Case no: HT03-7

Neutral Citation Number: [2003] EWHC 312 (TCC)
IN THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT

The Royal Courts of Justice
The Strand
London
WC2A 2LL

Friday, 24th January 2003

Before:

HIS HONOUR JUDGE HAVERY QC

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	COSTAIN LTD	CLAIMANT
	-v-	
	WESCOL STEEL LTD	DEFENDANT

- - - - - -

(Tape transcription by Smith Bernal Wordwave Ltd,
190 Fleet Street, London EC4A 2AG
Tel: 020 7404 1400
Official Court Reporters)

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MR MORT (Instructed by Morgan La Roche) appeared for the Claimant

MR BOULDING QC AND MR STANSFIELD (Instructed by Walker Morris) appeared for the Defendant

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JUDGMENT
(Approved by the Court)

Friday, 24th January 2003

1. **HHJ HAVERY QC:** I have before me an application under Part 8 for a declaration that a reference to adjudication is not valid. The claimant in this matter is a contractor, and the defendant a sub-contractor for steelwork. The work was said to be completed - but there is some dispute about that - in July of last year. The defendant went into administrative receivership in September and it is argued that the time for payment of the final account has not yet been reached because the defects liability period under the main contract has not yet expired.

2. The claim that has been put before the adjudicator is a claim for the amount claimed to be due under the final account, and other matters also arise in that connection. The documentation that has been put before me begins with some correspondence, a letter of the 24th September 2002 to the claimant from the joint administrative receiver of the defendant company, confirming his appointment as joint administrative receiver and pointing out that he was currently reviewing the position of the company's contracts – that is the defendant's contracts – and had instructed Curry and Brown (who are a firm of Quantity Surveyors) to act as his agents during the receivership, and confirming that Curry and Brown would contact the claimant shortly in order to discuss the contract in question.

3. The next thing that seems to have happened is a letter of 18th October to the claimant from a firm of solicitors, Walker Morris, who said they were acting for the receiver. It was stated that a dispute had arisen over payment of their client for the structural steelworks. The dispute was over the value of Wescol's – that is the defendant – final account and whether it was entitled to an extension of time. There was a subsidiary dispute, the letter said, as to whether the claimant was entitled to withhold payment of sums applied for in its application for interim payment 19. And it was stated that the difference between the parties on non-agreed variations amounted to £921,000-odd, details of which were said to be contained in a schedule. The letter ended by saying,

> "Unless we receive payment in cleared funds of our client's final account by 11th November 2002, we put you on notice that we will commence an adjudication to claim the full value of our client's final account as set out in the summary, or such other sum as the adjudicator shall find is due to Wescol. If we do not hear from you by that date, we will consider that you have no comments to make and that you do not disagree with our definition of the dispute."

That letter was answered by a letter dated 7th November 2002. The following points were made by the claimant in that letter. First that there could be no dispute presently as to the value of Wescol's final account since that was not yet due for determination. And then there was reference to the sub-contractor's obligation to provide documents. The letter stated,

> "If the documents now provided with your letter are purported to be those documents, then you must allow adequate time for their examination."

Then it was stated again that the demand for payment was premature. The letter went on to say that there had been continuous, close and positive dialogue between the parties in relation to progressing agreement of the valuation of the defendant's work, ceasing only with their insolvency. It was stated that the joint administrative receiver had indicated an intention that the dialogue should resume through Curry and Brown. And the letter continued,

> "Curry and Brown's failure to date to communicate with us has, therefore, been a surprise although we trust this oversight will be remedied. We are, of course, continuing to give attention to the material sent with your letter and we will respond in detail in due course. It seems to us that none of these circumstances points to the existence of a dispute."

And then it went on to say,

> "There has been no dispute concerning extension of time. Extensions have been given. Although the specified procedures in respect of extensions of time cease to apply upon the determination of Wescol's employment, it should be noted that the time-scale allowed for final review of interim extensions is 16 weeks."

4. There was no reply as such to that letter. There was a letter of the 13th December 2002 from Walker Morris on behalf of the defendant stating the intention to refer to adjudication "the dispute between the parties as to the value of the final account."

   And then it said,

   > "Without prejudice to the generality of the foregoing, the decisions which Wescol will ask the adjudicator to make will include the following:
   >
   > (1) Payment of the sum due to it under the contract forthwith or at such future date as the adjudicator shall determine;
   >
   > (2) A declaration as to the value of its final account;
   >
   > (3) A declaration as to its entitlement to an extension of time."

   And then the actual referral was made on 19th December.

5. The first and major point raised by the claimant is that a dispute had not arisen by 13th December 2002, at any rate not a dispute as to the value of the final account. I have found this a rather difficult question. Certainly in their letter of 7th November, Costain indicated that they were looking into the matter. It is also true that Curry and Brown did not return to them to discuss it. There is no doubt that there was a dispute as to when the money would become due, but there being no further communication on either side between 7th November and 13th December, it seems to me – taking a common sense view of the matter – that there was a dispute between the parties as to the amount of the final account.

6. I have been referred to some authorities. The word 'dispute' bears a range of meanings. I was referred to the decision of HH Judge Thornton QC in Fastrack Contractors-v-Morrison [2000] BLR 168, which refers at page 178 to Halki Shipping Corporation-v-Sopex Oils Ltd [1998] 1 WLR, CA. The latter case itself supports different meanings, or nuances of meaning, of the word as used in an arbitration clause. First, as including any claim which the other party refused to admit or did not pay (headnote, page 727). Second, a dispute exists where there is a claim which the defendant refuses to admit and refuses to pay (Page 746, letter A). Third, there is a dispute once money is claimed unless and until the defendants admit that the sum is due and payable (page 761, letter G). Fourth, there is a dispute where a party has refused to pay a sum which is claimed or has denied that it is owing. (page 761, letter H).

7. Judge Thornton concluded (paragraph 28 of his judgment, at page 178) that a claim and its submission do not necessarily constitute a dispute, that a dispute only arises when a claim has been notified and rejected, and that a rejection can occur when an opposing party refuses to answer the claim.

8. What has happened in this case certainly falls within the first and third of the meanings that I have discerned in Halki; but Costain have not, at any rate expressly, refused to pay the money or denied that the amount is correct.

9. Given that Costain deny that the money is at present due and have not accepted that the amount claimed is correct, I conclude that there was a dispute on 13th December as to the amount of the final account.

10. In those circumstances, I reject that ground of the claimant's argument.

11. There are two other issues that I can deal with shortly. One was that the notice was defective because it contained reference to two disputes, namely, the amount of the final account; and whether an extension of time for delay should be granted which related to the interim payment applications. It seems to me that the whole of these matters really are bundled together. It is not clear that the interim payment matter differs from the question of the final account, except insofar as the date for payment of the final account may still be in issue before the adjudicator.

12. Mr Mort, counsel for the claimant, submitted that it was not permissible to put two disputes in the same notice. The contract between the parties provides by Clause 38A that,

> "Any dispute or difference arising under the sub-contract may be referred to adjudication."

13. Mr Mort relied on the singular language there and repeated in a number of places, 38A.1, also 38A.2, also 38A.4.1. And he submitted that a dispute or difference should not be construed as referring to more than one dispute or difference. In the circumstances, it is not necessary for me to decide that question since I have come to the conclusion that in this case the compendious matters constitute one dispute.

14. The other issue is that the documents were not properly served. The agreement provides, by Clause 38A.9,

> "Notices, referral particulars, accompanying documents, written statement of contention, material, the adjudicator's decision, correspondence and the like, shall be sent by fax and first class post forthwith to the address of the party …" etc

And then,

> "This Clause shall take precedence over Clause 38A.4.2 as to the mode of service of documents for the purposes of this Clause 38A."

38A.4.2 says,

> "The referral [and] its accompanying documentation … and the copies thereof to be provided to the other party, shall be given by actual delivery, or by fax, or by registered post, or recorded delivery."

Clause 38A.9 is perfectly clear, and it is common ground that in this case the documents were not sent by the method prescribed by that sub-clause.

15. On the other hand, Mr Boulding QC for the defendant, has pointed out to me the provisions of Clause 38A.5.6 which says,

> "Any failure by either party to enter into the JCT adjudication agreement or to comply with any requirement of the adjudicator under Clause 38A.5.5, or with any provision in or requirement under Clause 38A shall not invalidate the decision of the adjudicator."

So, he says, the Clause 38A.9, in effect, is not binding, or at least does not invalidate a decision of the adjudicator.

16. Mr Mort submitted that to make sense of that apparent contradiction, namely that Clause 38A.9 was rendered nugatory, it must be held that Clause 38A.9 did not relate to documents instituting an adjudication.

17. There might be difficulties with Clause 38A because one of its provisions, contained in Clause 38A.4.1 is that,

> "Within 7 days from the date of such notice or the execution of the JCT adjudication agreement by the adjudicator, if later, the party giving their notice of intention shall refer the dispute or difference to the adjudicator for his decision."

The point was originally taken by Mr Mort that, because that was not an absolute 7-day limit but there was an alternative given, therefore the clause did not fall within the statutory

provisions; therefore the statutory scheme itself applies. However, Mr Boulding pointed out that this particular qualification to the time limit was expressly deleted by an amendment to the contract; and it is now common ground that Clause 38A does comply with the requirements of the Act and, therefore, the statutory provisions are not invoked. That agreement seems to imply that the provision in Clause 38A.5.6, that the failure to comply with any requirement under Clause 38A shall not invalidate the decision of the adjudicator, does not apply to Clause 38A.4.1.

18. In my judgment, Clause 38A.9 cannot be construed in the way contended for by Mr Mort. I conclude that the effect of Clause 38A.5.6 is to render the provisions and requirements of Clause 38A, including those of Clause 38A.9, non-mandatory so far as the validity of any decision of the adjudicator is concerned. Accordingly, I find against the claimants on their argument that, owing to failure of compliance with that clause, the referral to adjudication is invalid.

19. Accordingly, I dismiss the application.