Neutral Citation Number: [2017] EWHC 3235 (TCC)

Case No: HT-2017-000268

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 12 December 2017

Before:

THE HON MR JUSTICE COULSON

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Between:

Systems Pipework Limited **Cla**

- and -

Rotary Building Services Limited **Defe**

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- -

Mr Ben Sareen (instructed by **Hugh James**) for the **Claimant**

Ms Lynne McCafferty (instructed by **Fenwick Elliott LLP**) for the **Defendant**

Hearing date: 12 December 2017

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Judgment Approved

The Hon. Mr Justice Coulson :

1. INTRODUCTION

1.

Prior to the **Housing Grants (Construction and Regeneration) Act 1996** (“the 1996 Act”), there was a perceived problem in the construction industry that employers and main contractors were failing properly to answer sub-contractors’ claims for payment. Because they were not specifically obliged to do so, they often delayed in giving any answer at all and, even when they did, they would offer only vague reasons for non-payment. One of the beneficial effects of the 1996 Act is that paying parties are now required to identify early on what (if anything) they say is due and why. Standard forms of contract now require notices and cross-notices to be supplied within days, and contain provisions adumbrating the draconian consequences of a failure to issue a timely and/or detailed challenge.

2.

But in the usual way, there is a concern that the pendulum has swung too far the other way. These rigorous contractual terms have been extended to cover, not only interim payments (which was the primary aim of the 1996 Act), but the permanent rights and obligations that arise out of dispute resolution procedures and the settlement of the final account. Thus, in **Costain Ltd v Tarmac Holdings Ltd** [2017] EWHC 319 (TCC), I was recently obliged to find that one party's right to make a claim through adjudication and subsequent arbitration had been lost for all time, because that is what the standard form of contract said. In this case, the court is concerned with a similar situation: on the defendant's case, the claimant lost its right to make its own Final Account claim because it failed to challenge the defendant's assessment/valuation of that Final Account within 14 days.

3.

The parties first argued their respective cases as to the correct interpretation of the contract in an adjudication. The adjudicator decided in favour of the defendant. In these CPR Part 8 proceedings, the claimant seeks to challenge that decision. I deal with the points that now arise in this way. In **Section 2,** I set out the relevant terms of the contract. In **Section 3**, I set out a brief chronology. In **Section 4** I identify the three issues between the parties and the relevant principles of law. Thereafter, in **Sections 5, 6** and **7** I address each of those three issues. There is a short summary of my conclusions in **Section 8**. I am extremely grateful to both counsel for the excellence of their written and oral submissions.

2. THE CONTRACT

4.

By a sub-contract dated 18 December 2014, the defendant engaged the claimant sub-contractor to supply and install the steam, condensate, chilled water and cooling water systems at the Davidstow Creamery in Cornwall. The defendant was the main mechanical and electrical contractor at that site.

5.

The sub-contract documentation contained a number of appendices, including the defendant's standard conditions of sub-contract. These are loosely based on terms in standard forms of sub-contract.

6.

The relevant terms of the sub-contract dealing with the claimant's Final Account were as follows:

(a)

Clauses 1.3.6 and 1.3.7 provided:

"1.3.6 "Final Account" means the account submitted by the Sub-Contractor to the Contractor in accordance with Clause 28.1 or 28.6 and assessed and agreed in accordance with clause 28.7.

1.3.7 "Final Account Statement" means the document submitted by the Contractor to the Sub-Contractor confirming the value agreed in full and final settlement of all payment due relating to the Sub-Contract in accordance with clause 28.7."

(b)

Clause 28.5 provided:

“Within 4 weeks of completion of the Sub-Contractor Works in accordance with the Sub-Contract, the Sub-Contractor shall submit to the Contractor its proposed Final Account for the Sub-Contract Price adjusted only in accordance with the terms of the Sub-Contract Order.

The Sub-Contractor shall append to its Final Account copies of all Variation build-ups, whether or not such information has been previously provided, identifying the provision of the Sub-Contract which permits such recovery and referencing and attaching a copy of the relevant instruction and all other pertinent information in support of such to allow the Contractor to make accurate assessment of the Final Account.

The Sub-Contractor shall be bound by and shall not be permitted to add to or otherwise adjust its proposed Final Account after submission.”

(c)
Clause 28.6 provided:

“The Contractor shall assess the proper amount due for payment in respect of the Sub-Contractor’s Final Account based on the information submitted in accordance with clause 28.5 and shall notify the Sub-Contractor accordingly within 13 weeks of receipt of the Sub-Contractor’s proposed Final Account or such longer time as would be reasonable in all the circumstances taking account of the Main Contract conditions.

In the absence of a proposed Final Account submission from the Sub-Contractor in accordance with clause 28.5, the Contractor may value the proper amount due for payment in respect of the Sub-Contractor’s Final Account on a fair and reasonable basis and notify the Sub-Contractor accordingly.

In either case, if such notification is not dissented from in writing by the Sub-Contractor within 14 Days, then the notified figure will be deemed to have been agreed and will be binding on the parties.”

(d)
Clause 28.7 provided:

“No payment shall be due to the Sub-Contractor in respect of the Final Account until it has been agreed and confirmed in accordance with this clause 28.7. Once agreed, the Contractor shall within 14 days submit a Final Account Statement to the Subcontractor to confirm the figure is in full and final settlement of all payment due to the Sub-Contractor arising out of the Sub-Contract. The Sub-Contractor shall then sign and return the Final Account Statement to the Contractor together with its application for the agreed Final Account Figure less Retention.

The amount due in respect of the Final Account shall be the amount stated in the signed and returned Final Account Statement less:

28.7.1 a deduction in respect of Retention at 50% of the percentage rate stated In Appendix 6; and

28.7.2 the sum of the amounts paid in previous Interim payments.”

To aid comprehension, I have separated out the relevant parts of these clauses. The original text has them in indigestible blocks of prose.

3. A BRIEF CHRONOLOGY

7.

The claimant carried out the sub-contract works between December 2014 and the end of May 2016. For administrative convenience, the parties called the works done up to 31 January 2016 the "DC1" Works, and the works carried out after that date were referred to as "DC2" works. This distinction was not reflected in the terms of the sub-contract itself, or in any of the sub-contract documents.

8.

On 17 May 2016, the claimant emailed the defendant a "revised final account for DC1" and asked for "review and comment". On 22 May, the claimant made an interim application in respect of the DC2 Works. That was not paid.

9.

On 2 September 2016, the defendant provided the claimant with a lengthy document. The covering letter described that document as "our final account assessment for the works carried out on the above project by your company". This is said by the defendant to be a notification under clause 28.6, an assertion which the claimant disputes. That debate lies at the heart of the present dispute.

10.

Behind the defendant's covering letter of 2 September there was a lengthy final account assessment. The first page broke the final account assessment down into a number of different headings: the sub-contract order value; variations; daywork instructions; and daywork valuations by the defendant. Each of these compared figures put forward by the two sides. At the bottom of those relevant columns it identified a figure put forward by the claimant of £3,284,424.62 and a figure put forward by the defendant of £2,643,212.58.

11.

During the course of argument, it was the defendant's position that the 2 September document was, in part, an assessment of the claimant's claim of 17 May in respect of the DC1 Works (under the first sentence of clause 28.6), and partly a final account valuation of the DC2 Works (which had never been the subject of a final account claim, and was therefore a valuation under the second sentence of clause 28.6). The document itself contained no such identification or reference.

12.

On 16 September 2016, the claimant commenced an adjudication in respect of its entitlement to payment for the works carried out after 31 January 2016 (i.e. the DC2 works). The adjudication notice identified the dispute as being "over sums payable to [the claimant] in respect of its interim applications for payment numbers 1, 2, 3 and 4 in relation to phase 2 of the works (DC2)". The subsequent referral notice set out the detail of that dispute. That confirmed, at paragraph 2.3, that "DC1 works do not form part of this Referral".

13.

On 14 November 2016 the adjudicator decided that the defendant was liable to the claimant in the sum of £249,217.43. In other words, the challenge in respect of the DC2 Works was successful. That sum was belatedly paid by the defendant and no further issue arises out of that adjudication.

14.

Back on 20 September 2016, the defendant started a second adjudication seeking a declaration that, pursuant to clause 28.6, the claimant was bound by the final account assessment of 2 September 2016. I note that, on the defendant's case, this was just 4 days after the claimant's time for challenging that assessment had expired. On 15 November 2016, the same adjudicator concluded that the claimant was not bound by the total of the 2 September assessment (in so far as he had already

arrived at a different, higher figure for the DC2 Works), but was bound by the remainder of the 2 September assessment. Although the immediate consequences of that decision have been complied with, in accordance with the sub-contract, the claimant now seeks contrary declarations in these proceedings, saying that the adjudicator was wrong to reach the conclusions which he did.

4. THE ISSUES AND THE RELEVANT PRINCIPLES

15.
The issues between the parties are therefore threefold:

(a)
As a matter of construction of the sub-contract, what notification was the defendant obliged to give the claimant, in order for that notification to be binding under the third sentence of clause 28.6 of the sub-contract?

(b)
Was the 2 September 2016 assessment the required notification under clause 28.6 of the sub-contract?

(c)
If the 2 September 2016 assessment was the required notification in accordance with the sub-contract, was it validly dissented from?

16.
As to the general principles of construction, I follow the well-known guidance set out most recently by the Supreme Court in **Arnold v Britton**[2015] AC 1619 and **Wood v Capita Insurance Co**[2017] UKSC 24. What matters is what a reasonable person, having all the background knowledge available to the parties, would have understood the words of the contract to mean, using the language in its commercial and factual context.

17.
In addition, there have been a number of authorities which have considered the new breed of provisions in construction contracts relating to time limits, and the permanent loss of rights (as outlined in paragraphs 1 and 2 above). Amongst others, these cases include:

(a)
Caledonian Modular Limited v Mar City Developments Limited [2015] BLR 694, in which I said at paragraph 37:

"But it seems to me that, if contractors want the benefit of these provisions, they are obliged, in return, to set out their interim payment claims with proper clarity. If the employer is to be put at risk that a failure to serve a payless notice at the appropriate time during the payment period will render him liable in full for the amount claimed, he must be given reasonable notice that the payment period has been triggered in the first place."

(b)
Henia Investments Inc v Beck Interiors Limited [2015] BLR 704, in which Akenhead J said at paragraph 17:

"Although it is not apt to talk in terms of conditions precedent, I consider that the document relied upon as an Interim Application under Clause 4.11.1 must be in substance, form and intent an Interim Application stating the sum considered by the Contractor as due at the relevant due date and it must

be free from ambiguity. In this context, the Interim Application should be considered in the same light as a certificate. If there are to be potentially serious consequences flowing from it being an Interim Application, it must be clear that it is what it purports to be so that the parties know what to do about it and when."

(c)
Severfield (UK) Limited v Duro Felguera UK Limited[2015] EWHC 3352 (TCC), in which I said at paragraph 32:

"The whole point of the default provisions in the 1996 Act, by which an employer becomes liable for the sum notified, is to encourage simplicity and clarity. If X notifies Y of a claim for £1,000, and Y does not respond in the prescribed time to challenge that claim, £1,000 becomes due because it is the notified sum. Introducing the possibility of a partial claim for £675, by reference to a gloss put on an accompanying spreadsheet, would be to confuse the simple system of notification envisaged by the 1996 Act."

(d)
Jawaby Property Investment Limited v The Interiors Group Limited [2016] BLR 328, in which Sue Carr J said at paragraph 59:

"Whether or not this conclusion can be said to lead to a harsh result for TIG, this is an area where, as the authorities make clear, there is little scope for latitude. If a contractor wishes to have the benefit of the interim payment regime such as that contained in the Contract, then its application for interim payment must be in substance, form and intent an interim application stating the sum considered by the contractor as due at the relevant due date and it must be free from ambiguity."

(e)
Surrey and Sussex Healthcare NHS Trust v Logan Construction (Southeast) Limited[2017] EWHC 17 (TCC), in which Mr Alexander Nissen QC (sitting as a Deputy High Court Judge) set out a number of the above passages and concluded:

"37. The principles identified in these three cases are not in dispute. There is a high threshold to be met by any contractor who seeks to take advantage of these provisions whereby a sum automatically becomes payable if a timely employer's notice is not served."

18.
I consider that these principles apply to clause 28.6 and the defendant's Final Account assessment in the present case. Indeed it might be said that they apply afortiori, because in this instance, the court is dealing, not with an interim application which might be capable of subsequent adjustment or modification, but a final account entitlement which, on the defendant's case, would be lost to the claimant for all time if there has been a valid notification and no dissent.

5. ISSUE 1: WHAT NOTIFICATION IS REQUIRED?

19.
Pursuant to clause 28.6 (first sentence), the defendant/contractor is undertaking an assessment of the Final Account provided by the claimant/sub-contractor. Pursuant to clause 28.6 (second sentence) the defendant is undertaking a valuation because there has been no Final Account provided by the claimant. In either case, the defendant, in its discretion, was entitled to assess/value "the proper amount due for payment in respect of the Sub-Contractor's Final Account." Pursuant to the third

sentence of clause 28.6, in the absence of dissent, that amount was then the subject of an actual or a deemed agreement.

20.
On the face of it, therefore, what was required was the notification of the amount due for payment. To that extent, therefore, this requirement is similar to the need to identify the amount due for payment by way of an interim assessment, which was the subject of the decision in **Severfield**, and a number of the other authorities referred to at paragraph 17 above.

21.
In my view, that reading of clause 28.6 is consistent with clauses 28.3 and 28.4, and also clauses 28.13 and 28.14 of the sub-contract. These all dealt with interim payments. Clauses 28.3 and 28.4 explained that the sums due were calculated by a gross valuation less sums previously paid and, if appropriate, retention. Clauses 28.4, 28.13 and 28.14 each identified an obligation to pay “the notified sum”. And clause 28.7, which was concerned with the claimant’s Final Account, stated in terms that “the amount due in respect of the Final Account shall be the amount in the Final Account Statement” less 50% of retention and the sums previously paid.

22.
Accordingly, the sub-contract drew a distinction throughout between a gross valuation, on the one hand, and the sum due and payable, on the other. They are manifestly not the same thing.

23.
In typically clear terms, Ms McCafferty submitted that clause 28.6 envisaged the assessment/ valuation of the Final Account by the defendant, not the identification of any particular payment which, she said, would come later in the process. She said that this was because the clause was designed to achieve clarity and finality. But the difficulty with that argument is that it is not what the clause says. Both the first and second sentences state that what is to be notified is the proper amount due, not the overall valuation. It would have been easy for clause 28.6 to refer to “the proper value” rather than “the proper amount due for payment”, if that had been the parties’ intention. But it does not say that. Her construction would also mean that “the amount due” would have a different meaning in clause 28.6 compared to clause 28.7, which cannot be right either.

24.
Ms McCafferty sought to counter this by saying that, if clause 28.6 was concerned with the amount actually due, it would render clause 28.7 redundant, because that was where the calculation of the amount due was set out and explained. But I do not accept that. Clause 28.7 only came into play at all if, pursuant to clause 28.6, there was an actual or deemed agreement to “the notified figure”, which itself was a reference back to “the proper amount due for payment”. Moreover, clause 28.7 was administrative only; as Ms McCafferty rightly accepted, it was a provision which did not affect the rights and obligations of the parties. Following actual or deemed agreement to the payment due under clause 28.6, the position could not be modified in any way by either side under clause 28.7.

25.
Accordingly, I am satisfied that, on a consideration of the sub-contract as a whole, the assessment/ valuation under clause 28.6 of “the proper amount due for payment in respect of the Final Account” was an exercise which consisted of two parts: the assessment/valuation of the total amount payable for all the sub-contract work, less previous payments, and any ongoing retention.

6. ISSUE 2: WAS PROPER NOTIFICATION PROVIDED?

26.

Having identified what was required by clause 28.6, it is plain to me that the document of 2 September 2016 was not a proper notification of the amount due for payment in respect of the claimant's Final Account. There are a number of reasons for that conclusion.

27.

First, neither the accompanying letter, nor the bulky document which it attached, said that it was the notification of an amount due. Instead, both the letter and the attachment described themselves as a Final Account assessment.

28.

Secondly, neither the letter nor the attachment contained any identification anywhere of a particular sum which was said to be due and payable from the defendant to the claimant (or vice versa). It was a purported assessment of the value of the works carried out, no more and no less. It was therefore one half of the necessary exercise only.

29.

Thirdly, nowhere in the 2 September documents was there any reference to clause 28.6. Neither the letter nor the attachment said that it was a notification under clause 28.6, much less that it was (on the defendant's case now) actually a notification under two different parts of clause 28.6. In my view, if a notice under a certain clause has a draconian effect pursuant to the contract, the notice should make clear that it has been issued under that clause.

30.

Fourthly, and perhaps most important of all, it is clear from the defendant's own evidence in this case that the documents of 2 September 2016 were not the notification of "an amount due". Ms King's witness statement accepts that the documents were a Final Account assessment only, valuing the entirety of the sub-contract works, without more.

31.

It is right that Ms King then goes on to say that the claimant could have used that assessment to calculate the amount due for payment, by referring to other figures, from other sources. Of course, Ms King was obliged to make that argument, because it is plain to all that the 2 September 2016 documents did not identify, for example, what the defendant said had already been paid, or what the defendant said had been deducted and/or was now payable by way of retention. As Mr Sareen put it at paragraph 13 of his skeleton argument, if the 2 September documents had notified the amount due, it would have been quite unnecessary for the claimant to have to do any calculation at all.

32.

Thus, on any application of the principles identified in **Section 4** above, the answer to Issue 2 is clear-cut. As a matter of form, the 2 September assessment was a final account assessment, and not a notification of an amount due. There was no reference to the amount due in the 2 September assessment. Neither was there any reference to clause 28.6.

33.

As a matter of substance, the document was plainly a valuation of the whole of the sub-contract works, with no identification of any balance due. Sums previously paid, retention and the like, are nowhere to be found. Neither would the reasonable recipient have regarded the documents as a notification of the sum due: for it to be that, the minimum that was required was the actual identification of the sum due, and an express reference to clause 28.6.

34.

There is one final point that needs to be made in relation to Issue 2. I have already said that the fact that the claimant might have been able to work out or otherwise calculate what the sum might be is nothing to the point, because calculation of that kind is the very thing which clause 28.6 seeks to obviate. But I also think that Mr Sareen is right to point out that the documents to which Ms King refers in her witness statement, in support of her argument that the claimant could have worked out the sum due for themselves, include documents which postdate the 2 September assessment. Moreover, some of those documents are the defendant's own documents, rather than a document emanating from the claimant.

35.

All of this simply goes to confirm the basic principle that, if X is supposed to be notifying Y that a sum is due, under a clause that provides for a deemed agreement that binds the parties unequivocally, then it is a prerequisite of the arrangement that the sum due and the clause are clearly set out in the relevant notice. It is not good enough to say that the recipient could have worked it out for themselves; it manifestly fails to meet the necessary test when the alleged calculation that it is said could have been done by the recipient relied on later documents, some of which were not even in the recipient's possession.

36.

I acknowledge that this might be said to be an overly-strict interpretation of the sub-contract. But that has to be set against the fact that the defendant knew that the claimant valued the DC1 Works at a figure that was much higher than theirs (as their own 2 September assessment acknowledged) and knew that DC2 was the subject of a separate dispute anyway (see below). So this is a case where the claimant is attempting to bypass the arguments on the merits by taking advantage of the provisions of clause 28.6. They might well have been able to do so, if they had gone about things in the right way, and with proper transparency. In my view, they did not do either.

37.

For all those reasons, therefore, I conclude that proper notification was not provided. I therefore answer Issue 2 in favour of the claimant.

7. ISSUE 3: IF PROPER NOTIFICATION WAS SENT, WAS THERE DISSENT?

38.

Assuming that I am wrong, and there was proper notification of the amount due, did the claimant dissent from it within 14 days? The adjudicator found that the claimant did dissent from the notification, because it had commenced adjudication 1. The issue is whether that dissent was sufficient to stop the notification under clause 28.6 from taking effect at all, or whether the dissent was partial only.

39.

If I am wrong and there was proper notification, then I consider that there was the necessary dissent to allow the claimant to pursue all Final Account claims. Again, there are a number of reasons for that view.

40.

First, the words of clause 28.6 state that the notified figure "will be deemed to have been agreed and will be binding on the parties", but only in circumstances where the notification "is not dissented from in writing". It must be accepted by the defendant that the notification was dissented from in writing

by the notice of adjudication of 16 September; that is what the adjudicator decided. On that basis, the part of clause 28.6 dealing with the agreement and the binding nature of the notified figure never came into force.

41.
That can be tested in this way. Clause 28.6 envisaged an actual or deemed agreement between the parties. On the facts of this case, that would have to be in the sum of £2,643,212.58 (the amount notified as the Final Account assessment on 2 September). But there was no actual or deemed agreement to that figure because the challenge pursued in adjudication 1, and the result of that adjudication, meant that under the sub-contract, a larger sum was due. There was and could never have been an actual or deemed agreement in the sum notified on 2 September.

42.
Secondly, the deemed agreement was as to the value of the claimant’s Final Account. Because the claimant dissented from the defendant’s valuation of the Final Account, there was no deemed agreement as to the valuation. So the last part of clause 28.6 could not operate.

43.
The third reason concerns the defendant’s submission that a partial dissent, and therefore a partial agreement, was possible. Ms McCafferty said that the dissent only operated in part, such that other parts of the notified figure were deemed to have been agreed and became binding. But there is nothing in clause 28.6 which suggests that this process was capable of being triggered only in part and that notification and/or dissent and/or the deemed agreement and/or the binding nature of that agreement were somehow capable of being infinitely divisible. It is, as Mr Sareen correctly put it, a binary question. Anything else would have been difficult, if not impossible, to operate and would run counter to the alleged clarity brought by this provision.

44.
Fourthly, the defendant’s attempted reliance on the division between DC1 Works and DC2 Works is inappropriate in all the circumstances. The defendant’s Final Account assessment (which on this assumption was a proper notification) made no attempt to divide between DC1 Works and DC2 Works. If it was a notified figure, then it was a notified figure in the singular, for everything, and that only became binding if it was not dissented from. It was dissented from, and there is no scope now for saying that the binding nature of the alleged agreement should apply to everything except the DC1 works. I agree with Mr Sareen that, if there had been a separate notification of sums due for DC1 Works and DC2 Works, and the dissent had related to one notice only, then the position might be different, but that was not the case.

45.
Ms McCafferty said that it was not enough for the claimant to say that it dissented; they had to say what they dissented from, and why. But that is not what the contract says. And although she rightly said that the purpose of clause 28.6 generally was to ensure clarity and to avoid delay, that cannot override the words of the sub-contract.

46.
Again, I consider that this approach is entirely in accordance with the authorities noted in **Section 4** above. Again, the need for clarity in cases of this sort would be lost if partial notification or partial dissent (neither of which are referred to in the relevant clause) were somehow permissible. I also repeat my observation in paragraph 36 above: the potentially draconian consequences that flow from the defendant’s interpretation mean that the contract has to be strictly interpreted.

47.
Again, therefore, I decide Issue 3 in favour of the claimant.

8. CONCLUSIONS

48.
For the reasons set out in **Section 5** above, in relation to Issue 1, I conclude that what had to be notified was "the proper amount due for payment in respect of the Final Account". An assessment of the value of the final account was only one part of that process.

49.
For the reasons set out in **Section 6** above, in relation to Issue 2, I conclude that the 2 September 2016 assessment was not a proper notification of the amount due, in form or fact or substance. On the defendant's own case it required a calculation, by reference to other figures and other documents. It could not therefore have been a notification that £X was due.

50.
For the reasons set out in **Section 7** above, in relation to Issue 3, I find that if, contrary to my primary finding, there was a proper notification by the defendant to the claimant, then the claimant's dissent (by the service of the adjudication notice) prevented the notified sum from being the subject of actual or deemed agreement. The binding provision at the end of clause 28.6 never came into force. The contract did not envisage and did not provide for partial dissent.