



[2023] EWHC 2841 (TCC)
Case No: HT-2023-LIV-000020

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

35 Vernon Street
Liverpool
L2 2BX

Before:

DISTRICT JUDGE BALDWIN

Between:

LEVEL 1 RAISED FLOORING LIMITED

-and-

Claimant

J M CONSTRUCTION (SW) LIMITED

Defendant

Mr Charles Edwards for the **Claimant**
Ms Jennie Gillies (instructed by Endeavour Partnership LLP)
for the **Defendant**

Hearing date: 9th August 2023

Judgment (Approved)

Introduction – Claimant’s application to enforce an adjudication decision

1. The Claimant, a litigant in person, but with the assistance of Counsel at and for the purposes of the hearing, applies by way of Part 7 proceedings issued on 22nd May 2023 to enforce summarily a decision by way of construction adjudication of Mr M.T. Molloy dated 9th March 2022. There has been a deal of confusion generally (and emerging in detail after the hearing) as to whether there is the usual Part 23 accompanying application for the purposes specifically of applying for summary judgment on the claim. As far as I have been able to ascertain, the Claimant, having paid the requisite fee, intended for such an application to be sealed and issued in the usual way but, for reasons which are not clear, it appears that the application was never formally issued by the Court (having nevertheless apparently been seen by O’Farrell J for the purposes of her Order of 26th May 2023). It was also served in draft upon the Defendant and the Defendant is taking no point in this regard. The hearing in fact proceeded to address matters as if such an application had formally been before the Court and I am content that it is in accordance with the overriding objective for the Court to continue to proceed as if there had been a formal issuing of a sealed application. The application is supported by 2 witness statements (and exhibits) of Roger Andrew Kemp (a Director of the Claimant company), dated 19th May 2023 and 12th July 2023. The application is opposed by the Defendant, which relies upon the witness statement (and exhibit) of James Murdoch, (a Director of the Defendant Company) dated 30th June 2023.
2. By Order of 26th May 2023, O’Farrell J transferred the claim to Liverpool certifying that the application is suitable for hearing by a TCC District Judge.
3. I have been supplied with a hearing bundle and an authorities bundle plus one further separate authority from Ms Gillies and I shall refer to the hearing bundle pagination thus [x]. Counsel each supplied a skeleton argument which they supplemented orally during the remote hearing by Teams.
4. The Claimant’s contention is that it is right and appropriate at this stage for the Court to grant summary judgment in favour of the Claimant in the sum of £67,042.84, which sum features at paragraph 124 of the Adjudicator’s Decision together with interest as appropriate.
5. The Defendant’s stance is straightforwardly that there is no enforceable decision for payment of that or any sum upon which this claim can succeed and that the original adjudication was and these proceedings are misconceived.

Background and relevant chronology

6. The Claimant employed the Defendant under a construction contract dated 31st March 2021 which incorporated the JCT Minor Works Contract 2016 ed. to carry out works at 74 and 75(a) Barnet Grove, London E2. Although the Court is supplied, by way of witness evidence, with much in the way of factual background, such matters are generally not germane to the narrow issue before this Court. Suffice it to say that the relationship between the parties broke down and the contract was purportedly legitimately terminated by the Claimant on 5th November 2021¹ in accordance with the terms of the contract [9/82]. The architect had issued payment notices to the Defendant, such that the Claimant contended and continues to contend that there was an overpayment to the Defendant immediately prior to termination [10/82].
7. In the adjudication, the Claimant contended for a finding of an overpayment of £180,053.13 [3/141]. The Defendant contended that the total of the value of the works and sums owed to the Defendant for wrongful termination was in excess of that already paid by the Claimant and also denied that any payment could be due at that time, due to the termination provisions of the contract [4/142].
8. The matters for adjudication included the Claimant seeking redress in terms of the Defendant being ordered to pay £138,080.19 or such other sum as was determined [13(iii)/144].
9. The substantive adjudication issues for determination were set out by the Adjudicator as [15/144-5]:-
 - “(i) What is the value of the work undertaken by (the Defendant) at the date of termination?
 - (ii) Is (the Claimant) entitled to make a deduction in respect of corrective works and, if so, how much?
 - (iii) Is (the Claimant) currently entitled to payment and, if so, how much?”
10. The adjudicator’s decisions on these issues as at 9th March 2022 are:-
 - (i) £163,415.79 [95/180];
 - (ii) £6,618.48 [123/188];
 - (iii) (a) In principle there is an overpayment of £67,042.84 [124/188];

(b) The termination provisions of the contract do not provide for payment to be made at the time of the adjudication [124/189];

(c) If the termination was valid (in accordance with clauses 6.4, 6.5 or 6.6 of the contract), the Claimant is entitled to follow the procedure set down in clause 6.7, removing any requirement for

¹ The adjudicator has 16th November 2021 [3/141]

further payments to be made to the Defendant and preparing an account which itself will determine the total amount due in either direction [125/190];

(d) Consequently, if the termination was valid, “in the absence of an express provision which requires a valuation of the Works and entitles (the Claimant) to obtain payment at the date of the termination, there is no current entitlement to payment”, there was no immediate entitlement to payment under the contract and it was not necessary, in consequence, to address the Defendant’s points as to cross claims or invalidity of termination [126/190; 126/191; 127/191].

11. The Claimant, I am told without demur from Mr Edwards, did not take issue with the applicability of the cl. 6.7 procedure in the course of the adjudication.
12. The Claimant then, it is said, followed that procedure and produced an account dated 31st March 2023 which asserts that £350,050.82 is owed in total by the Defendant to the Claimant, to include the adjudicator’s “award” of £67,042.84.
13. The claim for the summary award of that latter sum is accordingly pursued on the basis of a “binding valuation”² by the adjudicator.
14. Other technical arguments in opposition have fallen away and the sole issue for determination is the existence of what I will call, for neutrality purposes, “a state of affairs” which the Court should enforce at this time.

Legal Principles

15. There is no issue between the parties but that the contract made provision for adjudication in accordance with the Construction Contracts (England and Wales) Regulations 1998 and that, as a result, any pertinent decision of the adjudicator would be binding on the parties pending any ultimate determination by way of legal proceedings or otherwise and that the requirement for compliance would follow.
16. The parties are in agreement that these courts will willingly and robustly enforce such decisions by way of summary judgment and that the underlying policy is to assist the cashflow of the party benefiting from any such decision pending ultimate determination of or agreement upon the issues in any underlying dispute.
17. Where there is a decision which is susceptible to enforcement, conventionally only two grounds of opposition might succeed, namely one based upon

² Mr Edwards’ skeleton @ para. 3.2

jurisdiction and the other upon a material breach of natural justice, see Coulson J in *Hutton Construction v Wilson Properties* [2017] BLR @ 14.

The Claimant's case

18. Mr Edwards submits that the adjudicator clearly decided that there was an overpayment at the time of termination and that this was supported by notification from the Architect. As such, once the cl. 6.7 procedure, helpfully referred to by the adjudicator [124/189], had subsequently been carried out, it ought to follow, in essence, that the floating determination (my phrase) of the adjudicator as to overpayment at termination crystallises into an enforceable interim decision, the unexecuted contractual process being the only impediment to the Court recognising a binding decision as to payment.
19. Otherwise, he submits, this would result in a needless and wasteful requirement to go over old ground in a further adjudication when that part of the relevant work has already comprehensively been valued. Anything else would also be contrary to the pro-cash-flow policy.
20. The Claimant further contends that the potential for a (so far not advanced) claim from the Defendant is not a valid ground to resist enforcement of the adjudicator's decision, as the whole purpose of such summary enforceability is to create, on the face of it, an entitlement, however potentially temporary that entitlement might be. In the event, Ms Gillies confirmed that no set off was being advanced.

The Defendant's opposition

21. Ms Gillies began by reminding the Court that there is no independent power or inherent jurisdiction of an adjudicator to make awards, the scope of any such power on appointment being derived from the terms of the contract under scrutiny.
22. As it transpires, she argues, there was ultimately no utility to the adjudication sought, given the contractual impediment, as identified by the adjudicator, to a "current entitlement to payment". All that was obtained was a free-standing snapshot of valuation as at the time of termination.
23. She emphasises that the contract contained no provision for payment at that stage and that even the cl. 6.7 procedure was only properly engaged if there was, in fact, a lawful termination by the Claimant, which contention remains in issue between the parties. The cl. 6.7 procedure similarly contains no requirement to make a valuation at the time of termination, unsurprisingly, as that would not further the primary aim of that procedure being invoked, namely to protect the employer in circumstances where the contractor becomes insolvent.

24. As such, the Court is asked to find that the adjudicator's decision is key. He was not making a binding determination as to entitlement as long as the 6.7 procedure was followed, but rather was giving a decision on lack of current entitlement and even then conditional upon valid determination, which issue remained undecided and was even conceded by the Defendant as outside the jurisdiction of the adjudicator.
25. Any complaints as to cash flow issues are to be seen as a result of the consequences of the terms of the contract (or, on the Defendant's stance, the actions of the Claimant) and nothing else.
26. Fairly, Ms Gillies concedes that enforcement can in some circumstances follow even when there is no direct decision, if it would be a logical consequence of a decision actually made, the applicable phraseology or test being a "necessary and indispensable result of the ... overall decision" or an "inevitable and logical" consequence of a valuation, see Coulson J in *Workplace v YJL* [2009] EWHC 2017 (TCC) at paras 16 – 19 – as Ms Gillies described it, a "night follows day" test.
27. Ms Gillies further makes reference to *WRW Construction v Datblygau Davies Developments* [2020] Bus LR (QBD), a decision of Recorder Singer KC where it was quite clear what the adjudicated sum owing was, but the adjudicator was agreed not to have had jurisdiction to order payment in favour of the Claimant, hence awarding a negative sum in favour of the Defendant. The Learned Judge's view @ para 19 was that:

"it would be contrary to principle and established authority for the court to effectively force a party who has the benefit of an award in its favour as far as a balance being due to it, thereafter to have to commence a further adjudication (to which there is no defence) for the purpose of obtaining an order for payment from the adjudicator before returning to the court if necessary, for further enforcement proceedings."

28. The circumstances of the instant claim, the Defendant argues, have none of the attributes which would invoke a positive application of the above "indispensability" approach.

Discussion

29. In my judgment, this is one of those rare cases where the Court should refuse to grant summary judgment. This is not, however, on either of the two bases expressed at paragraph 17 above, but rather upon the Court reaching a clear conclusion that there is in fact no decision of the adjudicator which is susceptible to enforcement, either on its face or by way of logical extension.
30. Whilst the essential question posed of and by the adjudicator at paragraph 9(iii) above is tritely answered "nil" and the Claimant's argument was not put

to me in the precise terms of the “logical and indispensable” result approach, in my judgment such an argument is in any event fatally flawed, for the reasons advanced by the Defendant.

31. I am singularly unpersuaded that an inevitable consequence of the decision was that the sum claimed was being adjudicated as enforceable as long as the cl. 6.7 procedure was completed, whether directly or logically. That was neither a question posed of the adjudicator nor does it inevitably follow from his decision, as the decision made was contingent upon an imponderable, namely the lawfulness of the termination. In other words, only “if” the termination was lawful was any such sum being valued as owing at any point, i.e. whether “currently” or later, and the conditionality of this was not required to be and therefore was not in fact addressed, in consequence of the existence of the cl. 6.7 point.
32. It seems to me that it must be right to determine that, in the absence of identification of and reliance upon any contractual power to order payment unconditionally, the adjudicator was in fact solely identifying that there was no current entitlement to payment to the Claimant from the Defendant and no more and no less than this. As I put to Mr Edwards during his submissions, there was no issue (iv) requiring the adjudicator’s decision on an “if not now, when?” basis.
33. It would be quite wrong, in my view, in those circumstances, for the Court to allow robustness, cash-flow or even the potential for old-ground to have to be revisited by way of a further adjudication, to undermine the, in essence, inchoate nature of the decision sought to be enforced and this Court declines to do so accordingly.
34. The question might be posed, “What was the purpose of the adjudication in such circumstances?”, but that, in my judgment, is neither a question which I am required to answer, nor one which has satisfactorily been answered by the Claimant, other than the impression gained that the Claimant perhaps thought it was asking for a more comprehensive determination than in fact it was.

Conclusion

35. In all the circumstances, it seems to me that the claim itself is susceptible to dismissal upon the Court declining any application for summary judgment, the Defence having, as I find, strong prospects of success, such summary enforcement and consequential matters seemingly being the sole subject matter of the claim.

District Judge John Baldwin

12th September 2023

