Neutral Citation Number: [2019] EWHC 1787 (TCC)

Case No: HT-2019-000164

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

Rolls Building,
Fetter Lane
London, EC4A 1NL

Date: 09/07/2019

Before :

MR ADAM CONSTABLE QC

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Between :

MG SCAFFOLDING (OXFORD) LTD	**Claimant**
- and -	
PALMLOCH LTD	**Defendant**

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- -

Gideon Shirazi for the Claimant
Simon Arnold (instructed by Preston & Co. Law Firm Limited) for the Defendant

Hearing date: 1 July 2019

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APPROVED JUDGMENT

MR ADAM CONSTABLE QC :

1. This is an application for summary judgment to enforce an adjudicator's decision. The central issue for determination is whether the adjudicator lacked jurisdiction in circumstances where the adjudication was commenced, and pursued, by the Claimant, MG Scaffolding (Oxford) Limited ('**MGS**') as Referring Party, against a Responding Party named 'MCR Property Group' ('**MCRPG**'), a trading name, and where, as MGS now accepts, the correct contractual counterparty is a company called Palmloch Ltd ('**Palmloch**'), the Defendant to this action.

2. The Court has been provided with the witness statements of Mr Peter Cooper on behalf of MGS and Mr Martin Brown on behalf of Palmloch.

Background to the Adjudication

3. In 2017, Mr Binfield, then employed by a scaffolding company called Craven Scaffolding Ltd, was asked by a Mr Warren Lewin to provide a quote for a scaffolding scheme, which he did in the sum of £38,154.00. Mr Lewin's email address ended '@mcrproperty.com'. This quotation was sent to Mr Warren Lewin at 'MCR Property Group' at an address at Universal Square, Manchester. A Purchase Order was subsequently raised, dated 3 October 2017. The PO was headed 'Palmloch Limited', and a reference given 'Palm/016'. The PO stated: '*Please invoice to:- Palmloch Limited*', with the same postal address as that to which the quotation for MCRPG had been sent. At the foot of the invoice, was stated 'Head Office: Palmloch Ltd….' with the same Universal Square address.

4. Mr Binfield subsequently moved to MGS, and on 21 February 2018, Ms Phillips of MGS emailed a quotation reference PC5953 in the same sum of £38,154, now on MGC paper, to Mr Lewin. On 23 February 2018, Mr Lewin emailed to ask if MGS could start on 5 March. MGS alleges it started work on 5th March 2018 pursuant to the instruction.

5. On 8 March, 2018, the previous PO was re-issued, with 'Craven Scaffolding Ltd' deleted and MG Scaffolding inserted in manuscript. This PO was still, therefore, in the name of Palmloch. The covering email from Mr Lewin ('@mcrproperty.com') stated

> '*This is a copy of the original PO, it will be the same number, so please make sure your accounts include this on the invoices and also note the company that needs invoicing, as any mistakes will delay payment.*'

6. Mr Brown suggests that MGS commenced work on 12 March 2018, rather than 5 March 2018.

7. Invoices were presented, as requested, to Palmloch. Various communications during the course of the works took place with Mr Lewin emailing from his '@mcrproperty.com' email address.

8. Both sides agree in these proceedings that the correct parties to the scaffolding contract were MGS and Palmloch. I note that, although the question of the correct parties is no longer in dispute, there nevertheless remains a disagreement between the parties about

precisely how the contract was formed, which may affect whether or which standard terms apply. That is not a matter which either side has invited the Court to express view about in this Judgment, and I do not do so.

9. During the project, disputes arose between the parties. In October and November 2018 there were email communications between Mr Cooper of MGS and Mr Brown of Palmloch about these disputes.

The Adjudication

10. On 7 December 2018, MGS commenced an adjudication against 'MCR Property Group' by Notice of Adjudication. This was sent by email from MGS to Mr Brown of Palmloch. The Notice alleging that the contract had been formed by (a) the provision of the quotation on 21 February 2018 and (b) the acceptance and instruction to commence work by email of 23 February 2018.

11. The entitlement to payment was based upon the absence of a valid pay less notice following an application for payment. MGS sought payment of the sum it claimed to be outstanding by reason of the non-valuation of its application, rather than upon any substantive investigation into entitlement.

12. The Adjudicator was appointed on 10 December 2018 by the RICS. The Referral Notice was served on 14 December 2018.

13. On 17 December 2018, a letter with an 'MCR' logo and footed with '*MCR Property Group is a trading name of MCR Management Limited*', was sent from Mr Brown to the Adjudicator. It contended that:

> '*MCR Property Group does not recognise any claim or issue requiring resolution from an adjudicator. MCR Property Group is no more than a brand name and holds no assets of its own. MCR Property Group has no debt outstanding with the referring party. Any claim, if any, requiring adjudication or dispute resolution should be directed towards the company whom the referring party has a dispute*'.

The letter did not suggest that the proper responding party to (any) claim was Palmloch.

14. This was taken to be a jurisdictional challenge by the Adjudicator and MGS was given until 19 December 2018 to provide a response. MGS responded that '*the only conclusion that can be drawn from the above is that MCR Property Group and MCR Management Limited are effectively one and the same'.* MGS no doubt took the reference in the letter to MCRPG being a trading name without assets in conjunction with the footer, and assumed that the assertion being made was that MCR Management Limited, rather than MCRPG, was the proper Responding Party. MGS indicated that it was prepared to re-issue, substituting the two names for MCR, but that this would be a waste of time. It did not do so.

15. The Adjudicator indicated that his non-binding view was that he was not persuaded by the Responding Party's challenge to jurisdiction, and that he would proceed to make a decision.

16. By letter dated 21 December 2018, Mr Brown again on MCR headed paper stated that,

> '*MCR Property Group is not the correct Responding Party. MCR Property Group is a trading name. The contracting party is Palmloch Limited, and in the event that the notice of adjudication is amended into the name of the correct Responding Party (Palmloch Limited), Palmloch Limited will serve a substantive response to the notice of adjudication. The correct Responding Party must be determined prior to the adjudication.*'

17. In its Reply, MGS re-asserted that the contract was between it and MCRPG, on the basis of the quotation and the email response, and that MCRPG was a trading name for MCR Management Limited (as had been indicated on the footer to the MCR stationary), and not Palmloch. It contended in terms that the purchase order was sent from MCR Property Group and was issued after the works, and was irrelevant. Following receipt of the Reply, the Adjudicator asked various questions.

18. Both parties responded. Mr Brown, on MCR paper (with no footer indicating that MCRPG was a trading name for MCR Management Limited, this time) re-iterated that neither MCR Management Limited nor MCR Property Group were the correct counter-party and that:

> '*In the event that a decision is made against MCR Management Limited or MCR Property Group, the jurisdiction will be strongly challenged in any subsequent enforcement proceedings. Furthermore, in the event that a claim or adjudication notice were to be issued against Palmloch Limited, Palmloch Limited will serve a substantive defence to those proceedings.'*

19. On 7 January 2018, the Adjudicator indicated a non-binding view that the true contracting party was Palmloch but that the party named in the Notice of Adjudication, 'MCR Property Group' could reasonably be construed to be the Responding Party on the basis that it was asserted by Palmloch that it was a trading name for Palmloch.

20. Shortly thereafter, a Mr Eades wrote to the Adjudicator on Palmloch Limited headed paper:

> '*In the circumstances and in view of your apparently [sic] decision to construe the Responding Party as Palmloch Limited, we believe it would be unjust for you to reach a decision (against Palmloch Limited) without first allowing Palmloch Limited sufficient time to issue a substantive response to the Notice of Adjudication. We therefore request a period of 14 days from the date of this letter to submit the said substantive response. In the event that you do not agree to this request, please note that Palmloch Limited will challenge the jurisdiction (in any subsequent court proceedings) of any decision made against it*'.

21. The Adjudicator acceded to the request to permit Palmloch to submit a substantive response, albeit Palmloch was given 3 days to do so. The direction was complied with, and on 11 January 2019, by a letter from Mr Brown in a letter with the MCR logo, Mr Brown provided substantive submissions as to why it considered that MGS did not have a valid payee notice and that the amount did not present a notified sum that must be

paid. The letter started by reaffirming '*our position that this adjudication has been commenced against the incorrect party and that your jurisdiction in this matter is invalid'*. The letter did not suggest that the truncation of the time requested to provide a substantive response was prejudicial in any way, or a breach of natural justice (and such a claim would have been inappropriate). No point is taken in these proceedings that Palmloch did not, in the event, in fact have the opportunity of presenting a substantive defence to the issues raised.

The Parties Contentions

22. MGS contend that whether or not the Adjudicator has jurisdiction is determined by the service of the Notice of Adjudication. That should be construed broadly and flexibly, avoiding a strict or technical approach, and construed in context. MGS say the Notice of Adjudication was valid to commence and pursue adjudication against Palmloch where:

    (1) MCR Property Group is admitted by Palmloch as being a trading name it uses;
    (2) The notice identified the relevant property, with which no other company which used MCR Property Group trading name other than Palmloch Limited had any connection;
    (3) It was in fact Palmloch who identified that the correct party to the adjudication was itself, Palmloch Limited. No confusion had, in fact, arisen on the part of the recipient.

23. MGS argue that its own confusion in the various submissions as to the correct counter-party is irrelevant to the proper meaning and validity of the Notice. MGS also argue that by making its submission on 11 January 2019, Palmloch took a step in the adjudication and waived its jurisdictional argument.

24. Palmloch argue that the Adjudicator can only decide disputes between parties to the contract. On the basis that MGS now accept that MCR Property Group or MCR Management Limited were not parties to the contract, it is said that it follows that the Adjudicator did not have jurisdiction said to concern those entities. Palmloch contends that this was not a case of 'misdescription' rather than jurisdiction (as considered in *Total M&E Services Limited v ABB Building Technologies Limited* [2002] EWHC 248), because MGS maintained throughout that the contract was not, in fact, with Palmloch, and seeks to distinguish the decision of Akenhead J in *Durham County Council v Jeremy Kendall (Trading as HLB Architects)* [2011] EWHC 780 (TCC), as discussed further below. Finally, Palmloch deny waiver on the basis that its reservation of rights was plain throughout.

Discussion

25. The starting point is that in order for an adjudicator reach a decision that the courts will subsequently enforce, the parties to the adjudication must also be the parties to the relevant construction contract, and, indeed, the subsequent enforcement proceedings.

26. This is an application for summary judgment. Therefore, if there is an argument that has reasonable prospects of success that the adjudication was not between the correct parties to the relevant construction contract, I should not give judgment for the

Claimant. A legitimate dispute, on the facts, as to who the correct party to the contract is, it is clear, a valid reason for refusing summary judgment.

27. It is common ground in these enforcement proceedings that:

(1) the correct contacting parties are MGS and Palmloch;

(2) the Adjudication was commenced and pursued against 'MCR Property Group', which is a trading name for Palmloch, with no legal existence of its own.

28. This is not, therefore, a case where the referring party in fact started an adjudication against the 'wrong' contracting party i.e. a different legal entity to that which it was in contract with. MGS started an adjudication using the trading name of a legal entity which the Defendant accepts was the correct contracting counterparty. The enforcement proceedings are brought, correctly, in the name of the contracting legal entities. It is not therefore a case where the Defendant to these enforcement proceedings is able to contend that it was not a party to the contract in respect of which the adjudication decision was rendered. Instead, the issue arises out of the fact that the adjudication was commenced and pursued using the trading name of the legal entity, rather than the name of the legal entity itself.

29. In oral submissions, counsel for both parties were agreed that at the heart of the dispute was the proper construction of the Notice of Adjudication. They were agreed that a notice of adjudication commences the adjudication, and sets out the scope of jurisdiction, and that whether an adjudication has been validly commenced against a particular party is a question of interpretation of the notice of adjudication.

30. Counsel for the Claimant, Mr Shirazi, contended for the following principles to apply:

(1) In construing the notice of adjudication, the exercise is to assess the notice as a whole against its contractual setting how it would have informed a reasonable recipient;
(2) A notice of adjudication should be interpreted broadly and flexibly avoiding a strict or technical approach, especially where the notice has been drafted by non-lawyers;
(3) A notice is validly started against a party provided that, read broadly and flexibly and against the relevant background, the notice identifies that party.

31. In doing so, the Court was referred by analogy to *Jawaby Property Investment Ltd v The Interiors Group Ltd* [2016] BLR 328, relating to the construction of a Pay Less Notice. At paragraph 43, Carr J stated:

> "*The requirement for 'form', 'substance' and 'intent' has often been repeated in the authorities….In construing the document or documents relied upon, the exercise is to assess it against its contextual setting how it would have informed a reasonable recipient – see Mannai Investment Co Ltd v Eagle Star Assurance Co Ltd [1997] AC 749 (per Lord Steyn at 772H)"*

32. Mr Shirazi also drew the Court's attention to the judgment of Hamblen J, as he then was, in *Easybiz Investments v Sinograin and Another* [2011] Lloyds LR 688, where the Court was tasked with construing a document which purported to commence arbitration. At paragraph 11(3), the Judge said:

> "*in considering whether these requirements are met, one should concentrate on the substance rather than the form of the notice and consider how a reasonable person in the position of the recipient would have understood the notice given its terms and the context in which it was written*".

33. Counsel for the Defendant, Mr Arnold, expressed reservations in agreeing unequivocally to these propositions, contending that:

(a) where the identity of the party is concerned, particular clarity is required. In this respect, he relied upon the words of HHJ Wilcox in *Total M & E Services v ABB Building Technologies* (2002) 87 Con LR 154, in which he indicated, '*Where there are similar company names, as for instance in a group of companies or where there are subsidiaries with overlapping management systems and some common directors, a precise description of the referring party could be critical'*;
(b) the test is how an objective third party, not necessarily the 'recipient', would construe the Notice;
(c) in putting itself in the place of the objective third party, the Court should not approach the task assuming any particular knowledge about any particular project or any particular company to which the Notice of Adjudication might be directed.

34. In this context, Mr Arnold conceded that on the facts of this case, it was 'fortuitous' that the recipient of the Notice of Adjudication was sufficiently familiar with the circumstances, that he formed the view that Palmloch was the correct legal entity to which the trading name MCRPG was intending to refer. However, it was argued that this happenstance cannot affect the answer to whether the degree of clarity in fact existed properly to identify to an objective third party the intended recipient of the Notice.

35. In terms of the proper approach of the Court, both *Jawaby* and *Easybiz* provide useful guidance to how the Court should approach the construction of a Notice of Adjudication. The exercise is to assess the notice as a whole against its contractual setting how it would have informed a reasonable recipient. I do not accept that there is much to be gained in distinguishing, as Mr Arnold sought to do, between how a 'reasonable recipient' might approach the task as opposed to some other objective third party, and to the extent that there might be some difference, I consider (as did Hamblen J in *Easybiz*) that the proper approach is to consider, objectively, how a reasonable recipient of the Notice would construe the Notice.

36. The words '*broadly and flexibly'* from Mr Shirazi's second and third principles above were taken from paragraph 11(1) of *Easybiz*, in which Hamblen J was dealing with how section 14 of the Arbitration Act should be interpreted, rather than how the documents

should be construed. That said, it is right that the guidance in the same sub-paragraph that '*a strict or technical approach should not be taken, especially where the notice has been drafted by non-lawyers'*, applied to construing the documents, rather than the statute. I do not, in any event, find that it is right that, by way of unqualified general principle, a Notice of Adjudication should always and in all respects be construed '*broadly and flexibly*'. This is because undoubtedly there is force in the submission that where the identity of the party is concerned (as opposed, for example, to the ambit of dispute referred to), there may, on the facts, be situations where a precise description of the relevant party could be critical, as observed in *Total M&E*. Where, on the facts, a particular level of precision is required then the ambit for breadth and flexibility may be more limited: all will depend on the precise circumstances of the dispute.

37. In summary, in considering whether the Notice of Adjudication identified the correct Responding Party, I must objectively assess the notice, construed as a whole against its contractual setting, and consider how it would have informed a reasonable recipient, concentrating on the substance rather than form.

38. The starting point in this assessment is that the Notice of Adjudication referred to Palmloch by the trading name Palmloch accepts that it used. Both parties have addressed the decision in *Durham County Council v Jeremy Kendall (Trading as HLB Architects)* [2011] EWHC 780 (TCC). In that case, Mr Kendall sought to argue that the adjudication had been initiated and pursued and the decision issued against 'HLB Architects', which was a trading name, with no legal existence, whereas the enforcement proceedings had been brought against him personally '(trading as…'). This point was, according to Akenhead J '*apart from being wholly without merit, … a bad one*.'

39. The decision demonstrates that there is nothing inherently fatal about the commencement, pursuance and issuance of decision of an Adjudication in the 'trading name' of a legal entity, where the decision is subsequently enforced in the Courts against the true legal identity. This is because, in that case, HLB Architects was in effect and reality Mr Kendall. The judge said :

> "*If someone trades under a particular name, and then is sued or otherwise proceeded against under that name, essentially it is he (or she) who is being proceeded against. The contract here was between Durham and HLB Architects which everyone must have understood was effectively a contract between Durham and Mr Kendall. Although the point was raised in the adjudication, in practice it did not stop Mr Kendall from fully participating in those proceedings.*"

40. It is right, as contended by Mr Arnold for Palmloch, that the present case is different in the following respects:

(1) MCR Property Group is a trading name used by a multitude of companies, including Palmloch, all trading from the same address;

(2) Although Palmloch understood that the contract was between it and MGS, irrespective of Palmloch's use of a trading name, that was not understood (at least

until now) by MGS. Indeed, MGS contended that it had *not* contracted with Palmloch.

41. As to the first point, it cannot be right as a matter of principle, that because more than one limited company uses the same trading name, it is, without more, no longer correct that the underlying legal entity and the trading name may be treated as 'one and the same'. Akenhead J referred in his reasoning to the absence of any other partner or entity to which the trading name could apply. I do not read this as suggesting implicitly that it would be necessary always for a trading name only to be associated with a single company; rather it was a fact that demonstrated there was no possibility of confusion between the parties in that particular case. It suggests, therefore, that different considerations may pertain if, by using a trading name rather than identifying the correct legal entity, it was not possible to construe the Notice of Adjudication as commencing adjudication against the correct legal entity.

42. At this point, it may be noted that in *Total M & E Services v ABB Building Technologies* (above), the commencement of adjudication in the name of Total Mechanical and Electrical Services Ltd rather than Total M&E Services Ltd, '*was a clear case of misdescription where the claimant and defendant at all stages were aware of the true identifies of the contracting parties and no-one could be misled*'. A misdescription of a party in a Notice of Adjudication does not of itself affect the validity of the Notice, although it may be different if there is a genuine lack of clarity as to the proper parties.

43. In the present case, there could not possibly have been any lack of clarity to the reasonable recipient as to the identity of the legal entity intended to be the responding party on a proper construction of the Notice of Adjudication. Although in theory, use of the trading name could have been a reference to one of a large number of legal entities, when the Notice is construed as a whole, that possible ambiguity did not exist in reality:

    (1) The Notice of Adjudication expressly referred to the specific property and project;

    (2) Other details (such as reference to the quotation, pre-contract correspondence and the payment notices etc) within the Notice also put beyond doubt the property and project to which the Notice related;

    (3) The relevant property was owned by Palmloch, and there is no suggestion that any other MCRPG companies were involved in the property or project in any way.

44. It is quite unrealistic, as Mr Arnold contends, to base the objective assessment of how a reasonable recipient would understand the Notice upon the perspective of an administrative employee in a (fictional) postroom with no knowledge of the property and projects to which the document expressly refers, or upon the assumption that such an administrator would not be able to take steps to direct a document of this nature to the correct legal entity amongst the many which have chosen to use the same trading name. Moreover, whilst such an approach to the assessment would not be appropriate generally, it would certainly be wrong in the present circumstances, where the Notice was emailed directly to the very person in MRCPG who had been recently dealing with the same commercial issues in the preceding weeks.

45. There was, in the course of oral argument, a debate as to the relevance of the accepted fact that (irrespective of the objective construction of the Notice) the actual recipient of the Notice within MCRPG subjectively understood from the details contained in the Notice that, of all those to whom the trading name might have referred, Palmloch was the intended responding party. Given my view of how the Notice should be construed objectively, it is unnecessary to decide the point. However, it would seem surprising if, in circumstances where a recipient was *in fact* in no doubt at all as to the correct legal entity the use of a trading name was intended to refer to, the Notice should nevertheless be deemed ineffective for failing sufficiently to have identified the parties.

46. This leads to the second point of distinction with *Durham* raised by Mr Arnold: he argues that, in circumstances where MGS throughout the adjudication contended that Palmloch was *not* the correct contracting party, it is not open to it to contend now that its reference to MCRPG could properly be understood as a reference to Palmloch. There was confusion, in other words, at least on the part of the Referring Party.

47. I do not agree. MGS' contentions following the service of the Notice of Adjudication are not relevant to the assessment of what that Notice, objectively, meant to the reasonable recipient. The question of whether the Notice of Adjudication was valid should be determined objectively. It is, in any event, fair to say that such confusion as was subsequently engendered in MGS with respect to the relevance of MCR Management Limited, was no doubt caused at least in part by Palmloch's somewhat opaque initial communication to the Adjudicator.

48. In summary, therefore, I reject Palmloch's contention, both in the adjudication and in these proceedings, that, by using Palmloch's trading name, the Notice of Adjudication was ineffective in commencing a valid adjudication. A reasonable recipient construing the Notice in context would have understood the use of the trading name as an unambiguous reference to Palmloch; and that is, indeed, how the Notice was construed in fact by the recipient.

49. In these circumstances, the question of waiver does not arise. In deference to the arguments of counsel, however, I will summarise my views. MGS argues that Palmloch's letter stating '*In the event that you do not agree to this request* [for 14 days to submit a substantive response]*, please note that Palmloch Limited will challenge the jurisdiction (in any subsequent court proceedings) of any decision made against it*' precluded Palmloch from taking the jurisdiction point in circumstances where it was given the opportunity, albeit within 3 days, to submit a substantive submission. I do not agree. It is my view that at all times, including in its submission of 11 January 2019, MCR/Palmloch made clear it believed that the adjudication had not been commenced against the correct party and reserved its position in that regard. At no time was a step in the Adjudication in fact taken without reservation. It remained open to it, in these proceedings, to take the point it has taken.

50. In the circumstances, I give summary judgment for the Claimant in the sum of £57,473.74 plus VAT together with interest.