (and also Kew's director) from even more wasted cost.

The construction industry is absolutely fertile ground for disputes like this given the complexity of the strict systems of notices and counter-notices and the interplay between the parties' contracts (ad hoc or standard form) and the construction legislation. If you're facing a customer or supplier with some creative and knowledgeable advisors on their side, you better have those ducks in a row.

If you want peace, prepare for war. Perhaps dramatic. But true.

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