Claim No.HT-06-91

Neutral Citation Number: [2006] EWHC 1365 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

St. Dunstan's House

Wednesday, 7th June 2006

Before:

HIS HONOUR JUDGE TOULMIN CMG QC

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B E T W E E N :

HILLVIEW INDUSTRIAL DEVELOPMENTS (UK) LTD. Claimant

- and -

BOTES BUILDING LTD. Defendant

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MS. C.-A. DOERRIES (instructed by Clyde & Co.) appeared on behalf of the Claimant.

MS. N. JEFFORD and MR. J. LEE (instructed by Thomas Eggar) appeared on behalf of the Defendant.

[Note: Ms Jefford argued the case

but was not available for the judgment]

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J U D G M E N T

JUDGE TOULMIN:

1 This is an application by Hillview Industrial Developments (UK) Limited ("Hillview") for summary judgment under Part 24 of the CPR to enforce an award made against Botes Building Limited ("Botes") by Mr. Mark Pontin on 27th March 2006 (acting as Adjudicator). Mr. Pontin ordered that Botes pay Hillview the sum of £292,650, plus statutory interest, plus the Adjudicator's fees within seven days. The Adjudicator's fees have already been paid.

2 The dispute had arisen as to Hillview's entitlement, as employer, to be paid liquidated damages by Botes, as contractor, in relation to Botes' alleged failure to meet certain contractual dates for sectional completion of new buildings and the construction of new units at Whitby Avenue, Park Royal, London.

3 On 7 th April 2006 I gave directions in the customary abbreviated form for the service of evidence and skeleton arguments. On 19 th April 2006 Botes' solicitors acknowledged service indicating that Botes intended to defend the whole of the claim.

4 On 27 th April 2006 Botes served a file of documents from the adjudication proceedings but did not serve any witness evidence as required by CPR Part 24.5 and the court order.

5 On 22 nd May 2006 Botes' solicitors, Thomas Eggar, wrote to Hillview's solicitors, Clyde & Co., inviting them to agree to an adjournment of the enforcement application due to be heard on 26 th May 2006 on the grounds that Botes was about to issue legal proceedings in relation to a claim on the Final Account and Final Statement, and that Botes would be applying for summary judgment in respect of its claim. Hillview declined to agree to the adjournment in a reasoned letter dated 23 rd May 2006.

6 On 24 th May 2006 Botes filed its claim for the sum of £190,780.46 plus VAT and interest, which it claimed was due on the Final Statement and was unpaid by Hillview. The claim form was accompanied by an application for summary judgment against Hillview.

7 On receipt of the application I wrote to the parties to enquire whether or not Botes' claim would be defended and I invited Hillview to set out the substance of any defence. I had it in mind that if no arguable defence was being put forward I should use my powers of case management to deal with the two claims together on 26 th May 2006.

8 In response, Hillview indicated the nature of its defence and at the hearing on 26 th May 2006, at which I heard this application, I gave directions for Botes' application for summary judgment leading to a hearing on 23 rd June 2006. Botes agreed that Hillview had had insufficient time to consider and respond fully to Botes' application and that the hearing of the application should be adjourned. Botes argued that it would succeed at the adjourned hearing.

9 The basis of Botes' claim is set out in para.14 of the particulars of claim. The contract between the parties is dated 19 th February 2004 and is in the JCT standard form of building contract with contractor's design, 1998 edition, with provision for sectional completion by the parties. Articles 30.5 and 30.6 of the contract provide that the contractor shall submit to the employer a final account and a final statement, the latter setting out the balance said to be due from one party to the other. Botes claims that under the contract the final statement shall be conclusive as to the balance due if it is not contested within one month and is due and payable 28 days thereafter.

10 There is some dispute about the date on which the sum, so Botes alleges, became due and payable. On 13 th March 2006 Botes submitted its final account and final statement. This set out a balance in Botes' favour of £190,780.45, exclusive of VAT. Botes claims that the sum was not disputed by Hillview and became conclusive on 13 th April 2006 and was due for payment on 15 th May 2006. Hillview claims that the relevant date is 11 th May 2006, not 15 th May 2006.

11 The timing is important because Botes says that it could not have made its claim until it became due and payable and that this date is relevant to the discretion which Botes says I should exercise in its favour. I am not entirely sure that in circumstances where it was being threatened with adjudication enforcement, Botes could not have started an action for a declaration once, on its case, the sum had become conclusively due, i.e. after 13 th April 2006, but I shall proceed on the basis that it could not have filed its claim until 15 th May 2006. Botes claims that the date is relevant because the shortness of time between 15 th May 2006 and 26 th May 2006 prevented the two applications

from being heard together. Hillview argues that if Botes had made its claim immediately and not on 24 th May 2006 it may well have been possible for the two claims to have been heard together.

12 In her skeleton argument for this hearing dated 24 th May 2006, Ms. Jefford, for Botes, wrote:

"3 Botes accepts that the Adjudicator's decision was a valid decision and that the normal practice of the court would be to give summary judgment as the mechanism for enforcing the decision. For the reasons explained below, however, in the particular circumstances of this case, Botes submits that the court ought not to do so at this stage."

13 This was the first indication that Botes had given that it had no substantive defence to the claim to enforce the adjudication award, and it contradicts the indication given in the acknowledgement of service that Botes intended to defend the claim. In the meantime however Hillview had expended substantial sums in preparing the application and the enforcement process had been delayed.

14 Botes contends that to give summary judgment for the sum of £292,650, plus interest, at this stage would be inappropriate and that the court ought to exercise its general discretion in such a way as to provide a fair result between the parties and a common sense approach to "money changing hands".

15 Ms. Jefford's primary submission is that although in normal circumstances Hillview would be entitled to summary judgment, in this case, under CPR 24.2 it would be open to the court to conclude that the circumstances in this case provided a compelling reason why the case should be disposed of at trial rather than by summary judgment. It would, she submits, be a curious result if Botes was required to pay the sum in the Adjudicator's award only for a substantial part of it to have to be repaid to Botes a short time after.

16 In the alternative, she submits that this application should be adjourned in order that both applications for summary judgment could be heard at the same time; or by my ordering immediate payment of the difference between the Adjudicator's award and the sums claimed by Botes and adjourning the application.

17 In the course of argument I asked specifically if there was any case being advanced that there was a risk that if the Adjudicator's award was paid in full and immediately, Hillview would not pay the sums due to Botes if the sums became due and payable. No argument had been advanced in the written submissions to this effect and it was confirmed that no such argument was being made by Botes.

18 Botes' next argument was that I could find that Botes was entitled to set off the balance due to it against the larger sum awarded by the Adjudicator.

19 Finally, Botes argues that if I give judgment against it for the full amount I should grant a stay for the short time until Botes' summary judgment application can be heard.

20 Hillview contends that under the Housing Grants Construction and Regeneration Act 1996 (the "1996 Act") it is entitled, in the absence of any arguable defence, to summary judgment immediately. It contends that this is the result, not only of the legislation but is underlined by a term in the contract. Article 39A.3 of the contract provides that:

"The adjudication shall be conducted in accordance with the Construction Industry Council's Model Adjudication Procedure from time to time in force … which are hereby incorporated into this contract."

21 Clauses 4 and 5 of the Construction Industry Council's Model Adjudication Procedure, Third Edition, provide:

"4. The Adjudicator's decision shall be binding until the dispute is finally determined by legal proceedings, by arbitration … or by agreement.

"6. The parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to legal proceedings or arbitration."

THE LAW :

22 The starting point of any discussion of the law must be the 1996 Act. It is now well established that the purpose of the legislation was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional basis and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by litigation, arbitration or agreement – see Dyson J. in Macob Civil Engineering Limited v. Morrison Construction Limited [1999] B.L.R. 92, 97.

23 The relevant provision of the 1996 Act is as follows:

"108(3) The contract shall provide that the decision of the Adjudicator is binding until the dispute is finally determined by legal proceedings … or by agreement."

24 It is clear from the jurisprudence, largely developed by this court and confirmed by the Court of Appeal, that there are only very limited grounds for refusing to enforce immediately an Adjudicator's award setting out what is due to a party under the contract in relation to the particular dispute which is referred to the Adjudicator – see Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd . [2000] 73 CLR 135 and succeeding cases..

25 After the argument had been completed I was referred to Interserve Industrial Services Limited v. Cleveland Bridge (UK) Limited [2006] E.W.H.C. (TCC) 741 (" Interserve"). In that case Jackson J. reviewed the existing authorities. That case addresses most of the issues in the present case. The facts in that case were that on an application by Interserve for summary judgment to enforce sums awarded under one adjudication, Cleveland Bridge sought to persuade the court to allow it to set off sums which would fall due to it, ten days after the hearing, as a result of a subsequent adjudication; alternatively, that there should be a stay of execution of any judgment in favour of Interserve pending the enforcement of the subsequent adjudication.

26 In the course of his judgment, Jackson J. set out the established principles which are of general application in cases concerned with the enforcement of adjudication awards:

1. As a matter of common law where a claimant and a defendant have a liability to each other, the general principle is that the defence of set-off arises. This applies, in the absence of clear words to the contrary, to building contracts as to other contracts (see Modem Engineering v. Gilbert Ash [1974] A.C. 689, 718 per Lord Diplock).

2. The purpose of s.108 of the 1996 Act provides for the rapid resolution of disputes in the construction industry on an interim basis and is an exception to the general rule set out above.

3. Section 111 of the 1996 Act, dealing with intention to withhold payment, provides a comprehensive code governing the right to set-off against payments contractually due (see His Honour Judge Hicks QC in VHE Construction Plc v. RBSTB Trust Co. Limited [2000] B.L.R. 187.

4. This general principle may be subject to certain limited circumstances where it may be possible to set off liquidated damages for delay against an Adjudicator's award (see Balfour Beatty Construction v. Serco [2004] E.W.H.C. (TCC) 3336 at Part VI of the judgment).

5. The intention of Parliament is that the decision of the Adjudicator is to be given effect in a way which is consistent with providing a quick and effective remedy on an interim basis and without consideration of arguments as to other provisions of the contract (see Ferson contractors v. Levolux AT Limited [2003] B.L.R. 118, and His Honour Judge Gilliland QC in MJ Gleeson Group Plc. v. Devonshire Green Holdings Limited (Salford District Registry, 19 th March 2004).

27 At para.43 of his judgment in Interserve Jackson J. said the following, the principle with which I respectfully agree:

"Where the parties to a construction contract engage in successive adjudications each focused upon the parties' current rights and remedies, in my view the correct approach is as follows: at the end of each adjudication, absent special circumstances, the losing party must comply with the Adjudicator's decision. He cannot withhold payment on the grounds of his anticipated recovery in a future adjudication based on different issues. I reach this conclusion both from the express terms of the Act and also from the line of authority referred to earlier in this judgment."

He held that Cleveland was not entitled to set off against the award in the second adjudication either its anticipated recovery or even the actual recovery in the third adjudication where the sum was not yet due.

28 In this case the Adjudicator's case was made on 27 th March 2006 and was payable within seven days. Botes has conceded that it has no defence to the enforcement claim. In these circumstances, Hillview is prima facie entitled to judgment immediately. I can see no reason why the principle set out in para.43 of Jackson J.'s judgment should not apply also where court proceedings are involved. In principle, Hillview should be entitled to judgment immediately or under the terms of the contract, "without delay". In any event, at this stage, all Botes has is a claim for monies due on the Final Statement in respect of which it has an application for summary judgment due to be heard on 23 rd June 1996 which may or may not succeed.

29 Dealing with Botes' submissions in the light of the purpose of the Act, the contract, and the authorities, I can see no possible justification for holding that the circumstances of this case provide a compelling reason why the case should be disposed of at trial, rather than by way of summary judgment. It would, in my view, be an abuse of the process of the court to allow the case to proceed to trial where Botes concedes that it has no defence.

30 I can also see no justification for adjourning the summary judgment hearing. The purpose of the 1996 Act is to provide a means of resolving construction disputes on a provisional basis and providing that sums awarded should be paid promptly. This is set out clearly in the contract. I can see no reason why this application should be adjourned so that both applications can be heard at the same time.

31 Put bluntly, Hillview was entitled to be paid within seven days of the Adjudicator's award on 27 th March 2006 and has not yet been paid.

32 Thirdly, I can see no reason why Botes should be permitted to set off to which it claims it will be entitled after it has succeeded in obtaining summary judgment on 23 rd June 2006. The application for summary judgment is contested and I have not yet heard it. Hillview has not had a proper opportunity to respond but it has made a response which Botes concedes that it should be permitted to argue. I

can express no view as to whether or not Botes will succeed. Even if the facts had been different Botes would have what is probably an insuperable hurdle to overcome in proposition 5 set out above that I should provide a quick and effective remedy on this application without consideration of other provisions of the contract.

33 Finally, I must consider whether or not to grant a stay in the circumstances of this case. I am satisfied that Hillview is entitled to judgment but I am also satisfied that the purpose of the 1996 Act is to provide a statutory framework which would enable justice to be done between parties to a dispute. It was not intended to cause injustice. This can, in appropriate cases, be dealt with by the grant of a stay. I am satisfied that the jurisdiction in adjudication enforcement cases to grant a stay under the CPR must be limited to cases where there is a risk of manifest injustice. I asked Ms. Jefford specifically whether or not it was being suggested that if the sum awarded in the adjudication was paid to Hillview, there was a risk that Hillview would be unable to, or would not, repay the sum awarded promptly in the summary judgment application of Botes if it were successful. If there had been a serious risk in those circumstances that money paid over on a provisional basis would not be recovered promptly in the event that Botes succeeded in obtaining summary judgment at the hearing on 23 rd June 2006, I should have given sympathetic consideration to granting a stay for the short time until that date or making other orders to secure the sum which had been paid. That is not the position here.

34 I see no injustice in ordering Botes to pay the sum awarded by the adjudicator forthwith, nor do I find it a curious result if Botes is required to pay the sum awarded by the Adjudicator in full only (if it be the case) for a substantial part of it to have to be repaid by Hillview in a short time from now. Such a solution is entirely consistent with the legislation.

35 I give judgment for Hillview in the sum of £292,650, plus statutory interest.