

Case No: HT-2016-000196

Neutral Citation Number: [2016] EWHC 2616 (TCC)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/09/2016

Before :

MS FINOLA O'FARRELL QC

(sitting as a Deputy High Court Judge)

Between :

KILKER PROJECTS LIMITED

- and -

ROB PURTON

(trading as Richwood Interiors)

Mr Alexander Hickey QC (instructed by **Fenwick Elliott LLP**) for the **Claimant**

Mr Robert Sliwinski (instructed by **Mr Purton on a Direct Access basis**) for the **Defendant**

Hearing dates: 23 August 2016

Judgment

Finola O'Farrell QC:

Introduction

1.

This is an adjudication enforcement application by the claimant against the defendant pursuant to Part 24 of the Civil Procedure Rules to enforce the decision of Mr Matthew Molloy dated 13 May 2016, in which he directed the defendant to pay the claimant the sum of £55,676.84 plus VAT and to pay his fees and expenses in the sum of £13,140.00.

2.

The defendant resists enforcement of the decision on the ground that the adjudicator did not have jurisdiction to determine the dispute because it had been decided by Mr Christopher Hough in an earlier adjudication.

3.

The dispute determined in the first adjudication before Mr Hough concerned the defendant's entitlement to sums claimed in his final account in the absence of a valid 'payment notice' or 'pay less notice' from the claimant. The dispute determined in the second adjudication before Mr Molloy concerned the claimant's entitlement to re-payment of part of those sums based on a valuation of the final account.

4.

The issue for the court is whether failure to serve a 'payment notice' or 'pay less notice' in accordance with the requirements of the Housing Grants, Construction and Regeneration Act 1996 as amended ("the 1996 Act"), precludes the paying party from challenging the payee's contractual entitlement to such payment so that the 'notified sum' in section 111 of the 1996 Act becomes final and conclusive as to the sum due under the contract.

Factual Background

5.

On or about 9 June 2014 the parties entered into an oral contract whereby the claimant agreed to carry out specialist joinery works at the Dorchester Hotel, Park Lane, London W1K 1QA.

6.

The works were carried out, subject to variations, but a dispute arose between the parties as to the sums due in respect of the final account.

7.

In the first adjudication, the defendant claimed that it was entitled to payment in full in respect of the sums claimed in his final account application dated 8 December 2014 by reason of the claimant's failure to serve a valid 'payment notice' or 'pay less notice' as required by the 1996 Act. In a decision dated 12 May 2015, Mr Christopher Hough, the adjudicator, determined that no valid payment notice or pay less notice was given and ordered the claimant to pay the defendant £147,223.00 in respect of the final account application plus the adjudicator's fees and expenses.

8.

The claimant resisted enforcement of the first adjudication decision on the basis that there was no concluded construction contract. The judgment is reported as [Rob Purton t/a Richwood Interiors Limited v Kilker Projects Limited \[2015\] EWHC 2624 \(TCC\)](#). In granting summary judgment to the defendant, Mr Justice Stuart-Smith held that there was an oral construction contract between the parties for the purposes of the 1996 Act, the statutory scheme applied and Mr Hough had jurisdiction to determine the dispute. The claimant has paid the judgment sum.

9.

In the second adjudication the claimant sought a declaration as to the true value of the final account for the works and repayment of any sums found to have been overpaid. In a decision dated 13 May 2016, Mr Molloy, the adjudicator, granted the following relief:

i)

a declaration that the true value of the final account for the works was £745,709.16;

ii)

an order that the defendant should pay the claimant £55,676.84 plus VAT; and

iii)

the defendant was primarily liable for the adjudicator's fees and expenses in the sum of £13,140.00.

10.

It is this second adjudication decision that the claimant now seeks to enforce. The defendant's position is that Mr Hough decided the dispute as to the value and payment of the final account in the first adjudication. It was not open to the claimant to re-adjudicate the value and/or payment of the final account. Therefore Mr Molloy had no jurisdiction to decide the dispute referred by the claimant in the second adjudication and his decision is a nullity.

The 1996 Act Payment Provisions

11.

The relevant provisions of the 1996 Act (as amended) are as follows:

"109 Entitlement to stage payments

(1)

A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless—

(a)

it is specified in the contract that the duration of the work is to be less than 45 days, or

(b)

it is agreed between the parties that the duration of the work is estimated to be less than 45 days.

(2)

The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.

(3)

In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.

(4)

References in the following sections to a payment provided for by the contract include a payment by virtue of this section.

110A Payment notices: contractual requirements

(1)

A construction contract shall, in relation to every payment provided for by the contract—

(a)

require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or

(b)

require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.

(2)

A notice complies with this subsection if it specifies—

(a)

in a case where the notice is given by the payer—

(i)

the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and

(ii)

the basis on which that sum is calculated;

(b)

in a case where the notice is given by a specified person—

(i)

the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and

(ii)

the basis on which that sum is calculated.

(3)

A notice complies with this subsection if it specifies—

(a)

the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and

(b)

the basis on which that sum is calculated.

(4)

For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero.

(5)

If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.

(6)

In this and the following sections, in relation to any payment provided for by a construction contract—

“payee” means the person to whom the payment is due;

“payer” means the person from whom the payment is due;

“payment due date” means the date provided for by the contract as the date on which the payment is due;

“specified person” means a person specified in or determined in accordance with the provisions of the contract.

110B Payment notices: payee’s notice in default of payer’s notice

(1)

This section applies in a case where, in relation to any payment provided for by a construction contract—

(a)

the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but

(b)

notice is not given as so required.

(2)

Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the date on which the notice referred to in subsection (1)(a) was required by the contract to be given.

(3)

Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given.

(4)

If—

(a)

the contract permits or requires the payee, before the date on which the notice referred to in subsection (1)(a) is required by the contract to be given, to notify the payer or a specified person of—

(i)

the sum that the payee considers will become due on the payment due date in respect of the payment, and

(ii)

the basis on which that sum is calculated, and

(b)

the payee gives such notification in accordance with the contract,

that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection).

111 Requirement to pay notified sum

(1)

Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.

(2)

For the purposes of this section, the “notified sum” in relation to any payment provided for by a construction contract means—

(a)

in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(b)

in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(c)

in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2) , the amount specified in that notice.

(3)

The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.

(4)

A notice under subsection (3) must specify—

(a)

the sum that the payer considers to be due on the date the notice is served, and

(b)

the basis on which that sum is calculated.

It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.

(5)

A notice under subsection (3)—

(a)

must be given not later than the prescribed period before the final date for payment, and

(b)

in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.

(6)

Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).

(7)

In subsection (5), “prescribed period” means—

(a)

such period as the parties may agree, or

(b)

in the absence of such agreement, the period provided by the Scheme for Construction Contracts.

(8)

Subsection (9) applies where in respect of a payment—

(a)

a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (3) is given), or

(b)

a notice under subsection (3) is given in accordance with this section,

but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid.

(9)

In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount not later than—

(a)

seven days from the date of the decision, or

(b)

the date which apart from the notice would have been the final date for payment,

whichever is the later.

(10)

Subsection (1) does not apply in relation to a payment provided for by a construction contract where—

(a)

the contract provides that, if the payee becomes insolvent the payer need not pay any sum due in respect of the payment, and

(b)

the payee has become insolvent after the prescribed period referred to in subsection (5)(a).

(11)

Subsections (2) to (5) of section 113 apply for the purposes of subsection (10) of this section as they apply for the purposes of that section.”

12.

It is common ground that the parties failed to agree the amount of, or intervals between, any stage or periodic payments and therefore the Scheme for Construction Contracts (England and Wales) Regulations 1998 (amendment) (England) Regulations 2011 (“the Scheme”) applies.

13.

Part II of the Scheme contains a default timetable for interim and final payments under a relevant contract and prescribes the mechanism for ascertaining the amounts of such payments as follows:

“Entitlement to and amount of stage payments

...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 periodic payments during the period from the commencement of the contract to the end of the relevant period.

(4)

An amount calculated in accordance with this paragraph shall not exceed the difference between -

(a) the contract price, and

(b) the aggregate of the instalments or stage or periodic payments which have become due.”

Dates for payment

3. Where the parties to a construction contract fail to provide an adequate mechanism for determining either what payments become due under the contract, or when they become due for payment, or both, the relevant provisions of paragraphs 4 to 7 shall apply.

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 the instalment or stage or periodic payments which have become due under the contract,

shall become due

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

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

whichever is the later.

6. Payment of the contract price under a construction contract (not being a relevant construction contract) shall become due on –

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

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

whichever is the later.

7. Any other payment under a construction contract shall become due –

(a) on the expiry of 7 days following the completion of the work to which the payment relates, or

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

whichever is the later.”

14.

It is common ground that the 1996 Act and the Scheme apply equally to interim and final payments.

15.

The effect of the payment provisions in the 1996 Act and the Scheme on the defendant’s entitlement to payment of the sums claimed in the first adjudication is not in dispute. The claimant’s failure to give a valid payment notice to the defendant in respect of the application for final payment rendered that application the “notified sum” within the meaning of section 111. As a result of the claimant’s failure to give a pay less notice to the defendant, the claimant was obliged to pay the “notified sum” without any deduction.

16.

The dispute between the parties is whether the decision in the first adjudication was determinative of the valuation issue referred in the second adjudication. If so, Mr Molloy would have no jurisdiction to determine the same or substantially the same dispute and his decision would be a nullity. That raises the issue whether the “notified sum” became final and conclusive as between the parties or whether the claimant, having paid it, was entitled to challenge the valuation of the final account in the second adjudication.

The Parties’ Submissions

17.

On behalf of the claimant, Mr Hickey QC submits that the 1996 Act and the Scheme regulate payment and cash flow. They do not decide the true substantive entitlement to payment under the contract and they do not determine entitlement to payment on a conclusive basis. A party who has failed to give the requisite payment and/or pay less notices must pay the amount stated in the payee’s payment notice by the final date for payment. However, having paid, that party is entitled to seek a determination of any dispute about the valuation of the contractual entitlement of the contractor for the works and it can do so in adjudication. It is submitted that this position is consistent with the decision of the Court of Appeal in Matthew Harding t/a MJ Harding Contractors v Paice [\[2015\] EWCA Civ.1231](#).

18.

On behalf of the defendant, Mr Sliwinski submits that the effect of a failure by a party to issue a payment notice and/or a pay less notice is that the payer has agreed the valuation of the payee for

that payment and must pay the application sum in full: [ISG Construction Limited v Seevic College \[2014\] EWHC 4007 \(TCC\)](#). In the case of an application for final payment, the effect of a failure by a party to issue a payment notice and/or a pay less notice is that the final account is agreed. It remains open to the payer to challenge the valuation in litigation or arbitration, for example by way of restitution, but the agreed valuation cannot be re-opened in a subsequent adjudication.

19.

I am grateful to counsel for their clear and concise submissions.

Relevant Authorities

20.

In [Rupert Morgan Building Services \(LLC\) Ltd v Jervis \[2003\] EWCA Civ 1563](#). Jacob LJ considered the meaning of section 111(1) of the (unamended) 1996 Act:

“[7] ...the debate seems to have been based upon an unspoken but mistaken assumption, namely that the provision is dealing with the ultimate position between the parties. That is not so ...

[8] The interim certificates, as is conventional, are on a “global” basis. By this I mean that each interim certificate takes account of the total work done to date and the total payments to date. It follows that if there is an error (e.g. a double charging) in an interim certificate, it can and should be corrected in the next.

[10] ... [Section 111 of the 1996 Act] does not say that failure to serve a withholding notice creates an irrebuttable presumption that the sum is in the final analysis properly payable. It merely says the paying party “may not withhold payment ... of a sum due.” This throws one back to the contract to find the answer to how the sum is determined and when it is due.

[11] ... In the absence of a withholding notice, s.111(1) operates to prevent the client withholding the sum due. The contractor is entitled to the money right away. The fundamental thing to understand is that s.111(1) is a provision about cash-flow. It is not a provision which seeks to make any certificate, interim or final, conclusive...

[14] ... (b) It provides a fair solution, preserving the builder's cash flow but not preventing the client who has not issued a withholding notice from raising the disputed items in adjudication or even legal proceedings.

...

(d) It does not preclude the client who has paid from subsequently showing he has overpaid. If he has overpaid on an interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or if necessary arbitration or legal proceedings...”

21.

In [ISG Construction Ltd v Seevic College \[2014\] EWHC 4007 \(TCC\)](#) Mr Justice Edwards-Stuart held that a second adjudication that sought to open up the valuation of an interim payment, that had been found to be payable in an earlier adjudication by reason of the absence of a pay less notice, was invalid. The passages in the judgment that are particularly relied on by Mr Sliwinski are:

[25] ... in the absence of any notices the amount stated in the contractor’s application as the value of the works executed is deemed to be the value of those works so that the employer must pay the sum applied for.

[28] ... if the employer fails to serve any notices in time it must be taken to be agreeing the value stated in the application, right or wrong. In my judgment, therefore, in that situation the first adjudicator must be in principle taken to have decided the question of the value of the work carried out by the contractor for the purposes of the interim application in question.”

22.

Mr Justice Edwards-Stuart clarified the ambit of his decision in *ISG v Seevic in Galliford Try Building Ltd v Estura Ltd* [\[2015\] EWHC 412 \(TCC\)](#):

“[18] I held that if an employer fails to serve the relevant notices under this form of contract it must be deemed to have agreed the valuation stated in the relevant interim application, right or wrong. Accordingly, the adjudicator must be taken to have decided the question of the value of the work carried out by the contractor for the purposes of the interim application in question.

[19] However, I made it clear that this agreement as to the amount stated in a particular interim application (and hence the value of the work on the relevant valuation date) could not constitute any agreement as to the value of the work at some other date...

[20] This means the employer cannot bring a second adjudication to determine the value of the work at the valuation date of the interim application in question. But it does not mean any more. There is nothing to prevent the employer challenging the value of the work on the next application, even if he is contending for a figure that is lower than the (unchallenged) amount stated in the previous application. If this was not made clear by my judgment, then it should have been, and it is certainly made clear by the decision of the Court of Appeal in *Rupert Morgan Building Services (LLC) Ltd v Jervis* [\[2003\] EWCA Civ 1563](#)...My judgment in *ISG v Seevic* was not intended to go behind that.”

23.

In *Matthew Harding t/a MJ Harding Contractors v Paice* [\[2015\] EWCA Civ.1231](#), the Court of Appeal determined that the employer could refer to adjudication the question of the true valuation of a final account following termination, despite an earlier adjudication ordering payment of the contractor’s application for final payment in full on the basis of a failure to serve a valid pay less notice. In upholding the decision of Mr Justice Edwards-Stuart at first instance, Jackson LJ, with whom the other judges agreed stated:

“[71] In the present case we are concerned with a final account following termination of the construction contract. Clause 8.12.5 of the contract conditions requires an assessment of the amount which is "properly due in respect of the account". The clause expressly permits a negative valuation. Mr Linnett did not carry out any such valuation exercise in the third adjudication. Therefore PS were entitled to refer that dispute for resolution in the abortive fourth adjudication. They will be entitled to do so again in the proposed fifth adjudication.

[72] This conclusion is consistent with the reasoning of HHJ Humphrey Lloyd QC in *Watkin Jones* and the reasoning of the Court of Appeal in *Rupert Morgan*. Nothing in *ISG* or *Galliford* contradicts this conclusion.

[73] One may then ask, what did the third adjudication achieve? The answer is that the third adjudication achieved an immediate payment to the contractor. Harding will be entitled to retain the monies paid to him unless and until either the adjudicator in the fifth adjudication or a judge in litigation arrives at a different valuation of Harding's final account under clause 8.12.

[78] In my view the employer's failure to serve a Pay Less notice (as held by the previous adjudicator) had limited consequences. It meant that the employer had to pay the full amount shown on the contractor's account and argue about the figures later. The employer duly paid that sum, as ordered by the previous adjudicator. The employer is now entitled to proceed to adjudication in order to determine the correct value of the contractor's claims and the employer's counter-claims."

Effect of the Statutory Payment Provisions

24.

The statutory payment provisions in the 1996 Act and the Scheme establish a regime for determining stage or periodic payments throughout a relevant construction contract. They do not affect the ultimate value of the contract sum that the parties have agreed is the price for the works and/or services provided. Very clear words would be required if Parliament intended to impose a scheme that would interfere with the commercial value of the bargain freely negotiated by the parties. As explained in above authorities, the statutory provisions are concerned only with cash flow and not the contract sum.

25.

Subject always to the express terms of the contract, where the "notified sum" is in respect of an interim payment, usually there is no contractual basis on which the contractor's entitlement to that payment can be re-opened. Any errors can be corrected in subsequent interim or final valuations. Therefore, an adjudication decision as to the "notified sum" payable precludes a challenge to the interim payment on grounds of valuation in a subsequent adjudication – see: ISG and Galliford.

26.

However, where the "notified sum" determined in adjudication is in respect of a final payment, unless the contract provides that such payment is conclusive as to the contract sum due, although the "notified sum" must be paid, either party is entitled to have the ultimate value of the contract sum determined in a subsequent adjudication, litigation or other form of dispute resolution – see: Rupert Morgan and Matthew Harding. It is not necessary for the contract to set out any specific mechanism for that final accounting exercise; payment of any final sum due to either party is based on enforcement of the contractual bargain.

27.

In the first adjudication Mr Hough determined the "notified sum" payable in respect of the contractor's final account application but did not determine the proper value of the final account. The claimant was obliged to pay the sum in full as determined by the court on enforcement. However, there was no agreement by the parties that the final account would be conclusive as to the final sum due under the contract and the statutory payment provisions do not have such effect. Therefore, the claimant was entitled to refer the final account valuation to Mr Molloy in a second adjudication.

Conclusion

28.

For the reasons that I have given, Mr Molloy had jurisdiction to determine the dispute referred by the claimant and his decision was valid.

29.

It follows that the claimant is entitled to have the adjudicator's decision enforced. Summary judgment should be entered for the claimant in the sum of £55,676.84 plus VAT, £13,140.00 in respect of the

adjudicator's fees and expenses, plus interest and costs, which I will deal with on paper following consideration of any further submissions from the parties.