CITY BASEMENTS LTD v NORDIC CONSTRUCTION UK LTD
Technology and Construction Court
Ramsey J
14 April 2014

THE FULL TEXT OF THE JUDGMENT OF RAMSEY J

Introduction

1. This is an application by the Claimant ("CBL") for summary judgment in respect of an adjudicator's decision which awarded sums against the Defendant ("Nordic"). There is also an application by Nordic for relief from sanctions in relation to service of a witness statement.

Background

2. There was a subcontract dated 22 May 2013 under which Nordic engaged CBL to carry out piling/groundworks and a basement and construction up to first floor as part of a car park for the construction of a six-storey residential block in London SW11. The subcontract incorporated the JCT Standard Form of Building Subcontract with Subcontractor's Design (2011 Edition). Clause 8.2 provides that the latest edition of Part I of the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme") applies.

3. On 3 December 2013 CBL made an application for interim payment No 8 to Nordic which, it says, resulted in CBL applying for payment of a certain sum. CBL says, and it is not disputed, that an application for interim payment made on that date in accordance with the terms of contract would lead to payment of that payment application becoming due on 17 December 2013 under clause 4.9, with the final date for payment being 10 January 2014 under clause 4.10.

4. Under the provisions of the subcontract Nordic was required to give a payment notice under clause 4.10.2 no later than 22 December 2013 but it failed to give any such notice. Then Nordic had the opportunity under the subcontract to serve a pay less notice under clause 4.10.3 but did not give any pay less notice. Accordingly CBL submits that the sum in the payment application was due for payment on 10 January 2014 in accordance with the provisions of clause 4 and the other provisions of the subcontract.

5. CBL says that it commenced the adjudication by its notice of intention to refer a dispute to adjudication dated 15 January 2014, which in due course led to the adjudicator's decision which forms the basis of this application for summary judgment.

These Proceedings

6. The adjudicator's decision was not paid and proceedings were commenced on 12 March 2014 seeking summary judgment. On 13 March 2014 standard directions for adjudication disputes were given in this court which included, at paragraph 3, a provision that any further evidence in relation to the Claimant's application should be served and filed by the Defendant by 4:00pm on 31 March 2014 and by the Claimant in response to that of the Defendant by 4:00pm on 4 April 2014.

Failure to serve witness evidence in response

7. In the event what happened in this case was a defence, which had a statement of truth from Mr Adam Greenfield, the contracts manager for Nordic, was served on 31 March 2014, the date on which, in accordance with the directions, Nordic was to serve its evidence in response. It appears that from correspondence it became apparent to Nordic's solicitors that they should have served a witness statement but they had not, and they then made an application dated 3 April 2014 for relief from sanction seeking at that stage to rely upon the witness statement of Mr Greenfield. There was a letter from CBL's solicitors in response on 4 April 2014 indicating that relief from sanction should not be granted.

8. The matter came before me on paper on 8 April 2014, when I made an order that Nordic was permitted to rely on the defence with the statement of truth signed by Mr Greenfield as the Defendant's evidence under paragraph 3(1) of the order dated 13 March 2014, and insofar as Nordic sought to pursue the application further and to rely on any further matters which were contained in the witness statement of Mr Greenfield, such application would

be heard at the hearing on 14 April. I set out my reasons for that decision, although by an administrative error they may not have reached the parties. Essentially, I said that the defence which has been filed was signed with a statement of truth. As set out at paragraph 24.5.2 of the Civil Procedure White Book, this is written evidence as much as a witness statement.

9. In the event the application for relief from sanctions to put in the witness statement of Mr Greenfield has not been pursued. The only matter which arose was whether certain documents which were exhibited to that witness statement should be put in. First of all, the application for interim payment No 8 was already exhibited as part of Mr Glover's second witness statement and therefore there was not any need for an application to put that in. The two other documents are a letter at page 270 of the bundle, which is a letter of 3 December 2013 from CBL and a letter of 4 December 2013 from Nordic. In the event there was no serious challenge to those letters being admitted. They are referred to in various documents within the bundle and therefore it has not proved necessary for me to consider the application for relief from sanctions, as the defence has formed the evidence put forward by Nordic and there has been and could be no serious objection to the two further letters being put before the court.

10. I should add, though, that this is a case, like many of the cases in this court, where there is a short timetable set on applications to enforce adjudicators' decisions. Those applications for summary judgment are the subject of curtailed directions leading to a hearing in about a month after the applications are issued. It is the essence of these applications that the timetable has to be complied with. As can be seen from the directions, once the witness evidence had been served on 31 March, evidence in reply had to be put in by the Friday of that week, that is, 4 April, and that clearly could not happen if, as here, it was only the subject of an application which was made on 3 April. The application then had to be responded to on 4 April. It led to the order on Tuesday, 8 April, with skeletons having to be served on Thursday, 10 April and with the bundle authorities being filed with the court on 11 April prior to the hearing today on Monday, 14 April. In the context of those directions a failure to serve evidence on time cannot be regarded as trivial.

11. The witness statement in this case was to be a hundred pages and dealt with many matters which would clearly have needed to be responded to, and would have led inevitably to further rounds of late evidence and difficulties. Further, in the case no good reason was put forward. The reason set out in the witness statement supporting the application is as follows:

> "Paragraph 3 of the Order does of course direct the Defendant to file any "further evidence" by 4pm on 31 March 2014 rather than a defence. I did not file a witness statement on behalf of the Defendant through a misunderstanding of the Order but would contend that the Defence that I have filed does amount to further evidence given that it contains a 255 statement of truth. At the very least it clearly sets out the facts and issues over which the Defendant opposes summary judgment and, in the alternative, the enforcement of a judgment.
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> 5. On 2 April 2O14 I received a letter from the claimant's solicitor (Exhibit TW3) which led me to re-examine Mr Justice Ramsay's Order. I now realise that l should have obtained a witness statement from my client and filed the same by 4pm 31 March 2014. Accordingly I now seek leave to file the witness statement of Adam Greenfield out of time."

12. That obviously first of all refers to the defence, which I have dealt with, and that is properly before the court as evidence. What I do not accept is that there was anything reasonably open to misinterpretation in the form of the standard order which is made in these courts on applications for summary judgment. In those circumstances, had the matter not proceeded as it has proceeded, there would have been no question in this case of granting relief from sanctions under the new Rule 3.9. Everything points to the importance in these sorts of applications of keeping costs proportionate and in complying with orders of the court in terms of filing evidence, therefore, had the matter come before me seeking permission for the witness statement to be served out of time, it would have been refused.

The application for summary judgment

13. I now deal with the substantive matter which is before the court, which is the application for summary judgment of the adjudicator's decision.

14. As I have said, the the application was made by email on 3 December 2013 in relation to interim application No 8. That indicated that it was due for payment on or before 18 December 2013 and it is said that the build-up

of the variations which were not agreed would be served under a further cover. The relevant document is in a fairly standard form and sets out a current application, sums previously certified as movement in the period and contains schedules which then show how the sum is made up. Importantly in this case, it showed work as being 100% complete and included the release of retention of £22,000, being half the retention which would be released on practical completion.

15. That document, it seems to me, on its face is only capable of indicating one sum due, which is the movement in the period plus the release of retention. I understand that there might have been an alternative case based on underpayment on previous certificates or overpayment, but the sum which is due for payment under a certificate is the sum which is the movement in that period and any cumulative under or overpayment is not dealt with in terms of the sums which are due under the particular certificates or applications. Therefore the application was made as referred to in the evidence of Mr Glover in his second witness statement. It was in a common form and was put in showing the sort of details which are usually shown in these applications.

16. There was then a further letter which was sent by CBL and that wrote to confirm that practical completion was achieved on dates which it said were 11 October and 6 November 2013 and it sought release of 50% of the retention monies, which is what had been applied for on the same day.

17. On 4 December 2013 Nordic wrote to say that they had inspected the works and in their opinion practical completion had not yet been achieved. In those circumstances, although there was then further correspondence which is referred to in paragraph 17 of the defence, nothing was said further about payment. There was no payment notice given, as I have said, nor was a pay less notice given. All that happened was that 10 January passed and no payment was made. Then an intention to refer to adjudication was given by CBL on 15 January 2014.

18. On behalf of Nordic it is said that, as at 15 January 2014, there was no dispute and that the matter therefore was not ripe to be referred to adjudication. It says that it was a precondition to have a dispute to refer to adjudication and without it the adjudicator would not have jurisdiction. Nordic therefore says that the adjudicator does not have jurisdiction and therefore the adjudicator's decision should not be enforced. It is said, although this is not a matter dealt with in the evidence, that the application was merely overlooked in the course of concerns both as to continued performance and as to achieving practical completion of the works. It is said therefore that there is no basis for inferring that there was a dispute when payment was not made on 10 January 2014.

19. Mr Darton, who appears on behalf of Nordic, refers me to the terms of the subcontract and in particular the provisions of schedule 1, which set out various matters in terms of supplemental provisions relating to collaborative work, health and safety and so on, and at paragraph 6 of schedule 1 to the subcontract it says:

> "With a view to avoidance or early resolution of disputes or differences (subject to Article 4), each Party shall promptly notify the other of any matter that appears likely to give rise to a dispute or difference. The senior executives nominated in the Sub-Contract Particulars (item 1) (or if either is not available, a colleague of similar standing) shall make as soon as practicable for direct, good faith negotiations to resolve the matter."

20. Mr Darton submits that, given this term, it is not easy to infer from inactivity in this case that there was a dispute. What should have happened, he says, if paragraph 6 was properly implemented, was that there would have been some form of discussion between the parties before there was any question of adjudication being commenced. He therefore submits that there was no dispute to be referred to adjudication.

21. I have already indicated the basis for Mr Darton's second submission, which is that in fact there was no basis for there to be payment on 10 January 2014 because there was no sum in the application for payment. I reject that argument for the reasons given above. This a standard form of application and it was, in my judgment, a proper application for payment which, under the contractual provisions, then became the basis of payment in default of a payment notice or a pay less notice. Therefore there was, it seems to me, a sum which would be due by the final date of payment of 10 January 2014. However, as I have indicated, Mr Darton submits that by that date there is no dispute to be inferred.

22. On behalf of CBL Ms O'Hagan submits, first, that the scope of the jurisdiction point now taken by Nordic in this case is wider than the point which was taken within the general reservation of rights made in the

adjudication which had a limitation which was introduced by the final provision. She therefore submits that Nordic cannot take the jurisdiction point.

23. Nordic's Response dated 29 January 2014, as quoted in the adjudicator's decision, set out the "Background to the dispute" and stated that Nordic was unaware that a dispute existed between the parties and the notice of adjudication was the first claim submitted by CBL. It said that a suspension was notified by CBL by a notice on 24 January 2014 and that the dispute would have fully crystallised on 24 January 2014 if the payment CBL said was due was not paid. That was the way in which Nordic put the position and then set out the reservation:

> "The responding party contends that no dispute existed between the parties for matters contained in the Notice of Adjudication dated 15th January 2014 and therefore the adjudicator does not have jurisdiction in this matter as the dispute appears to have crystallized on the 24th January 2014 after the notice was served."

24. Ms O'Hagan submits that this is a different point to the issue which Nordic now seeks to take. I have been referred to the decision of Akenhead J in *Allied P&L Ltd v Paradigm Housing Group Ltd* [2009] EWHC 2890 (TCC) and also within the bundle of authorities is the more recent decision in *Laker Vent Engineering Ltd v Jacobs E&C Ltd* [2014] EWHC 1058 (TCC).

25. Those decisions show that where there is a general reservation, then that is sufficient to reserve all arguments of jurisdiction. Where, however, there is a specific reservation, that is not sufficient for a party to be able to rely on it to widen the scope of the reservation. It seems to me that, fairly reading the document submitted by Nordic on 29 January 2014, although it is clear that Nordic relied on the crystallisation of the dispute on 24 January 2014, the reservation was in two parts. Nordic contended that no dispute existed between the parties in respect of matters contained in the notice of adjudication dated 15 January 2014 and therefore, which is the second part, the adjudicator did not have jurisdiction because the dispute crystallised on 24 January 2014.

26. In my judgment, Nordic's reservation was a general reservation of jurisdiction but based on there being no dispute between the parties for matters contained in the notice of adjudication dated 15 January 2014 and was not limited to a jurisdictional challenge based on the fact that the dispute had crystallised on 24 January 2014.

27. Ms O'Hagan's second argument is that, as of 10 January 2014, it is necessary to look at the position under the subcontract. She refers to the provisions of clause 4.9 and 4.10 which deal with the detailed mechanism by which there is, first of all, an application, and secondly there are provisions in 4.10.2 for a payment notice and provisions for a pay less notice under 4.10.5. Once the time for those steps has passed and subject to any matters raised either by a payment notice, which would further define payment or by a pay less notice, which would indicate a lesser payment would be appropriate, she submits that on the date for final payment there is an obligation to pay. She says that if payment is not made on that date then the inference is that the failure to pay a sum on the due date is a dispute which gives rise to a right to adjudicate. In any event, looking at the limited correspondence in December 2013 and given that the application for payment in this case included application for the release of retention on practical completion and the clear dispute as to whether or not practical completion had occurred, she submits that there was clearly a dispute as to what sums would be due, even though that issue was not taken further under the contractual provision of payment notices or pay less notices. In relation to paragraph 6 of schedule 1 she submits and I accept that the important words are "subject to article 4", which is the provision as to adjudication.

28. As the Housing Grants, Construction and Regeneration Act 1996 (as amended) states, a party should have the right to refer to adjudication at any time and there is no requirement to go through dispute avoidance or seek early resolution of disputes in order to go to adjudication. Whilst dispute avoidance and the early resolution of disputes by informal contact is obviously of great benefit to the construction industry, it is not a precursor to adjudication. As a result, the main issue, it seems to me, between the parties is whether or not on 10 January 2014 and by the failure to pay on 15 January 2014, it can be said that there was a dispute between the parties.

29. The law on whether or not there is a dispute was set out in the first instance decision Jackson J (as he then was) in *Amec Civil Engineering v Secretary of State for Transport* [2004] EWHC 2339 (TCC) where, after reviewing the various authorities at [68] he summarised the principles which have to be applied in deciding whether there is a dispute. His decision was then referred to in the Court of Appeal decision in *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* [2004] EWCA Civ 1757, where the relevant part of the

judgment of Jackson J was cited by Clarke LJ (as he then was) in [62] where the main points of relevance are first of all:

> "1. The word 'dispute' which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.
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> 2. Despite the simple meaning of the word 'dispute', there has been much litigation over the years as to whether or not disputes existed in particular situations. This litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.
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> 3. The mere fact that one party (whom I shall call 'the claimant') notifies the other party (whom I shall call 'the respondent') of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.
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> 4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.
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> 5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute."

30. I was also referred to the dissenting judgment of Rix LJ on this aspect in *AMEC Civil Engineering Ltd v Secretary of State for Transport* [2005] 1 WLR 2339 where he said:

> "68. Thirdly, and significantly, the problem over `dispute' has only really arisen in recent years in the context of adjudication for the purposes of Part II of the Housing Grants Construction and Regeneration Act 1996. Jackson J referred below to some of the burgeoning jurisprudence to which the need for a "dispute" in order to trigger adjudication has given rise. In this new context, where adjudication is an additional provisional layer of dispute resolution, pending final litigation or arbitration, there is, as it seems to me, a legitimate concern to ensure that the point at which this additional complexity has been properly reached should not be too readily anticipated. Unlike the arbitration context, adjudication is likely to occur at an early stage, when in any event there is no limitation problem, but there is the different concern that parties may be plunged into an expensive contest, the timing provisions of which are tightly drawn, before they, and particularly the respondent, are ready for it. In this context there has been an understandable concern that the respondent should have a reasonable time in which to respond to any claim."

31. In this case there was an application for payment. That application is a claim which is made and there was a long period of time, in this case, first of all up to the date for payment, which was 17 December 2013, and then to the final date for payment of 10 January 2014 when it was open for Nordic to take any points that they sought to take legitimately under the contract. Once the 10 January 2014 date came, then if payment was not made that day or shortly afterwards, I consider that the clear inference on an objective basis is that there was a dispute as to whether Nordic would make the payment. In other words, they disputed the payment being made on 10 January 2014 or, indeed, at any date after that.

32. There is no need, as it seems to me and as is made clear by paragraph 6 of schedule 1, in the case of an adjudication where it is a simple dispute about payment, for the parties to do anything else other than comply with the contractual provisions. Had they complied with that, payment would have been made on 10 January 2014. It was not made on 10 January 2014 and the only possible inference is that there was a dispute as to the making of payment on that date, despite the fact that the contractual mechanism for a payment notice or pay less notice had not been complied with.

33. I also consider that the correspondence around 3 and 4 December 2013 makes it quite clear that any question of payment of the retention or of payment of 100% after completion of the works was a matter of dispute between the parties at that stage. Whilst Mr Darton submits otherwise, not on the basis of the objective evidence but rather subjectively on the basis that his clients merely overlooked the position, the subjective position of each party is not what the court is concerned about. The court has to look at the position objectively in the light of the contractual provisions and the communications between the parties as to whether or not on 10 January 2014 there was a dispute as to payment.

34. I am quite clear there was. Indeed it may seem strange that once the notice of adjudication was given, if there had been no dispute, that immediate payment was not made as would be expected in the absence of a dispute. It is quite clear that immediate payment was not made then and it has not been made before today's hearing. Although what happened after the date is not a matter for the court to take into account in interpreting the position in January 2014, it is a matter of note as to why, if there were no dispute, even today the relevant sums have not been paid.

35. In those circumstances I do not consider that this is a case where there are reasonable grounds for successfully arguing that the adjudicator did not have jurisdiction and therefore that there should not be summary judgment in this case. Accordingly I grant summary judgment in the sums set out in the adjudicator's decision.