Case No: HT-14-371

Neutral Citation Number: [2014] EWHC 3824 (TCC)

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

Royal Courts of Justice

Rolls Building, 7 Rolls Buildings

London EC4A 1NL

Date: 21st November 2014

Before:

MR. JUSTICE EDWARDS-STUART

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Between :

	Matthew Harding	**Claimant**
	(t/a M J Harding Contractors)	
	- and -	
1)	**Gary George Leslie Paice**	**Defendants**
2)	**Kim Springall**	

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Gideon Scott Holland Esq (instructed by **Davies and Davies LLP**) for the **Claimant**

Charles Pimlott Esq (instructed by **Silver Shemmings LLP**) for the **Defendants**

Hearing date: 29th October 2014

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Judgment

Mr. Justice Edwards-Stuart:

Introduction

1.
This is an application by the Claimant for an injunction to restrain the Defendants from proceeding with a reference to adjudication started by a Notice of Adjudication dated 14 October 2014. Mr. Gideon Scott Holland, instructed by Davies & Davies, appeared for the Claimant, and Mr. Charles Pimlott, instructed by Silver Shemmings, appeared for the Defendants.

2.
The application was made initially on two grounds:

i)

that the Defendants have acted unreasonably and/or oppressively by pursuing the adjudication without first complying with the Decision dated 6 October 2014 in a previous adjudication ("the third adjudication") between the parties; and

ii)
that the adjudicator appointed in the new (fourth) adjudication does not have jurisdiction to decide the dispute referred to him because that dispute is the same or substantially the same as that already decided in the previous adjudication.

3.
By a letter dated 27 October 2014 Silver Shemmings notified Davies & Davies that their clients would not be defending the application to enforce the decision in the third adjudication. However, they said that their clients needed to put arrangements in place in order to find the money and they asked the Claimant to extend the time for payment until 3 November 2014.

4.
This offer, although made after the Claimant's application had been issued, has largely undermined the Claimant's first ground for making this application. However, Mr. Scott Holland expressed concern that the Defendants might not make the promised payment and wished to reserve his client's position. In relation to the first ground, the application is stayed, with permission to apply.

5.
When I had heard submissions from both parties I reached the conclusion that there was clearly a triable issue and that the balance of convenience favoured granting a short interim injunction until 4 November 2013. A few days' delay would make little difference and it might avoid the need for the Claimant to spend time and money preparing a Response in the fourth adjudication were I to grant the relief sought by the Claimant. Accordingly, I granted interim relief on that basis.

The facts

6.
The Claimant is a building contractor and at all material times the Defendants were property developers.

7.
The parties entered into a building contract dated 25 March 2013 in the form of the JCT Intermediate Form of Building Contract 2011 with amendments ("the Contract"). The Claimant undertook to carry out the construction and fit out of two residential houses together with related landscape and access works at a site in Purley, Surrey. Work commenced in April 2013.

8.
The Contract provided for the right to refer a dispute or difference to adjudication in accordance with the Scheme for Construction Contracts.

9.
The relationship between the parties deteriorated and, by a letter dated 18 September 2013, the Defendants purported to terminate the Contract, alleging a failure to proceed regularly and diligently with the works, and a refusal to accept the Defendants' choice of Contract Administrator and refusal of access to the site.

10.

In response, the Claimant rejected the Defendants' right to terminate and argued that his work was actually ahead of schedule. His case was that he was being prevented from making progress by the Defendants' failure to make a valid appointment of a replacement architect and/or, from about mid June 2013 onwards, to provide the required design information.

11.
By the end of September 2013 work had come to a standstill. On 30 November 2013 the Claimant gave the Defendants notice pursuant to clause 8.9.2.2 of the Contract that the works had been suspended because of the Defendants' failure to appoint a replacement Architect/Contract Administrator and to provide the design information necessary to continue with construction beyond wall plate level. In the same letter the Claimant gave the Defendants notice pursuant to clause 8.9.3 that they had 14 days in which to cease the suspension, otherwise the Claimant would be entitled within 21 days from the expiry of that 14 days to terminate its employment under the Contract.

12.
On 3 January 2014 the Claimant served notice of termination of its employment under the Contract pursuant to clause 8.9.3.

13.
By the terms of clause 8.12.3 of the Contract, following termination by the contractor he was entitled to submit an account setting out the value of the work carried out, including the total value of the work properly executed up to the date of termination, the cost of removal from site and any direct loss or damage.

14.
The Claimant duly submitted his account to the Defendants under that clause on 8 August 2014. In that account the value of the works carried out up to the date of termination was said to be £797,859.49, and the balance owing taking into account sums already paid was £397,912.48 plus VAT.

15.
Under clause 8.12.5 the Defendants were obliged to pay the amount properly due in respect of the account within 20 days of its submission. That was by 6 September 2014.

16.
The Claimant's case is that if the Defendants wanted to pay less than the amount stated in the account, they had to issue a Pay Less notice in accordance with the requirements of paragraphs 9 and 10 of the Scheme for Construction Contracts, and that the latest date for serving a Pay Less notice is seven days before the final date for payment. On this basis, according to the Claimant, a Pay Less notice had to be served by the Defendants by 30 August 2014. In addition, the Pay Less notice had to set out the sum that the payer considers to be due and the basis on which that sum is calculated.

The third adjudication

17.
This was commenced by Notice of Adjudication dated 1 September 2014. The Notice, given by Blue Sky ADR who were acting for the Claimant, was in the following terms:

"Accordingly, on behalf of [the Claimant] we hereby give notice pursuant to clause 9.2 of the Contract of [the Claimant's] intention to refer, and hereby do refer, the dispute between [the Claimant] and you, the Employer, concerning [the Claimant's] clause 8.12 Contractors Account dated 8 August 2014

which you rejected '… in its entirety …' under cover of PJ English Associates Ltd's letter dated 18 August 2014.

We shall request the Adjudicator to make the following declarations and give the following decisions:

1. A declaration that after taking into account amounts actually and physically previously paid to [the Claimant] under the Contract the amount properly due to [the Claimant] in respect of the account and that shall be paid by you to [the Claimant] on or before 6 September 2014, without deduction of any retention, (or any other sum for that matter), shall be the sum of £397,912.48 or such other sum as the Adjudicator shall decide;

2. A decision that you shall pay [the Claimant] the sum of £397,912.48 being the outstanding sum under the Contract or such other sum as the Adjudicator shall decide;

…"

18.
In his decision, dated 6 October 2014, the adjudicator noted that in order to determine whether or not the Claimant was entitled to the sum claimed it was necessary to decide who terminated the Contract.

19.
The adjudicator made a number of observations about the volume of material that been put before him, including hundreds of pages of authorities, and particularly the fact that much of it came in electronic form when he had asked for hard copies. He also noted that the Claimant refused to extend the time period for his decision, from 28 to 42 days. He said that the reason given for this refusal was because the adjudication was "an open and shut matter" about the failure to issue a Pay Less notice. The adjudicator observed that it was far from being open and shut because before he could decide that issue, he had first to decide who had terminated the Contract.

20.
This part of the Decision makes depressing reading. I have considerable sympathy for the adjudicator: it appears to have been a model of how an adjudication should not be conducted.

21.
The adjudicator noted that the Claimant's primary position was that the sum for which it applied on 8 August 2014, namely £397,912.48, should have been, but was not, paid by 6 September 2014. The Defendants' first answer to this was to contend that it was they who terminated the contract on 18 September 2013. The adjudicator resolved this issue in favour of the Claimant.

22.
The adjudicator then went on to decide that the Defendants had not issued a compliant Pay Less notice, principally because - whether or not it was served in time - it did not specify the basis on which the sums set out in it were calculated.

23.
As a result, the adjudicator decided that the Claimant was entitled to payment of £397,912.48.

The fourth adjudication

24.
This was commenced by a Notice of Adjudication dated 14 October 2014. The Notice was in the following terms:

“We hereby give notice of our intention to refer the dispute to Adjudication in relation to the value of the works undertaken by [the Claimant] for works carried out at the above project and entitlement in relation to defects in [the Claimant’s] works.

The dispute arose following [the Claimant’s] application for the sum of £397,912.48 on 8 August 2014 and its subsequent rejection by us.

We, therefore, seek a Decision from the Adjudicator:

i. That the Value of the Contract Works (as per Priced Document: Contract Sum Analysis) is in the sum of £340,032.60 or such other sum as the Adjudicator shall decide;

ii. …”

The terms of the contract

25.
The consequences of termination are set out in clause 8.12. Clause 8.12.3 provides:

“where the Contractor’s employment is terminated under clause 8.9 …, the Contractor shall as soon as reasonably practicable prepare and submit an account …. The account shall set out the amount referred to in clauses 8.12.3.1 to 8.12.3.4 …, namely:

1 the total value of work properly executed at the date of termination of the Contractor’s employment, ascertained in accordance with these Conditions as if the employment had not been terminated, together with any other amounts due to the Contractor under these Conditions;

…”

26.
Clause 8.12.5 provides:

“after taking into account amounts previously paid to the Contractor under this Contract, the Employer shall pay to the Contractor (or vice versa) the amount properly due in respect of the account within 28 days of its submission to the other Party, without deduction of any retention.”

(My emphasis)

27.
Clause 8.12.5 is in one respect a curious provision because, unlike the interim payment machinery in the contract, it does not require the employer to pay the amount stated in the contractor’s account. Instead, it provides that the employer is to pay “the amount properly due in respect of the account” within 28 days. If anything, this suggests that the amount payable under the clause might be different from the amount stated in the contractor’s account.

28.
The third adjudication appears to have proceeded on the footing that the employer was required to serve a Pay Less notice if it wished to pay less than the sum stated in the contractor’s account. Since the adjudicator decided that the Pay Less notice purportedly served by the employer did not comply with the requirements of the contract, he held that the sum stated in the contractor’s account was payable.

29.

At paragraphs 184 and 185 of his decision, the adjudicator said this:

184. Therefore, in the absence of a valid pay-less notice, **Harding was entitled to receive payment of £397,912.48 on 6 September 2014** .

185. For the avoidance of doubt, I stress that I have not decided on the merits of Harding's valuation and have not decided that £397,912.48 represents a correct valuation of the works. The parties made submissions in this adjudication about the proper valuation but these did not fall to be considered by me because of the rule relating to a notified sum becoming automatically due in the absence of a valid pay less notice."

30.
In my judgment the adjudicator decided that:

i)
if the employer wished to pay less than the sum stated in the contractor's account, it had to issue in time a compliant Pay Less notice; and

ii)
the employer did not issue such a notice; and, therefore

iii)
the employer had to pay the amount stated in the contractor's account.

31.
In these circumstances Mr. Scott Holland submitted that the adjudicator had determined "… the amount properly due in respect of the account" so that the employer cannot re-open this issue in separate adjudication proceedings.

32.
In fact, Mr. Scott Holland's submission logically goes further. If it is correct that if the employer wishes to pay less than the sum stated in the contractor's clause 8.12 account, it must issue a Pay Less notice (a proposition about which I express no opinion), it follows that the employer can only set aside the adjudicator's decision in subsequent litigation by showing that its Pay Less notice was validly served. If it fails to do that, submits Mr. Scott Holland, then its challenge to the adjudicator's decision must fail.

33.
If Mr. Scott Holland is right, this has far reaching consequences. A failure to serve a valid Pay Less notice in time would deprive the employer forever of the right to challenge the contractor's account. So if the contractor had seriously overvalued his account, but the employer or his advisers failed to serve a valid Pay Less notice in time, the contractor would obtain a windfall that the employer could never recover.

34.
This, if correct, is a more draconian regime than that which applies to the Final Certificate. In the case of the latter, if the employer commences adjudication or litigation within 28 days of the issue of the Final Certificate, it ceases to be conclusive in respect of the matters raised in the litigation or adjudication (see clause 1.9).

35.

I consider that Mr. Scott Holland's argument, elegantly though it was put, cannot be right. What is due under clause 8.12.5 is the "… amount properly due in respect of the account". The adjudicator has not determined what is "properly due". He has determined that, in the absence of a valid Pay Less notice, the employer must pay the amount stated in the contractor's account within 28 days. The effect of this, according to the submissions of Mr. Scott Holland, is that the absence of a compliant Pay Less notice converts a sum that may not be properly due into one that is properly due, and does so for all time.

36.
I do not accept this argument. In the circumstances, therefore, it seems to me that it is open to the employer to have determined, either by adjudication or litigation, the question of what sum is properly due in respect of the contractor's account. However, that right does not detract from its obligation to comply with the adjudicator's decision in the meantime by paying the sum ordered.

37.
I should add that I have some reservations about the application of the provisions of the Scheme for Construction Contracts (as amended) to clause 8.12.5 and, in that context, the meaning of expressions such as "due date for payment" and "notified sum", but since I heard no argument on this point I do not propose to say any more about it.

Paragraph 9(2) of Part I of the Scheme

38.
This provides that:

"An adjudicator must resign when the dispute is the same or substantially the same as one which has previously been referred to adjudication, and a decision has been taken in that adjudication."

39.
Mr. Scott Holland submits that this applies where:

i)
the dispute referred to the second adjudication is the same or substantially the same as one that has previously been referred to adjudication; and

ii)
a decision has been taken in the first adjudication.

40.
Mr. Scott Holland submits that it does not matter that the question decided in the first adjudication is not one that the second adjudicator is being asked to decide, or that the first adjudicator did not decide all the issues referred in the first adjudication. He submits that all that is required to trigger the resignation of a new adjudicator is that there has been a decision in a previous adjudication and that an issue to be referred to the new adjudicator is one that was covered by the Referral Notice in the first adjudication, whether it was decided or not.

41.
Ingenious though this argument is, in my judgment it is wrong. The paragraph refers to "dispute" and "one" in the singular and so the reference to "a decision" must be a decision on the dispute referred in the first adjudication. If the first dispute raised more than one issue or, as in this case, raised issues that were put in the alternative, a decision by an adjudicator in the first adjudication on a party's

primary case only does not, it seems to me, prevent a second adjudicator from determining the alternative case (if it becomes necessary to decide it).

42.
If it were otherwise, a party could refer a number of questions to adjudication, under the umbrella of being part of one dispute, and then invite the adjudicator to decide only one or two of them. If Mr. Scott Holland is correct, this tactic would prevent the other party from subsequently referring any of the undecided issues to another adjudicator.

43.
Mr. Scott Holland's approach seems to me to be unsupported by the authorities. In Quietfield Ltd v Vascoft Construction Ltd [2006] EWCA Civ 1737, May LJ said [31]:

"More than one adjudication is permissible, provided a second adjudicator is not asked to decide again that which the first adjudicator has already decided."

So in that passage May LJ was focusing on what the adjudicator decided, rather than the scope of the dispute that was referred to him.

44.
In Benfield Construction Ltd v Trudson (Hatton) Ltd [2008] EWHC 2333, at [34], Coulson J's summary of the relevant principles included the following:

"(c) The extent to which a decision or a dispute is binding will depend on an analysis of the terms, scope and extent of the dispute or difference referred to adjudication and the terms, scope and extent of the decision made by the adjudicator."

45.
That observation is also inconsistent with Mr. Scott Holland's construction of paragraph 9(2) of Part I of the Scheme.

46.
For these reasons I reject Mr. Scott Holland's argument based on paragraph 9(2).

Conclusion

47.
The Claimant is not entitled to the injunction sought and so this application must be dismissed. Accordingly, the order granting interim relief that I made at the hearing on 29 October 2014 must be discharged forthwith.

48.
I will hear counsel on any questions arising out of this judgment, including costs, if they cannot be agreed. In the context of costs, the Defendants may wish to consider the implications of the fact that the offer made in Silver Shemmings' letter dated 27 October 2014 was after the Claimant had issued these proceedings and this application.