Neutral Citation Number: [2007] EWHC 3042 (TCC)

Case No: HT 07 348

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 December 2007

Before:

MR JUSTICE AKENHEAD

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Between:

AMBER CONSTRUCTION SERVICES LIMITED	**Claimant**
- and -	
LONDON INTERSPACE HG LIMITED	**Defendant**

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- -

Glovers for the **Claimant**
Mills & Co for the **Defendant**

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JUDGMENT

Mr. Justice AKENHEAD:

Introduction

1. This application relates to an interesting issue which has arisen in relation to whether only fixed costs should be payable if the defendant to an issued claim admits or pays the sum claimed within a few days of the issue on or before the Acknowledgement of Service. The parties have agreed that this issue and any consequent costs assessment can be dealt with by way of the written submissions which were served by the Claimant and the Defendant on the 27th and 30th November 2007 respectively.

The facts

2. The Claimant, a contractor, was engaged by the Defendant to demolish existing structures and build six residential units at 2 Clapham Road, London SW9. There was a dispute between the parties as to the terms of the contract but it was accepted that it was made in about September 2003 and incorporated at least some of the provisions of the IFC Standard Form issued by the JCT in 1998.
3. Various issues had arisen between the parties by August 2007. The Claimant was claiming some £241,172.76 plus VAT and interest which was challenged by the Defendant.
4. The Claimant served a Notice of Adjudication on 22 August 2007 and then applied to the RIBA requesting it to nominate an adjudicator. On 28 August

2007, the RIBA nominated Mr J.E. Price as adjudicator who received the Referral Notice on 29 August 2007.

5. By letter dated 7 September 2007, the Defendant sent detailed submissions as to why Mr Price was said not to have jurisdiction. The grounds were broadly that the contract was said not to be in writing, the IFC provisions as to adjudication were not incorporated, the Notice of Adjudication was issued after the request to the RIBA and the Referral Notice was issued late. Mr Price resolved that he did have jurisdiction in his letter to the parties of 10 September 2007.
6. The parties exchanged written submissions about the substance of the dispute and the Claimant extended the time for Mr Price to issue his decision until 10 October 2007.
7. Mr Price duly issued his decision dated 4 October 2007. He decided that the Claimant was entitled to a net sum of £63,912.55 plus VAT, interest of £7,589.62 and continuing interest of £16.63 per day from 4 October 2007 until payment and £6,336.25 plus VAT for his fees.
8. The Claimant instructed Solicitors, Glovers, who wrote to the Defendant and its solicitors on 17 October 2007. The letter referred to Mr Price's decision and said as follows:

> "In the decision dated 4 October 2007 Mr Price ordered that payment should be made by 11 October 2007. LIHGL has failed to make payment

as directed. LIHGL is contractually bound to honour the Adjudicator's decision and has no defence to any claim for payment.

Should our client not be in receipt of cleared funds of £79,455.36 by 5 p.m. on Wednesday 24 October, then legal proceedings will be commenced in the High Court for enforcement of the Adjudicator's decision by Summary Judgment without further notice.

Our client will seek its legal costs on an indemnity basis and further interests in those proceedings. Our client will seek indemnity costs on the basis that LIHGL should be aware at this time that it has no arguable defence to the claim."

9. The Defendant's solicitors, Mills & Co, replied on 22 October 2007:

"You say that our client has no defence but clearly that is wrong. We attach a copy of our letter to your client dated 10 October 2007 setting out our client's defence to your client's claim.

You will note that in addition to our client's defence, our client also has a counterclaim against your client, details of which are also attached.

We can confirm that we are instructed to accept service."

The attached letter dated 10 October 2007 from Mills & Co stated that Mr Price had substantially reduced the Claimant's claim and that the Defendant had a counterclaim of £97,264.93 plus VAT and interest. It indicated that in any event the Adjudicator had no jurisdiction. It stated:

"Should you attempt to enforce Mr Price's decision in the courts, our client reserves its right to raise additional points or include additional evidence to defend any such claim."

10. During the course of the adjudication, the Defendant had served a Pre-Action Protocol Letter, apparently in respect of its counterclaim. On 23 October 2007, Glovers responded to that letter in effect indicating that more time was needed to respond.

11. Mills & Co wrote a "without prejudice save as to costs" letter on 24 October 2007. This contained an "all-in settlement offer in full and final settlement of all outstanding claims" in the sum of £35,000. Mills & Co wrote:

"Should your client attempt to enforce the decision of Mr Price but fail in its attempt to do so, your client will be liable for our client's legal costs arising out of the enforcement proceedings as well as its own legal costs arising out of the failed attempt.

As this offer is being made in an attempt to save both our respective client's legal costs associated with court proceedings this offer will lapse on Friday 2 November 2007 or on the commencement of enforcement proceedings by your client, whichever is the sooner".

12. On 1 November 2007, without further notice, the Claimant issued a Part 7 Claim Form, the "brief details of claim", of which called upon the Defendant to pay the sums ordered to be paid by the adjudicator in the sum of £79,255.80 plus interest and:

"that the Defendant pay the Claimant's costs of this claim on an indemnity basis".

In the Claim Form (which is standard) there is a box which identifies the "Amount Claimed", the "court fee" (said in this case to be £900), and Solicitor's costs. The latter box was filled in "TBA" (to be advised).

13. On the same day, 1 November 2007, Glovers applied for an order that the time for acknowledgement of service be abridged to two days. An application under Part 24 was also issued for Summary Judgment against the Defendant.

14. Attached to the Claim Form was Particulars of Claim and a Witness Statement of Mr Philip Eyre of Glovers explaining the basis of the claim and the application for Summary Judgment. Various documents were exhibited to that statement including what were said to be the contract terms, together with various adjudication documents including the decision of Mr Price.

15. HHJ Toulmin, CMG, QC in this court considered the Claimant's application and, as is standard in the Technology and Construction Court for adjudication enforcement claims, gave directions not only abridging time for acknowledgement of service but also fixing a hearing date for the Part 24 application on 7 December 2007 and providing for the exchange of evidence, bundles and skeleton arguments.

16. On 6 November 2007, Glovers faxed Mills & Co. the order made by HHJ Toulmin. It appears that the Claim Form together with the other documents were served on 7 November 2007.

17. By letter dated 9 November 2007 to this Court, copied to Glovers, Mills & Co on behalf of the Defendant filed their client's Acknowledgement of Service which admitted the full amount claimed as shown on the Claim Form.

The Issue

18. The Defendant argues that so far as the Claimant's costs of and occasioned by the Claim are concerned, they should be limited to £100, which it is said is the fixed amount which is payable in circumstances where liability in full is admitted. This is challenged by the Claimant which seeks to argue that the rules about fixed costs do not apply in this case and that in any event the Court has the jurisdiction and a discretion to order fuller costs.

19. Each party has submitted a bill of costs for summary assessment, the Claimant's relating to the costs of and occasioned by issuing proceedings and taking the matter forward to date, whilst the Defendant's is limited to the costs of defending this application by the Claimant for its full costs.

Decision

20. CPR Part 45 is entitled, "Fixed Costs". CPR Part 45.1 states as follows:

> "(1) This Section sets out the amounts which, unless the court orders otherwise, are to be allowed in respect of solicitors' charges in the cases to which this Section applies.
>
> (2) This Section applies where –
>
> (a) the only claims are claims for a specified sum of money where the value of the claim exceeds £25 and –

(i) judgment in default is obtained under rule 12.4(1);

(ii) judgment on admission is obtained under rule 14.4(3);

(iii) judgment on admission on part of the claim is obtained under rule 14.5(6);

(iv) summary judgment is given under Part 24;

(v) the court has made an order to strike out a defence under rule 3.4(2)(a) as disclosing no reasonable grounds for defending the claim; or

(vi) rule 45.3 applies; …"

21. Rule 45.2(b) is immaterial in this case relating as it does to delivery of goods, recovery of land, possession, demotion claims or steps taken by a judgment creditor.

22. Since there has been no judgment or striking out, the fixed fee provision could only apply, therefore, if Rule 45.3 is applicable:

"(1) where –

(i) the only claim is for a specified sum of money and;

(ii) the defendant pays the money claimed within 14 days after service of particulars of claim on him, together with the fixed commencement cost stated in the claim form,

(iii) the defendant is not liable for any further costs unless the court orders otherwise."

23. Thus in both Rules 45.1 and 45.3 it is clear that the Court retains a discretion to "order otherwise". Thus, in appropriate cases, the Court retains its discretion to order such costs as are appropriate. That said, the fixed cost regime applies, so to speak, in default if the Court does not otherwise order. CPR 45 recognises that many sets of proceedings brought in Court will be in the nature of debt collection exercises. Many such claims will not involve the use of independent solicitors but will be handled internally by the claimants in question. In many such cases the claimants will not incur significant costs and may well not want to incur further costs arguing that they are entitled to more than the fixed amounts. CPR 45 applies amounts and formulas to determine what the fixed costs are in any case. Thus, in a claim such as the present, where the value of the claim exceeded £5,000, the fixed cost is £100.

24. The Claimant argues that it can in effect prevent the application of fixed costs by simply not filling in the fixed commencement cost on its Claim Form. I do not consider that that is correct. The provisions of CPR 45.3, unless the Court otherwise orders, will operate to apply the costs fixed by CPR 45 and it therefore matters not that the Claimant has deliberately or by oversight failed to fill in the solicitor's costs box on the Claim Form.

25. However, in this case, it is wholly appropriate for the Court to exercise its discretion to order costs at a greater level than the costs fixed by CPR 45. My reasons are as follows:

    (i) This Court has recognised the importance of a summary and

prompt procedure to secure enforcement of adjudicators' decisions properly reached.

(ii) In this case, some four weeks elapsed after the issue of the adjudicators' decisions before the enforcement proceedings were issued.

(iii) In their letter dated 17 October 2007, the Claimant's solicitors gave very clear warning that, unless the sum due under Mr Price's decision was paid promptly, proceedings would be commenced without further notice.

(iv) In correspondence, the Defendant's solicitors made it clear in effect that they would not pay primarily because, they argued, the adjudicator did not have jurisdiction. They were thus putting forward an apparently comprehensible defence to any enforcement proceedings

(v) Even in the "without prejudice save as to costs" letter, it was made clear that the offer did not recognise that the sum which Mr Price had decided was due was payable.

(vi) It can have come as no surprise that proceedings were issued. A party which makes a "without prejudice save as to costs" offer is not entitled in some way to have it responded to or to assume that threatened proceedings against it will or might be withheld. It would be different if the without prejudice correspondence had

revealed some agreement by which the Claimant undertook, at least temporarily, not to issue proceedings. That is certainly not the case here.

(vii) The Defendant's argument that the Claimant has acted "secretively" in incurring substantial costs in preparing for its without notice application and its proceedings in general is without foundation. Glovers wrote in terms on 17 October 2007 that, if the amount due pursuant to Mr Price's decision was not paid promptly, proceedings would be commenced in the High Court without further notice. The Defendant obviously knew that Glovers were involved and they knew, because they had been so warned, that proceedings could be commenced at any time without further notice, particularly given that its solicitors had put forward a potential defence, and it must or should have appreciated that significant costs could be incurred if High Court proceedings were issued. They could have ascertained, as was likely, that, if the proceedings were commenced in the TCC, the TCC practice as contained in their Guide would or could be followed. That is exactly what happened.

(viii) The procedure, set out in paragraph 9.2 of the TCC Guide (Second Edition, First Revision, October 2007), appears to have been followed substantially by Glovers. The Part 7 Claim Form needed

to be accompanied by Particulars of Claim and the Part 24 application needed to be accompanied by a witness statement which exhibited, at least, the construction contract and the relevant adjudication documents. This procedure is now the norm for adjudication enforcement proceedings.

(ix) It is inevitable in those circumstances that the costs will exceed by a very substantial amount the fixed costs called for in CPR 45.

(x) It would not be fair to limit a successful claimant which complied with the steps called for in the Rules and the Guide. The Claimant was justified in issuing proceedings and a Part 24 application following a threatened defence and an unqualified admission on the part of the Defendant after issue.

26. The Claimant has submitted a Statement of Costs for summary assessment in the sum of £8,326. A number of objections to this are made, one which is justified and two which are not

(i) Complaint is made that some 11 hours is attributed to the partner and a trainee solicitor attending on their client, and a sum of some £2,400 is claimed. I do not consider that it was unreasonable or anything other than reasonable for an experienced partner and trainee solicitor to attend upon their clients to find out in some detail what the dispute was about and in connection with potential proceedings. Neither the hours

charged nor the rates are unreasonable.

(ii) Objection is made that some 3.8 hours was spent for attendance on the Defendant. There was correspondence between the parties and e-mail communication. It appears also that there were one or more telephone conversations. The amount claimed does not seem in any way excessive.

(iii) However, over £4,000 is claimed for some 31 hours of "work done on documents". The bulk of this is 29 hours for the trainee solicitor. The Defendant says, with some justification, that that is excessive and suggests that it should have taken no longer than three hours. I consider that, based on the amount of papers, the drafting of his witness statement and the need to form a view as to what papers should be exhibited to Mr Eyre's witness statement, two hours of partner's time at £310 per hour and 12 hours of trainee time at £120 is reasonable for the amount of work likely to have been involved on documents.

Thus, the total which I allow by way of summary assessment for the Claimant's costs is £6,162.00

27. I invite the Claimant's solicitors to draw up the requisite order and submit it to the Court.