Neutral Citation Number: [2009] EWHC 2022 (TCC)

Case No: HT-09-251

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

St. Dunstan's House

133-137 Fetter Lane

London EC4A 1HD

Date: 14th July 2009

Before:

MR. JUSTICE COULSON

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Between:

WINDGLASS WINDOWS LTD	**Claimant**
- and -	
(1) **CAPITAL SKYLINE CONSTRUCTION LTD**	**Defendants**
(2) **LONDON AND CITY GROUP HOLDINGS LTD**	

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MR. JAMES BOWLING (instructed by **Messrs Gullands**) for the **Claimant**

MR. PETER BROGDEN (instructed by **Goldkorn Mathias Gentle Page LLP**) for the **Defendants**

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Judgment

MR. JUSTICE COULSON :

1. Background

1.
By a contract evidenced in writing and made on about 10th November 2008, the first defendant ("Capital") engaged the claimant ("Windglass") to supply and install glazed windows, doors and screens at a site known as City Link Court, Long Gate, London SE1 4PU. The second defendant ("LCGH") is Capital's parent company.

2.
The contract did not contain an adequate mechanism for determining either what interim payments became due under the contract or when they became due for payment. Accordingly, pursuant to Part II of **The Scheme for Construction Contracts (SI 1998/649)** the following terms were implied into the contract between the parties:

2 (1) The amount of any payment by way of instalments or stage or periodic payments in respect of a relevant period shall be the difference between the amount determined in accordance with sub-paragraph (2) and the amount determined in accordance with sub-paragraph (3).

(2)
The aggregate of the following amounts –

(a) an amount equal to the value of any work performed in accordance with the relevant construction contract during the period from the commencement of the contract to the end of the relevant period (excluding any amount calculated in accordance with sub-paragraph (b)),

(b) where the contract provides for payment for materials, an amount equal to the value of any materials manufactured on site or brought onto site for the purposes of the works during the period from the commencement of the contract to the end of the relevant period, and

(c) Any other amount or sum which the contract specifies shall be payable during or in respect of the period from the commencement of the contract to the end of the relevant period.

(3) The aggregate of any sums which have been paid or are due for payment by way of instalments, stage or period payments during the period from the commencement of the contract to the end of the relevant period …

4. Any payment of a kind mentioned in paragraph 2 above shall become due on whichever of the following dates occurs later –

(a) the expiry of 7 days following the relevant period mentioned in paragraph 2(1) above, or

(b) the making of a claim by the payee.

5. The final payment payable under a relevant construction contract, namely the payment of an amount equal to the difference (if any) between –

(a) the contract price, and

(b) the aggregate of any instalment or stage or period payments which have become due under the contract,

shall become due on the expiry of –

(a) 30 days days following completion of the work, or

(b) the making of a claim by the payee,

whichever is the later …

8(2) The final date for the making of any payment of a kind mentioned in paragraphs 2, 5, 6 or 7, shall be 17days from the date that payment becomes due.

9. A party to a construction contract shall, not later than 5 days after the date on which any payment –

(a) becomes due from him, or

(b) would have become due, if –

(i) the other party had carried out his obligations under the contract, and

(ii) no set-off or abatement was permitted by reference to any sumclaimed to be due under one or more other contracts,

give notice to the other party to the contract specifying the amount (if any) of the payment he has made or proposes to make, specifying to what the payment relates and the basis on which that amount is calculated.

10. Any notice of intention to withhold payment mentioned in section 111 of the Act shall be given not later than the prescribed period, which is to say not later than 7 days before the final date for payment determined either in accordance with the construction contract, or where no such provision is made in the contract, in accordance with paragraph 8 above.

3.
Windglass' first application for an interim payment was in the sum of £45,000 plus VAT and dated 28th February 2009. In accordance with the implied terms set out above, the due date was 7th Marc 2009 and the final date for payment was 24th March 2009. Windglass' second application was in the sum of £121,000 plus VAT. That was dated 31st March 2009. In accordance with the terms of the contract, the due date was 7th April 2009 and the final date for payment was 24th April 2009.

4.
There was a dispute between the parties as to whether or not Windglass had agreed to make their applications for interim payment in a particular form. Capital said that they had agreed to make those applications in their standard format. Windglass said that there was no such agreement. That was a matter that was part of the dispute referred to the adjudicator. He concluded that there was no agreed format for the interim applications. That decision, of course, is binding on the parties and, indeed, on me.

5.
However, it appears that, because the applications were not made in accordance with their preferred template, Capital declined to make any payments at all to Windglass, notwithstanding the delivery of the doors, windows and screens to site and their installation on site. Windglass therefore referred their unpaid claims to adjudication. By a decision dated 2nd June 2009, the adjudicator found that Capital owed to Windglass the sum of £149,400 plus VAT, together with interest at £2,129.27. He also found that Capital were liable for the RICS adjudication appointment fee of £289.56 and the adjudicator's fees of £5,382.00.

6.
The basis of the adjudicator's decision was as follows:

(a)
The due dates for payment and the final dates for payment were those set out in paragraph 3 above.

(b)
Capital had failed to issue any effective notices of payment and/or withholding notices under the scheme, so they were not entitled to raise any set-off or cross-claim either for defects or delay.

(c)
Windglass were entitled to the sums sought, less a 10% reduction to reflect "final snagging and review".

7.
No part of the sums awarded by the adjudicator was paid by Capital. Accordingly, on 19th June 2009, Windglass commenced these proceedings. They now seek summary judgment against Capital in the total sum of £185,033.83 including interest up to today's date. Further, or in the alternative,

Windglass had originally sought summary judgment in the same sum against LCGH on the basis of an alleged guarantee provided by LCGH in a letter of 5th November 2008. However, for reasons which are dealt with in greater detail in **section 3** below, Windglass now merely seek directions for the future conduct of their claim against LCGH.

8.
Windglass' application for summary judgment under CPR Part 24 against Capital is resisted on the basis that the adjudicator exceeded his jurisdiction when he concluded that the withholding notices were invalid because they did not set out any valid grounds for withholding. The argument is that the **Housing Grants Construction and Regeneration Act 1996** does not require that the ground for withholding payment set out in the notice be valid for that notice to be an effective withholding notice. If that was wrong, Capital had originally sought a stay of execution on the grounds of Windglass' financial position, but the application for a stay is no longer maintained. On the basis of the evidence before me, I consider that that concession is rightly made.

9.
As for the application against LCGH, that is resisted on the basis that, even if the adjudicator's decision was valid and should be enforced as against Capital, LCGH say that they were never a party to a signed guarantee; that the guarantee was sent without authority; and that, in any event, a decision of an adjudicator cannot bind a surety.

10.
I deal in **Section 2** below with the application against Capital before moving on to **Section 3** to deal with the claim against LCGH and the parties' competing positions. I set out a short summary of my conclusions in **Section 4** below. I am grateful to both counsel for their assistance in dealing with these issues.

2.
The Claim against Capital

2.1 The Starting Point

11.
The proper starting point for any application to enforce the decision of an adjudicator can most conveniently be found in the words of Chadwick LJ in **Carillion Construction Limited v Devonport Royal Dockyard Limited**, where he said:

85. The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the court will interfere with the decision of an adjudicator …

86. … Parliament may be taken to have recognised that in the absence of an interim solution, the contractor or a sub-contractor or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash flow requirements of contractors and their subcontractors. The need to have the right answer has been subordinated to the need to have an answer quickly. The scheme was not enacted in order to provide definitive answers to complex questions …"

2.2 The Law relating to Withholding Notices

12.
Sections 110 and 111 of the 1996 Act provide as follows:

110. Dates for payment

(1) Every construction contract shall

(a) Provide an adequate mechanism for determining what payments become due under the contract and when.

(b) Provide or a final date for payment in relation to any sum which becomes due. The parties are free to agree how long the period is to be between the date on which the sum becomes due and the final date for payment.

(2) Every construction contract shall provide for the giving of notice by a party not later than 5 days after the date on which payment becomes due from him under the contract or would have become due if

(a) The other party had carried out his obligations under the contract and

(b) No set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts

specifying the amount if any of the payment made or proposed to be made and the basis on which that amount was calculated.

(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) and (2) the relevant provisions of the scheme for construction contracts apply.

111. Notice of intention to withhold payment.

(1) A party to a construction contract may not withhold payment under the final notice of payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment. The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

(2) To be effective, such a notice must specify

(a) The amount proposed to be withheld and the ground for withholding payment or

(b) If there is more than one ground, each ground and the amount attributable to it and must be given not later than the prescribed period before the final date for payment.

(3) The parties are free to agree what that prescribed period is to be. In the absence of such agreement, the period shall be that provided by the scheme for construction contracts.

13.
For the reasons previously explained, the contract in this case did not include express provisions of the sort contemplated by sections 110 and 111 and, therefore, the **Scheme for Construction Contracts** (set out at paragraph 2 above) applied instead.

14.
As to withholding notices (section 111) the authorities have established

(a)

To be effective a withholding notice must be in writing: **Strathmore Building Services v Colin Greig** [2001] 17 Const LJ 72.

(b)
To be effective a withholding notice must be issued a requisite time before the final date for payment: **VHE v RBSTB** [2000] BLR 187.

(c)
The courts will take a practical view of the contents of a withholding notice and will not allow complaints as to form which might be described as artificial and contrived: **Thomas Vale Construction v Brookside Syston Ltd** [2006] EWHC 3637.

15.
It is also important to differentiate between the withholding notice (section 111) and the notice of payment due (section 110). The latter notice is supposed to come first in time and is the mechanism by which the main contractor tells the sub-contractor what he is prepared to pay by way of interim payment and why. It is a separate stage from the withholding notice under section 111 in which the main contractor has to set out any sum being withheld and the reasons for withholding.

16.
In the present case, there were no notices under section 110, but the parties are agreed that, in accordance with **Rupert Morgan Building Services v Jervis**[2004] 1 WLR 1867, the absence of a section 110 notice does not, without more, entitle Windglass to the sums claimed in their interim applications. Those sums could still be adjusted, if appropriate, to reflect the true value of the work done and the materials supplied. That is why there can be no complaint that the adjudicator in the present case made a 10% reduction from the sums originally claimed by Windglass.

2.3 The Withholding Notices and the Adjudicator's Decision

17.
In the present case, there were two purported withholding notices. The first was dated 13th March 2009 and was in response to Windglass' first application for an interim payment. It said this:

"We refer to the above valuation and attach hereto your original copy.

Our financial director has returned this application and is not willing to process this amount due to insufficient supporting information.

Please note that our company policy is such that each sub-contractor valuation must be presented in a standard format, copy attached, and authorised by the appropriate site manager before your application can be processed.

Could you kindly re-present your application with the correct supporting information and our office will process it immediately".

18.
The second withholding notice was dated 13th April 2009. It was provided in response to Windglass' second application for payment. It was in precisely the same terms as the notice set out above.

19.
The adjudicator was asked to deal with the effectiveness or otherwise of these withholding notices. Te relevant parts of his decision read as follows:

“8.3.4.7 In my finding the Capital letters of both dates do not meet the requirements of HGCRA Section 111(1) in that they do not seek to propose the ground(s) for withholding. The responding party has refused to process the application because the Capital valuation process has not been adhered to. I have already stated to the parties my finding in this regard where there is no express contractual requirement for WWL to present their valuation in the prescribed format.

8.3.4.8 In respect of Capital’s compliance with Section 110, in the absence of any detailed comments on the amounts to be paid to WWL by implication, Capital could not have issued the required Section 110 notices for each payment.

Adjudicator’s conclusions and findings

8.3.4.9 In my finding I am persuaded that based upon the materials placed before me, Capital have not issued effective Notices of Payment and/or Withholding under Section 110 and 111 of the Scheme”.

2.4 Discussion

20.
In my judgment, there are four separate reasons why Capital’s allegation that the adjudicator exceeded his jurisdiction must fail.

21.
First, the adjudicator concluded that:

(a) Effective withholding notices were needed if the sums otherwise due by way of interim payment were to be reduced or not paid at all by reason of the cross-claim for defects and delay;

(b) There were no such withholding notices;

(c) The cross-claim for defects and delay could not be raised as a defence to the claim for interim payments in the absence of valid withholding notices.

22.
Each of those sub-issues was a matter on which the adjudicator was asked for his decision. They all fell fairly and squarely within his jurisdiction. He decided those issues against Capital. It seems to me, therefore, that his decision on these issues is temporarily binding and cannot be the subject of the court’s interference: see **Quartzelec Ltd v Honeywell Control Systems Ltd**[2008] EWHC 3315 TCC and **Letchworth Roofing Company v Sterling Building Company**[2009] EWHC 1119 TCC. In my judgment, this is not a jurisdiction point at all.

23.
Secondly, I do not accept the suggestion that section 111 of the 1996 Act and the relevant part of the Scheme do not require a withholding notice which sets out valid grounds for withholding money otherwise due. Neither do I agree that, as long a there is something which purports to be a withholding notice, then that is sufficient to justify withholding, regardless of the contents of the notice itself. It seems to me that that argument is contrary to the express words of section 111 which requires “an effective notice of intention to withhold payment”. S.111 then goes on at subsection (2) to identify what is required for a notice to be effective. If those requirements are not met, the notice is not effective. To that extent, therefore, I do not believe there is any meaningful distinction between a ‘valid’ or an ‘effective’ notice.

24.
Thirdly, the adjudicator has set out why he considered that the letters of 13th March and 13th April were not effective withholding notices in accordance with the 1996 Act. He found that neither of them identified either the amount proposed to be withheld or the ground for withholding payment. In my judgment, to the extent that it is relevant, it seems to me that the adjudicator was plainly right to reach the conclusion that he did. Indeed, no other analysis is possible. Thus if I was entitled to review the adjudicator's decision, I would reach exactly the same conclusions that he did.

25.
Fourthly, I accept Mr. Bowling's proposition that, even if the adjudicator should have looked at and taken into account the alleged counterclaim for defects and delay, it is so vague, so unparticularised, so unlinked to the terms of the contract, that it could not operate as a valid set-off and counterclaim in any event. Thus if there was any sort of difficulty with jurisdiction, or there had been any sort of alleged breach of natural justice, then I accept the proposition that the default was technical only and had no effect whatsoever on the outcome of either the adjudication or this application: see **Cantillon v Urvasco** [2008] BLR 250.

26.
The highwater mark of Capital's case can be found at paragraph 15 of Mr. Brogden's helpful skeleton argument. That says as follows:

The First Defendant in this instance acted sensibly. It knew it had a substantial counterclaim but believed it also had good grounds to forestall a payment application that was not in a format previously agreed. It withheld payment on the latter grounds, then defended the adjudication on the substantial grounds with the help of legal advisers. The First Defendant submits that the notice should act as a 'gateway' by which it gains entitlement to raise any other defence in the adjudication.

27.
Attractively though it was put, I reject that argument. The 1996 Act does not permit a party to put in an ineffective withholding notice and then, in the subsequent adjudication, seek to put together an entirely different justification for withholding payment. Such a 'foot in the door' approach (if I may call it that) is contrary to the 1996 Act, which emphasises the obligation on the paying party to give good reasons, there and then and in advance of the date for payment, if any part of a sum otherwise due is not going to be paid. If that paying party does not do so, then, in the words of Chadwick LJ, it has to pay now and argue later.

28.
For the avoidance of doubt, it seems to me that the point that arose in this case was indistinguishable from the point in **Letchworth.** In my judgment in that case, I said:

25. Whilst there is no doubt that a defendant can raise whatever matters he likes by way of defence for the adjudicator to consider, that general principle does not permit a defendant to rely on a cross-claim which should have been the subject of a withholding notice, but was not. In other words, a defendant cannot avoid the absence of a valid withholding notice if, by reference to the contract and on the facts of the particular dispute, the raising of the cross-claim in question required such a notice. To hold otherwise would be to obviate the need for withholding notices at all: see **Harwood Construction Ltd v Lantrode Ltd** (Unreported, 24.11.00).

29.

It seems to me that, for the reasons I have given, precisely the same conclusion must apply in the present case. The absence of an effective withholding notice is fatal to the bringing of the cross-claim and therefore means that the adjudicator's decision must be enforced.

2.5
Summary

30.
For the reasons set out above, it seems to me that the only ground put forward by Capital in defence of the claim for enforcement must fail. Windglass are therefore entitled to summary judgment against Capital in the sum of £185,033.83, including VAT and interest, and interest until payment at a rate of £40.19 per day.

3.
The Claim against LCGH

3.1
The Guarantee

31.
Capital's letter of instruction to Windglass dated 5th November 2008 asked them to proceed with the works. It said that Capital "with the guarantee of its parent company" authorised a certain level of expenditure which far exceeds the sum being sought in these proceedings. The letter went on:

Sunlight Projects Group Holdings Ltd is the ultimate holding company of Capital Skyline Construction Ltd and we, the undersigned, are authorised to bind Sunlight Projects Group Holdings Ltd in this contract.

In consideration of Windglass Windows Ltd provision of credit trading facilities to cut its Capital Skyline Construction, Sunlight Projects Group Holdings Ltd undertakes to pay all sums due or which become due to Windglass Windows Ltd in respect of contracts entered into prior to the date of any cancellation of this agreement …

32.
There is then a provision for the signatures of the three parties with the words "Signed for and on behalf of" repeated three times, once each for Capital, Sunlight Projects Group Holdings Ltd, and Windglass.

33.
The letter was apparently sent out by a Mr. Ford under cover of an email which he signed. The evidence suggests that the letter was sent out by Capital on the instructions of a Mr. Ashby, who was a director of both Capital and Sunlight Projects Group Holdings Ltd. On 1st June 2009, Sunlight Projects Group Holdings Ltd changed their name to LCGH.

3.2
The Issues

34.
LCGH take three principal points as to the invalidity of the claim made against them. First, they say that the document relied on is an unsigned guarantee and is therefore unenforceable by virtue of section 14 of the **Statute of Frauds 1677**. Secondly, they suggest that the letter of 5th November was put forward without their authority. Thirdly, they say that they are not bound by the result in the

adjudication on the basis that a surety cannot be bound by a judgment or an arbitration award to which he is not a party: see **InRe Kitchin**[1881] LR 17 Ch 668 and, much more recently, **Sabah Shipyard (Pakistan) v Government of Pakistan**[2008] 1 Lloyd's Rep 210.

35.
In response to these points, Windglass make the following submissions:

(a) They submit that the typed words in the letter are sufficient to serve as a signature, alternatively they say that the signed e-mail was sufficient to act as a signature.

(b) If they are wrong about that, so that the **Statute of Frauds** prohibition would otherwise apply, they seek to run in the alternative a case that the letter was not a guarantee, but an indemnity, in respect of which the **Statute of Frauds** point would not apply.

(c) They submit that the argument about the lack of authority would depend on oral evidence, particularly relating to the roles of both Mr. Ford and Mr. Ashby.

(d) They submit that the surety point is potentially important. Both counsel are agreed that, as far as they are aware, there is no authority in which an adjudicator's decision has been held to be binding on a surety. They therefore say that the hearing of any application against LCGH should be adjourned so as to allow sufficient time to allow that potentially important point to be addressed.

3.3
Discussion

36.
I am reluctant to reach any final conclusions in respect of this aspect of the case. First, this hearing has already exceeded its time estimate by a considerable margin. Secondly, the claim against LCGH is, in any event, contingent and only becomes an issue at all if Capital do not pay the judgment sum. I expressly asked Mr. Brogden whether or not Capital were in a position to pay, and he was not able to tell me that they were unable to pay the judgment sum noted above. Accordingly, the entire claim against LCGH may be entirely academic.

37.
Thus it seems to me that for those reasons alone, I ought to adjourn the application against LCGH giving directions leading up to a hearing in September for a full hearing on which there can both be oral evidence and, if appropriate, full legal argument on the guarantee/indemnity issue and the surety issue. However, I ought to make two general observations.

38.
First, it seems tolerably clear from the words of the letter of instruction of 5th November that much emphasis was placed by Capital on the financial backing of what are now LCGH. It seems that that financial backing was offered as an inducement to Windglass to get them to commence work and incur considerable expense. In those circumstances, it seems to me that it would be a most unhappy result, and one that the court would wish to avoid if possible, if LCGH were then allowed to take points about the absence of a manuscript (as opposed to a typed) signature in order to avoid the liability that was clearly being advertised in the letter.

39.
Secondly, let us assume that there was a valid cause of action against LCGH, but let us also assume in their favour that they are not bound by the adjudicator's decision. That then means that the claim for

summary judgment against them would be on the basis that the best possible evidence of the sum due was the amount identified by the adjudicator. In those circumstances, what would LCGH's defence to that claim be? That was a point I put to Mr. Brogden. He was unable to identify any such defence, making the point that, on his submission, this was not something which LCGH had to address. With respect to him, it seems to me that it is something that they may very well have to deal with in September. Certainly, at first blush, it seems to me that it would be difficult for LCGH to rely on the counterclaim for delay and defects to defeat the claim, in circumstances where the sum has been found due to Windglass because that same counterclaim was not the subject of an effective withholding notice. LCGH agreed to pay all sums which became due to Windglass under the contract. On the face of it, that would plainly include the sums identified by the adjudicator.

40.
For these reasons, therefore, it seems to me that LCGH's possible defences are not straightforward, but I recognise that there are a number of principles of law which the parties have not yet had an opportunity fully to explore. In those circumstances, it seems to me that those matters must await the hearing in September.

4.
Conclusions

41.
For the reasons set out in **Section 2** above, the jurisdiction point taken by Capital must fail. Accordingly, Windglass are entitled to summary judgment pursuant to CPR Part 24 in the sum of £185,033.83, together with interest at a rate of £40.19 per day.

42.
For the reasons set out in **Section 3** above, the contingent claim against LCGH is adjourned until September, which hearing would embrace both oral evidence and full submissions. But such a hearing will only take place if (and only if) the judgment sum is not paid by Capital.