Neutral Citation Number: [2018] EWHC 102 (TCC)

Case No: HT-2017-000345

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 26 January 2018

Before :

Miss Joanna Smith QC sitting as a Deputy

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Between :

Victory House General Partner Limited **Cla**

- and -

RGB P&C Limited **Defe**

- -

- -

Mr Justin Mort QC (instructed by **Cannings Connolly**) for the **Claimant**

Mr Nicholas Collings (instructed by **Child & Child**) for the **Defendant**

Hearing date: 19 January 2018

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JUDGMENT

Introduction

1.
This claim arises out of the development and conversion of an existing office building into an 87 bedroom hotel at Victory House, Leicester Square, London ("**the Hotel**").

2.
The hearing came before me as a Part 8 Claim made by Victory House General Partner Limited ("**VH**"), the employer under a building contract made in about October 2015 ("**the Contract**") pursuant to which VH engaged RGB P&C Limited ("**RGB**") as contractor to design and construct the Hotel.

3.
By way of an Additional Claim and an application for summary judgment dated 5 January 2018, RGB seeks to enforce an adjudicator's decision dated 7 November 2017 ("**the Decision**") made against VH upholding RGB's entitlement to payment under the Contract pursuant to RGB's interim payment application 30 ("**Application 30**") of 11 July 2017.

4.

The Part 8 Claim seeks a declaration that the Decision was invalid for breach of natural justice, together with declarations which relate directly to the substance of the Decision.

5.
At the outset of the hearing, I explored with counsel the extent to which Part 8 was the correct procedure for pursuit of the substantive claim and, after hearing submissions on the point, I gave a short judgment in which I rejected VH's case that the substantive claim was suitable for determination under the Part 8 procedure, relying in particular on the judgment of Jefford J in Merit Holdings Limited v Michael J Lonsdale Limited [2017] EWHC 2450 (TCC).

6.
In my judgment, the matters raised on the Part 8 Claim, which include matters of disputed fact, are not suitable for resolution under the Part 8 procedure which is only to be used where the claimant seeks the Court's decision on a question which is unlikely to involve a substantial dispute of fact. It is not an answer to this point to suggest, as Mr Mort QC did on behalf of VH, that issues could be resolved in the Part 8 proceedings on the basis of assumed facts, but that in the event of the decision being unfavourable to his client, he would then be in a position to challenge any disputed matters of fact at a later time in further substantive proceedings. In my judgment this would be an entirely unsatisfactory way to proceed. Not only is it unlikely to be consistent with the Overriding Objective, but it also risks prejudice to one or other of the parties in the presentation of their case. I concur with Jefford J's judgment in MeritHoldings Limited v Michael J Lonsdale Limited [2017] EWHC 2450 (TCC) at paragraph 22 that it is likely to lead to the court arriving at ill-formulated and ill-informed decisions. In the event of a subsequent challenge to such a decision, there will be no saving of costs and resources and no advantage in permitting determination of the issues to be expedited.

7.
Accordingly, the declarations sought in the Part 8 claim, with the exception of the declaration that the Decision was invalid for breach of natural justice which will be addressed in the context of RGB's claim for summary judgment, need to be dealt with under the Part 7 Procedure which will enable the parties' respective positions on the disputed issues to be fully and properly explored. I shall invite the parties' submissions on directions for the pursuit of the claim under Part 7 in due course.

8.
My decision on the Part 8 Claim left the issue of enforcement to be determined on RGB's application for summary judgment.

Background to the Summary Judgment Application

9.
The Contract was a building contract within the meaning of part II of the Housing Grants Construction and Regeneration Act 1996 as amended. It provided for stage payments. Under its terms RGB was obliged to procure a transformer or substation from the relevant statutory undertaker. Only once the transformer was installed and commissioned could the electrical and mechanical services in the Hotel be completed and commissioned.

10.
The project suffered from delays and in about early 2017 the parties fell into disagreement as to RGB's entitlement to payment. However, on or about 13 March 2017, the parties entered into a Memorandum of Understanding ("**the MOU**"), executed as a deed, consisting of two pages. The

recitals to the MOU, which are of importance to this Judgment for reasons which appear later, read as follows:

“(A) Under the Contract the Employer engaged the Contractor to carry out the Works at Victory House, Leicester Square, London.

(B) The Contract sum is £6,670,000.00. The Employer has paid the Contractor £8,183,875.20. The Contractor has indicated a Final Account submission of circa 9.8m. The project has been beset with delays and has been challenging for all parties.

(C) The Contractor is seeking additional funds to that referred to in (B) above to pay for materials and subcontractors.

(D) The Employer is wary of making further payments until the transformer is installed and operational so that meaningful progress can be made to completion.

(E) The principal for the Employer’s Advisers, Mr Asif Aziz, and the principal for the Contractor, Mr Jeff Britnell, are friends and would like to agree a non-confrontational approach to overcome the current issues.

(F) This Memorandum of Understanding seeks to remove commercial matters from the “critical path” and focus everyone on delivery of the project.”

11.
The MOU provided for three stage payments as follows:

“To enable delivery of the attached program the Parties agree to the following stage payments:

(1)
Immediate payment 13/03/17 to enable placing/paymentof all outstanding variations and sub-contractor accounts: £200,000

(2)
10th-17th April or when power on is certified: £200,000

(3)
17th May or / on receipt of all T&C certificates in preparation for PC: £200,000”

12.
The first two payments were made by VH (it says, pursuant to the provisions of the MOU) and it is common ground that the transformer was installed and operational by no later than 24 June 2017, albeit this was after the date envisaged by the MOU. In July 2017, RGB sought to operate the payment mechanism under the Contract by issuing Application 30 in the sum of £682,802.88 plus VAT. VH refused to pay this sum, contending that its obligation to make payments under the Contract was now governed by the MOU. By a notice of intention dated 15 August 2017, RGB referred this dispute to adjudication.

13.
It was RGB’s case in its Referral Notice that it was entitled to payment in respect of Application 30, that VH had served a late Payment Notice on 26 July 2017 and had not served a Pay-Less Notice. RGB expressly refuted the suggestion that the payment provisions of the Contract had been superseded by the MOU and it contended that as a matter of law, the MOU was not legally binding and had plainly not been intended by the parties to be legally binding.

14.
On 18 August 2017 the Royal Institute of Chartered Surveyors nominated Mr Franco Mastrandres to act as adjudicator ("**the Adjudicator**").

15.
By its Adjudication Response dated 5 September 2017, VH denied RGB's entitlement to the sums claimed and asserted that the entire claim referred to adjudication was misconceived. In particular, VH said (i) that the MOU, which as I have said was entered into as a deed, was a binding and effective agreement which superseded the payment provisions of the Contract; (ii) that pursuant to the terms of the MOU, RGB was not entitled to any further payment until "receipt of all T&C certificates in preparation for PC" and that in the absence of these certificates no sum was due; and (iii) by way of alternative, that if the original payment regime under the Contract remained effective, it had served a valid Pay-Less Notice on 31 July 2017 or alternatively on 11 August 2017. The Adjudication Response includes detailed submissions as to the legal effect of the MOU having been entered into as a deed and as to the proper construction of the terms of the MOU.

16.
RGB served a Reply to VH's Adjudication Response on 11 September 2017, identifying the key issues for the Adjudicator as: (i) Does the MOU replace the payment provisions in the Contract to prevent payment of Application 30 made by RGB and (ii) Has VH issued any valid and effective Payment Notice and/or Pay-Less Notice that allows it not to pay the amount set out in Application 30. RGB asserted that it was "crystal clear that the Parties did not intend for the [MOU] to replace the provisions in the [Contract]", that this was clear from the face of the MOU and that in any event "the intention of the parties was that the final third payment of £200,000 [under the MOU] was to be made no later than 17 May 2017". This had not happened and in the circumstances RGB maintained that it had every right to submit Application 30. RGB made detailed submissions as to the proper interpretation of the MOU.

17.
By a Rejoinder dated 18 September 2017, VH sought to respond to RGB's Reply. It focussed on what it described as a volte face by RGB from its original position that the MOU was not legally binding to a new position that whilst the MOU was legally binding the parties did not intend it to replace the provisions of the Contract. VH said "This on its face is an extraordinary proposition because RGB appears to contend that it is entitled to the sums agreed to be paid by VH under the [MOU] in addition to being paid sums calculated and paid pursuant to the terms of the Contract". VH made yet further detailed submissions in response to this proposition by reference to its case as to the construction of the MOU.

18.
Pursuant to a direction from the Adjudicator, RGB served a Surrejoinder dated 21 September 2017, rejecting the suggestion that it had ever maintained that the MOU was legally binding and re-asserting what it called its primary position that the MOU was irrelevant for the purposes of Application 30 as the payment terms in the Contract applied.

19.
By an email dated 26 September 2017, the Adjudicator wrote to the parties indicating that he would be assisted by "greater detail on the terms/effect of any binding Memorandum of Understanding (on the assumption at this stage, but without deciding upon the existence of such)". He suggested that this should be explored at a short meeting with the parties. A meeting thus took place on 23 October

2017, albeit that, for reasons I need not go into in this Judgment, it proved abortive. Later that day, the Adjudicator sent an email to the parties confirming that it had nevertheless been agreed that he would provide the parties with such questions on the circumstances surrounding the making of and the context and construction of the MOU as would better aid his understanding of the parties' submissions on such matters.

20.
The Adjudicator sent an email the following day (24 October 2017) setting out the questions in respect of which he required answers. These questions included item 3 as follows: "In Recital D what is the purpose/scope/effect of the words "The Employer is wary of making further payments until the transformer is installed and operational so that meaningful progress can be made to completion?" (I shall refer to this as Question 3(a)) and "How, if at all, was that purpose/scope/effect affected/ discharged by the transformer being installed and operational by 24 June 2017?" (I shall refer to this as Question 3(b)).

21.
Both parties responded to these questions on 31 October 2017, albeit that VH did so 3 hours after receipt of RGB's answers. As to Question 3(a), RGB responded: "The purpose / scope / effect of this clause is merely a background expression of Victory House's attitude regarding payment of further sums under the Contract to RGB until BTP were able to value the works". RGB went on to point out that it was "notable what this Recital does not say. It does not say that Victory House will not make any further payments under the Contract until the transformer is operational, nor does it state that Victory House will not make any further payments under the Contract until Practical Completion, no matter when Practical Completion was achieved, as Victory House now seek to allege…".

22.
As to Question 3(b), RGB responded as follows: "In the event that any purpose/scope/effect is attached to Recital D then that concludes upon the installation of the transformer on 24 June 2017".

23.
VH answered both questions posed by the Adjudicator in item 3 of his email together, at paragraph 4.1 of its response as follows: "The Adjudicator is referred to the responses set out above. VH was concerned about making any additional payments to RGB given the sums paid already and the lack of progress towards Practical Completion". During the course of argument, Mr Mort QC referred my attention to paragraph 3.4 of VH's response which he said was also relevant to the answer provided by VH. This reads: "Recital D identifies VH's reluctance to make any further payment to RGB for the reasons set out above. VH was reluctant to pay any sums in addition to the £6,670,000 paid to date until there was significant progress towards completion which would be represented by the installation and operation of the transformer or, in other words, 'Power On'".

24.
In an email dated 2 November 2017, VH's solicitor made the following enquiry of the Adjudicator: "Further to the Referring Party's responses to your questions, please let us know if there is anything in them that you would like us to respond to before you make your decision." The Adjudicator did not respond to this enquiry and issued the Decision on 7 November 2017.

25.
In the Decision, the Adjudicator rejected RGB's primary case that the MOU was not legally binding. However, he also rejected VH's case that the MOU superseded the Contract and effectively governed what payments were to be made by VH to RGB to the date of Practical Completion. Instead, he held

that the true effect of the MOU was to suspend the obligation on VH to make interim payments under the Contract until such time as the transformer was installed and operational, i.e. by no later than 24 June 2017; it did not, however, extinguish those obligations (see in particular paragraphs 5.19, 5.42, 5.43 and 5.47 of the Decision). For what it is worth, it does not seem to me that the Adjudicator arrived at this conclusion purely because of his interpretation of the proper scope and effect of Recital D (as is evidenced by his rather more detailed analysis in paragraph 5.19), but for the purposes of this Judgment I do not need to say anything about whether the Adjudicator's construction of the MOU was correct or not.

26.
In light of his conclusion as to the construction of the MOU, the Adjudicator went on to find that Application 30, which was made after the date on which the transformer had been installed and was operational, was properly made and was not precluded by the provisions of the MOU. He also held that VH had not raised either a valid Payment Notice or a valid Pay-Less Notice against that application and, in the circumstances, he decided that VH should forthwith pay to RGB the sum of £682,802.88 plus VAT together with interest until the date of payment.

27.
VH has not complied with the Adjudicator's decision and on 16 November 2017, RGB issued a winding up petition against VH based on its failure to honour the Decision. After that petition was served VH commenced the Part 8 proceedings which included the request for a declaration that the Decision was invalid for breach of natural justice. Accordingly the winding up petition was not advertised and RGB now seeks summary judgment from this court to enforce the Decision.

28.
Given that I have decided that it would not be appropriate for me to deal with the substantive issues raised in the Part 8 claim, it is not for me to determine on what is now a simple enforcement application whether the Adjudicator has made an error of law in his construction of the MOU (see Carillion v Devonport Royal Dockyard [2005] EWCA Civ 1358). The only issue now before me is whether there has been a breach of natural justice by the Adjudicator.

Natural Justice

29.
VH's case as to breach of natural justice is simple: it says that the Adjudicator's decision as to the true construction of the MOU did not reflect an argument that had been advanced by either party and that this was therefore a case in which a central finding by the Adjudicator involved him in "going off on a frolic of his own".

30.
In the recent decision of AECOM Design Build Limited v Staptina Engineering Services Ltd [2017] EWHC 723 (TCC), Fraser J was invited to accept a very similar argument. He referred to the decision of Edwards-Stuart J in Roe Brickwork Ltd v Wates Construction Ltd [2013] EWHC 3417 (TCC), in which Edwards-Stuart J cited with approval from the earlier judgment of Akenhead J in Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC) [2008] BLR 250 at [57](e).

31.
VH has relied on the whole of paragraph 57 in CantillonLtd v Urvasco Ltd [2008] EWHC 282 (TCC) [2008] BLR 250 for the purposes of its argument in this case and so I set it out in full:

“57(a) It must first be established that the adjudicator failed to apply the rules of natural justice.

(b) Any breach of the rules must be more than peripheral; they must be material breaches.

(c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.

(d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.

(e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of Balfour Beatty Construction Company Ltd v The Camden Borough of Lambeth was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto”.

32.
At paragraphs 43 and 44 of his judgment in AECOM Design Build Limited v Staptina Engineering Services Ltd [2017] EWHC 723 (TCC), Fraser J went on to say:

“43. Edwards-Stuart J also stated in Roe Brickwork Ltd v Wates Construction Ltd [2013] EWHC 3417 (TCC) at [24] that “there is no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party has contended, provided that the parties were aware of the relevant material and the issues to which it gave rise had been fairly canvassed before the adjudicator”.

44. In my judgment the latter passage of Edwards-Stuart J aptly summarises the position here. The adjudicator decided a point of importance on the basis of the material before her, and on a basis for which neither party had contended and she was entitled to do so. …She was not bound to accept only one of the two alternatives put to her by the parties. Questions of contractual interpretation in particular will often (if not usually) be capable of more than two possible answers, and so the correct answer (as the adjudicator may see it) may not have been expressly proposed by either one of the parties. That does not mean that by choosing a different answer, the adjudicator is breaching natural justice by failing to notify the parties of this and inviting further submissions…”.

33.
In paragraph 45 Fraser J pointed out that AECOM or its advisers may, upon receiving the decision, have wished that they had put more comprehensive submissions to the adjudicator on the point she had alighted on but he said “that is not the same as there having been a breach of natural justice, still less a material breach, in this case”.

34.
Mr Mort QC seeks to distinguish AECOM on the basis that the findings of the Adjudicator in that case were simply a modified version of the main contractor’s submissions and thus fell within the boundaries of the dispute between the parties. By contrast, in this case, he submits, the Adjudicator

invented a new point on construction which was central to his construction of the MOU as a whole, and so a material breach of natural justice.

35.
In summary he says (i) that the parties' responses to the Adjudicator's questions as to the scope and effect of recital D were, in effect, the same and that they were both "ad idem" on that point; (ii) that VH had no hint that the Adjudicator was thinking of treating Recital D as an operative term and (iii) he points to the evidence of Mr Asif Aziz on behalf of VH to the effect that the Adjudicator's analysis in paragraphs 5.42 and 5.47 of the Decision was not an argument that RGB had advanced or one that VH was aware it needed to meet in the Adjudication and that the Decision had come as a "surprise" to VH; (iv) he says that in such circumstances an adjudicator should not arrive at a different conclusion from the one advocated by both parties without giving them an opportunity to comment on that different conclusion. For completeness, I note also that in his witness statement, Mr Bate, solicitor acting on behalf of VH, says that had he thought that the Adjudicator was going to use RGB's answer at 3(b) as one of the bases for his decision "then I would have definitely sought his leave to respond to it".

36.
Accordingly, Mr Mort QC submits that this was a material breach by the Adjudicator (falling within paragraphs 57(a)-(e) of the guidance of Akenhead J in CantillonLtd v Urvasco Ltd [2008] EWHC 282 (TCC) [2008] BLR 250).

37.
I reject these submissions for the following reasons:

(i)
The parties were aware from the outset that a central question in the Adjudication concerned the true and proper construction of the MOU. They each made detailed submissions on this issue in the various documents I have referred to above.

(ii)
The Adjudicator's questions provided to the parties by email on 24 October 2017 made it clear that he was inviting submissions as to the purpose, scope and effect of Recital D.

(iii)
RGB responded to the questions posed. Whilst it asserted as its primary case that Recital D was merely factual background, in my judgment it also sought expressly to grapple with the question posed in its answer at 3(b). I do not read this answer as having limited ambit, as was submitted by Mr Mort QC, and nor do I read it as being on all fours with VH's position. I certainly do not see how it could be said that the parties were 'ad idem' in responding to Question 3(a) and (b) and in this regard, I accept the submissions of Mr Collings on behalf of RGB. It seems that the Adjudicator understood RGB's answer at 3(b) to be providing a clear response to Question 3(b) – see footnote 14 of the Decision. I note in passing the evidence of Mr Bate, on behalf of VH, at paragraphs 7 and 16 of his witness statement to the effect that the relevant paragraphs of the Decision "were based on a submission by the Defendant that had not been made by it in any of its statements of case nor in any of its witness statements" and that he had not understood the process of responding to the Adjudicator's questions as involving new submissions. Insofar as this evidence was intended to seek to draw a distinction between the formal documents in the Adjudication and the answers to the Adjudicator's questions, I reject any such distinction. Mr Mort QC did not rely on this point in his oral

submissions; advisedly perhaps as it appears to be an acknowledgement that the Defendant did in fact expressly address the question posed.

(iv)
VH did not respond directly to the question posed (whether in the answer to Questions 3(a) and (b) or in paragraph 3.4 of its Response). Instead, it chose to reassert the factual background reflected in the Recital. This was its own decision and whilst it may regret that decision, it seems to me that it cannot now complain that it did not have an opportunity to address the point.

(v)
Even assuming that VH did not understand the significance of the questions posed by the Adjudicator, once it received RGB's response, which Mr Bate appears to have recognised went beyond its previous submissions, it should have been clear to VH that RGB had made an alternative submission on the assumption that Recital D had operative effect. VH could have sought the Adjudicator's permission to respond to this point, but it did not do so. I do not regard the Adjudicator's failure to respond to the enquiry made on 2 November 2017 as taking the matter any further. It was for VH to decide whether it wished to seek permission to make further submissions.

(vi)
In my view, the circumstances of this case thus fall within the guidance given by Akenhead J at paragraph 57(e) of Cantillon Ltd v Urvasco Ltd [2008] EWHC 282 (TCC) [2008] BLR 250, to the effect that "if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto". The Adjudicator did not go off on a frolic of his own in the Decision and this is not a case in which he decided a point of importance on a basis for which neither party had contended. His Decision was made against the background of having posed a specific question about the purpose, scope and effect of Recital D; a question which both parties had the opportunity to answer. RGB's answer to Question 3(b) appears to have formed the starting point for his analysis. Even if I were wrong about that, the point raised by the Adjudicator in his Decision was one of contractual interpretation and he was, in my judgment, entitled to arrive at a conclusion that did not necessarily reflect the submissions made by the parties for the reasons clearly identified by Fraser J in AECOM Design Build Limited v Staptina Engineering Services Ltd [2017] EWHC 723 (TCC).

Conclusion

38.
It follows therefore that in my judgment, RGB is entitled to summary judgment in respect of its Additional Claim. Issues of costs and any other consequential matters, including any directions that may be sought for the purposes of converting the Part 8 proceedings into Part 7 proceedings will be dealt with on the formal handing down of this judgment to the parties, if they cannot be agreed.