No. HT-2021-000416

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

[2021] EWHC 3598 (TCC)

Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London, EC4A 1NL

Monday 13th December 2021

Before:

MR JUSTICE EYRE

B E T W E E N :

BRAVEJOIN COMPANY LIMITED Claimant

- and -

PROSPERITY MOSELEY STREET LIMITED Defendant

MR ZVESPER (instructed by Irwin Mitchell LLP) for the Claimant.

MR LUMB (Employee, Prosperity Moseley Street Limited) for the Defendant.

JUDGMENT

(Please note this transcript has been prepared without the aid of documentation)

MR JUSTICE EYRE:

1
The Claimant is a company that is engaged in steelwork, cladding, and related fabrication. The Defendant is a single purpose vehicle engaged in the development of a site in Moseley Street in Birmingham. The Claimant was engaged to perform works on that site as a subcontractor to J A Ball. That company went into administration. The Claimant's case is that it was then engaged directly by the Defendant.

2
In November 2020 the Claimant rendered invoices to the Defendant. Rather I should say that it rendered invoices in the following circumstances. The invoices were sent under cover of an email of 9th November 2020 to chrishay@prosperitydevelopments.co.uk. It is not disputed that Mr Hay was acting on behalf of the defendant company and potentially others in what I will call the Prosperity Group. It is also not disputed that the defendant company did not have its own website or email address. The 9th November email had the subject "Moseley Street invoice - 21289" and said: "Good afternoon, please find enclosed invoice 21289." There were similar emails in respect of the other invoices which were sent on the same date.

3
Invoice 21289 was from the Claimant. It was addressed to "Prosperity Developments" and had the customer order number "Mr C Hay PMSL-015-009" with Bravejoin Limited's job reference "C8390". The other emails and invoices were in similar terms though not all had the PMSL-015-009 reference as well as that of Mr Hay. The total amount of the invoices was £77,500-odd. Those invoices were sent, as I have said, on 9th November.

4
At 12.42 on 19th November Mr Hay responded from the email address chris.hay@prosperitydevelopments.co.uk on a letterhead which simply said "Prosperity Developments" and gave a Prosperity Developments website. The response was sent to "admin@Bravejoin.co.uk" and copied in various Bravejoin personnel. The heading of the email was "Re Moseley Street - payment confirmation" and it said "Thank you. I'll have them paid on 11 December 2020."

5
Then twenty minutes later, at 13.03 on 19th November 2020, Mr Hay sent an email with the same subject line, "Moseley Street - payment confirmation" with an attachment "Bravejoin's site valuation 01PDF. The email said:

"Happy days.

Payment certificate number 01 as attached.

I'll send the warranty through hopefully this week so you can complete before 11 December 2020."

6
That email had attached to it on a Prosperity Developments' pro forma a "subcontract valuation" operating for these purposes as a payment notice. It is of note that it had a header: "Bravejoin - site - valuation 01" and that the contract was stated to be "Moseley Street, Birmingham." The body of the document said:

"Subcontract PMSL-15-008. Subcontractor Bravejoin. Works valued up to 15 November 2020. Release date 15 December 2020."

7
The payment was valued at £37,889.59. There was a footer which had https://d.docs.live.net/…" and then a string of numbers in figures followed by "/prosperitymoseleystreetlimited/subcontractor/structuralsteelwork/bravejoin-site-valuation-01." That valuation related to three of the six invoices which had been sent by the Claimant.

8
On 29th January two pay less notices were sent in respect of two of the other invoices. They are in similar terms. I will deal with that which appears at p.99 in the electronic bundle. It begins with a reference in the top left: "PMSL-2901221-CH-Bravejoin". The same reference but with a slightly different number appears on the second pay less notice. That is dated 29th January and it is addressed to "Bravejoin Company Limited". It is said to be in respect of the contract at Moseley Street. It is a notice to pay less and is expressed:

"…to be in accordance with the terms and contracts of your subcontract."

9
The pay less notice at page 99 says this in the last part of the text:

"The reason behind our assessment of a nil valuation is the works you are claiming for have not been substantiated in any way, furthermore, PMSL are yet to receive a completed design declaring the extent of the enabling works in order to value against. Therefore, in lieu of a lack of information, we have made a Nil assessment."

It is signed by Mr Hay who signs himself as signing "for and on behalf of Prosperity Moseley Street Limited"

10
As I have noted, the payment notice had a release date of 15 December and, indeed, Mr Hay's email of the same date as the payment notice said that he would have the invoices paid on 11th December. There was, in fact, no payment. It seems that at some point, the Claimant intimated, suggested, or queried whether the proper defendant was Prosperity Wealth which appears to be another company in the group of companies related to the Defendant.

11
On 18th February 2021 Trowers & Hamlins, the solicitors then acting for the Defendant, wrote to the Claimant's solicitors under this heading:

"Our client Prosperity Moseley Street Limited

Your client Bravejoin Company Limited

150-159 Moseley Street."

12
I will not quote the whole letter but under a subheading "The contract", it says:

"While it is common ground between our respective clients that Bravejoin provided services in respect of the Property, it is clear there is a difference of opinion between our respective clients as to the scope of services that Bravejoin was engaged to provide and the identity of the party with whom Bravejoin contracted."

13

The next but one paragraph says:

"While direct discussions took place between PMSL and Bravejoin in the period leading up to and immediately following JAB entering administration, and direct payments were made by PMSL to Bravejoin and JAB, it appears that Bravejoin considers (at least latterly) he contracted directly with 'Prosperity Wealth' in relation to the Property. The precise basis upon which Bravejoin considers it was appointed by Prosperity Wealth in relation to the Property and what it says the scope of the services it was engaged to provide was (and why it says this) and how this fits in with its employment as a subcontractor to JAB is not clear."

14
It then goes on to say this:

"We invite you to confirm Bravejoin's position in respect of these issues as soon as possible. Full details of those claims have never been provided beyond a suggestion from Bravejoin that the raising of a series of invoices has given rise to an entitlement to a payment by a company linked to the Prosperity group of companies (possibly an entity referred to as Prosperity Wealth as noted above). The specific entity within the Prosperity group with whom Bravejoin says it has contracted (and other fundamental issues as identified above) has never been identified by Bravejoin with any precision and does not appear to be clearly identified on any of the invoices apparently relied upon. In the event that Bravejoin wishes to provide full details of its alleged claims then we will, of course, consider them. However, until such a time as those details are provided, no dispute can properly be said to exist. All rights remain reserved in the meantime."

15
Then under the heading "PMSL's claims", it says:

"PMSL's position is that it did not engage Bravejoin directly to carry out the fabrication, delivery, and the erection of steelwork relating to the property after JAB entered administration as the parties were unable to agree terms in relation to this work. A draft contract was provided to Bravejoin by PMSL which Bravejoin expressly declined to sign."

16
The antepenultimate paragraph of the letter says this:

"We now invite you to provide clarification as to the precise details of Bravejoin's intimated claims in respect of the Property to include full details of its position as to the contracts in relation to the Property (to include what it says its agreed scope of work was and who it contracted with), and details of how it is said (if at all) that its employment under its contract with JAB came to end."

17
That letter, as I have said, was on 18th February 2021. The Claimant did not respond to that letter and some little while later, on 16th July 2021, it referred the dispute which it contended existed to adjudication.

18
On 6th September Mr Paul Jensen, the appointed adjudicator, issued his decision. At [8] he dealt with the question of jurisdiction saying:

"The Respondent has submitted that I have no jurisdiction for the reason that the dispute had not crystallised prior to the commencement of the adjudication. I find, however, that the fact that invoices

submitted by the Claimant were not paid gave rise to a dispute and, therefore, I find the respondent's challenge to my jurisdiction for that reason fails."

19
At [23], the adjudicator set out his conclusion as to the scope of the contract concluding that the order he found had been placed related only to design, and at [27], he said this about the six invoices:

"I agree with the respondent that the invoices were not valid applications for payment and therefore, it was not necessary for the respondent to issue any payment or pay less notices but, however, the respondent did treat five of them as valid applications and issued payment notices in respect of the first three invoices in the sum of £36,752.82 being the full amount of the invoices less at 3% retention. Consequently, I find the respondent is obliged to pay that sum in accordance with its payment notices. It has not done so and, consequently, I decide that the respondent should now pay that sum to the Claimant."

20
It is that decision that the Claimant now brings proceedings to enforce. The matter is before me on the summary judgment application in respect of those enforcement proceedings.

21
The Defendant's case was put in a witness statement by Mr Lumb who is an employee of the Defendant and a director of at least one other company in the Prosperity Group. Mr Lumb has today represented the Defendant in person. That witness statement appeared to be saying that there was no dispute between the Claimant and the Defendant potentially because the Claimant had intimated a claim against Prosperity Wealth, and also saying that there was no contract with the Defendant and so on that footing no dispute had crystallised before the adjudication took place.

22
In his oral submissions to me Mr Lumb put matters rather differently and his concern as set out today was that what had happened was that Bravejoin had produced a design that did not work and which was a failure and he asked why should the Defendant pay invoices for a design that did not work. Indeed, he said the Defendant was still happy to work with Bravejoin but was working to try and find a solution to the inadequacy of the design.

23
It can be a defence to an application to enforce an adjudication award that an adjudicator lacked jurisdiction and there would be no jurisdiction if a dispute had not crystallised before the commencement of the adjudication.

24
I have been helpfully referred to guidance as to how the courts have referred to the meaning of a dispute. So, firstly, in Ringway Infrastructure Services Ltd v Vauxhall Motors Ltd [2007] EWHC 2421 (TCC), Akenhead J said this at [55] having reviewed the authorities:

"I draw the following conclusions from these authorities, at least in the context of the current case:

"(1) The existence of a dispute or difference may be inferred from what is said or not said by the party in receipt of what may be termed 'a claim'.

(2) There does not have to be an express rejection of a 'claim' by the recipient. In so far as the case of Monmouthshire County Council v Costelloe and Kemple Ltd ... suggests otherwise, the more recent cases of Amec and Collins suggest otherwise.

(3) A 'claim' for the purpose of giving rise to a dispute or difference may not be a claim for money or for the payment of money. The variety, extent and scope of disputes are infinite. It may involve simply an assertion of a right by one party.

(4) One needs to determine whether there is 'claim' and whether or not that claim is disputed from the surrounding facts, circumstances and evidence pertaining up to the moment that the dispute, subsequently referred to adjudication (or arbitration), has crystallised."

That was in 2007.

25
Then in 2015 Coulson J in CSK Electrical Contractors Ltd v Kingwood Electrical Services Ltd [2015] EWHC 667 (TCC) said this at [4]. He referred to the starting point being the decision of Jackson J in AMEC Civil Engineering Ltd v Secretary of State for Transport [2004] EWHC 2339 (TCC) and after quoting from Jackson J said:

"That analysis explains the general view that, for crystallisation to occur, no more than the service of a claim by the claiming party, and subsequent inactivity for a further short period by the responding party, may be enough."

26
He noted that that was the approach that had been taken by Akenhead J in Ringway case.

27
The year before that, in 2014, Ramsey J in City Basements Ltd v Nordic Construction UK Ltd [2014] EWHC 4817 (TCC) had dealt with the matter thus beginning at [29]. At [29], he had quoted from Jackson J's position in the Amec case. Ramsey J quoted thus from Jackson J's comments, as adopted by Clarke LJ in the Court of Appeal in Collins (Contractors) Ltd v Baltic Quay Management [1994] Ltd [2004] EWCA Civ 1757:

"1. The word 'dispute' which occurs in many arbitration clauses and also in section 108 of the Housing Grants Act should be given its normal meaning. It does not have some special or unusual meaning conferred upon it by lawyers.

...

4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection ... [or] ... may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case..."

28
At [31], Ramsey J noted that in the case before him there had been an application for payment. There was a long period of time up to the date for payment and from then until the final date for payment. He said:

"...Once the 10 January 2014 date came, then if payment was not made that day or shortly afterwards, I consider that the clear inference on an objective basis is that there was a dispute as to whether Nordic would make the payment..."

29
At [32], he said:

"There is no need, as it seems to me and as is made clear by paragraph 6 of schedule 1, in the case of an adjudication where it is a simple dispute about payment, for the parties to do anything else other than comply with the contractual provisions. Had they complied with that, payment would have been made on 10 January 2014. It was not made on 10 January 2014 and the only possible inference is that there was a dispute as to the making of payment on that date, despite the fact that the contractual mechanism for a payment notice or pay less notice had not been complied with."

30
I note the last sentence at [33]:

"...The court has to look at the position objectively in the light of the contractual provisions and the communications between the parties as to whether or not on 10 January 2014 there was a dispute as to payment."

31
In [34], he said:

"...it may seem strange that once the notice of adjudication was given, if there had been no dispute, that immediate payment was not made as would be expected in the absence of a dispute."

32
Ramsey J made it clear that he was not regarding that last point as of crucial significance in the interpretation of the question of whether there was a dispute or not but it is also clear it was a pointer as to whether or not there was a dispute and it is a similar pointer in the circumstances of this case.

33
Finally, I have been referred to the decision of Akenhead J in VGC Construction Ltd v Jackson Civil Engineering Ltd [2008] EWHC 2082 (TCC) at [49]. The relevant part of that paragraph is the second sentence where the judge said:

"...It might be possible in certain circumstances to apply the principles of estoppel or waiver to a disputed claim which the claiming party indicates clearly and unequivocally to a responding party that it is withdrawing that claim or assertion; if the responding party acts on that representation about withdrawal to its detriment, then the claiming party may find it difficult in practice to pursue the claim at all."

34
He went on to say:

"However, it is necessary critically to examine whether a claiming party is in effect withdrawing or abandoning the claim which it has made which has been disputed. The Court will need to consider whether the claiming party was effectively intending to abandon or merely temporarily to suspend or hold back any entitlement which it may have had to pursue dispute resolution processes laid down by the contract in question. There may, in context, be a difference between a party who indicates that it will hold its claim 'in abeyance' because that may imply in the circumstances something less than a

withdrawal. A withdrawal of a disputed claim may give rise to a substantive defence in any subsequent dispute resolution process."

35

My conclusion on the facts here is that there clearly was a dispute. Invoices were sent to Mr Hay. The terms of the invoices, including the order number, made reference to the Defendant. More significant are the responses in Mr Hay's emails of 19th November, the payment notice, and the pay less notice. Those were clearly issued on behalf of the Defendant to the Claimant. At one point, it does seem that the Claimant was confused as to the correct contractual counterparty and that is referred to in the letter from the Defendant's solicitors of 18th February. The letter of 18th February 2021 asserted there was no dispute but it was, in fact, itself indicating that there was a dispute because it was denying any liability on the part of the Defendant to pay the Claimant. That must be an indication of a dispute in the context of the invoices, the payment notice, and the pay less notices. It is also significant that there was no payment at any stage after the date when Mr Hay said there would be payment and as was indicated in the payment notice.

36

The short point is that six invoices were rendered by the Claimant to the Defendant. They were treated by the Defendant as having been rendered to the Defendant. That is show by the payment notice which was clearly issued on behalf of the Defendant if only as indicated by the reference in the footer which must be the Defendant's reference. More significantly the pay less notices relating to two out of the same batch of six invoices were avowedly on behalf of the Defendant. What explanation could there be in those circumstances for non-payment and that response other than that the Defendant was disputing liability to pay at least in the sense of not accepting its liability to pay? As I have said, that was shown by the letter of 18th February.

37

The point that was raised in Mr Lumb's witness statement and, to some extent, referred to in the correspondence that the dispute ceased because of the Claimant's suggestion at some point that the payment should be from Prosperity Wealth, has to be considered. However, Mr Zvesper is right to say that that was not a withdrawal of the claim still less was it one on which the Defendant acted to its detriment. At most, it was a not uncommon raising of the question of which was the appropriate contracting party to be the recipient of any claim or proceedings in circumstances where, as was apparent from the correspondence, there was a lack of a company name on large elements of the email correspondence and, indeed, a lack of clarity shown in Mr Lumb's comments to me today when I asked about his role. It is clear from all of that that the defendant company and other companies in the group proceeded somewhat informally as to the nature of which company was doing what. All doubtless understood what was happening on the ground but the formalities were not clear. It is not surprising, in those circumstances, that the Claimant appears to have questioned which company should be the recipient of any proceedings or claim. That, in circumstances where invoices were rendered; where a payment notice was sent; and where pay less notices were served does not mean that there was not a dispute nor does it mean that there was an abandonment of the claim or of the dispute of the kind which Akenhead J was referring to in the VGC Construction case.

38

Today, Mr Lumb raised rather different points. Today, Mr Lumb raised a challenge to liability to pay under the contract. It seems that the Defendant is aggrieved as to the position of the Claimant and aggrieved as to what the Defendant sees as the failure of the design produced by the Claimant. It may very well be correct that there was an ineffective design produced but the question before me today is

enforcement of this adjudication award and the criticism which is now made of the claim of the Claimant under the invoices is not a defence today to the adjudication award and it can be of no relevance on the question of enforcement of that award.

39
The position, in very short terms, is this. At the time of the reference of the matter to the adjudicator there was a dispute between the Claimant and the Defendant. That dispute was referred to the adjudicator. The adjudicator had jurisdiction to conclude that dispute. He came to a decision that a particular sum of money was payable and that sum of money is payable. There is no defence with any real prospect of success to that claim and there will be summary judgment for the Claimant.

MR JUSTICE EYRE: Now, remind me what the figure is, Mr Zvesper.

MR ZVESPER: Sorry, I was on mute. The figure is £39,038.66, plus interest and costs.

MR JUSTICE EYRE:

40
There will be judgment for that sum, plus interest.

LATER

41
The Claimant asks for interest on the same basis as was awarded by the adjudicator, namely under the Late Payment of Commercial Debts (Interest) Act 1998.

42
I am satisfied that is the appropriate rate here and I award interest on that basis. So that is £744.38 to the date of today and at a daily rate of £8.18 to the date of payment.

LATER

43
The Claimant was the successful party here. The normal rule is that the successful party recovers his, her, or its costs. There is no reason to depart from that rule here. So the Claimant will recover its costs.

44
The next question I have to decide is the basis on which they should be assessed. There are two bases of assessment, Mr Lumb. One is what is called the standard basis, which is for normal cases. The other is the indemnity basis. However, the courts have said that because adjudication enforcement is so important, the normal approach is to award indemnity costs in adjudication enforcement cases.

MR JUSTICE EYRE: Now, I will look at the actual figures in a moment but is there any reason that I should not award costs on the indemnity basis here?

MR LUMB: I cannot see any reason, your Honour.

MR JUSTICE EYRE: No.

45
I think again Mr. Zvesper is right that this is a case where there was an application to enforce adjudication where the defence put forward, I have no doubt in good faith, was simply misconceived

and never going to succeed. Therefore, there is no reason why the normal TCC approach of awarding indemnity costs should not follow in the particular circumstances here.

LATER

46
I am going to assess these figures. Assessing them on the indemnity basis, I have to have regard to what is a reasonable sum with any doubts as to reasonableness being resolved in the favour of the receiving party, that is the Claimant here, and taking no account of proportionality.

47
The original figure of £33,000-odd did seem on the high side even on the indemnity basis. The revised figure of a touch over £23,000, in my judgment, cannot be said to be unreasonable in the context of a half day adjudication, albeit one conducted virtually in the circumstances here.

MR JUSTICE EYRE: Remind me what the figure was, Mr Zvesper.

MR ZVESPER: £23,857.

MR JUSTICE EYRE:

48
Yes, I cannot say that that figure is not the appropriate figure. I will assess the costs in that figure.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.