Neutral Citation Number: [2019] EWHC 2601 (TCC)

Case No: HT-2019-000236

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/10/2019

Before :

MR ADAM CONSTABLE QC

- -

Between :

LJH Paving Limited	**Claimant**
- and -	
Meeres Civil Engineering Limited	**Defendant**

- -
- -

James Frampton (instructed by Harrison Clark Rickerbys Ltd) for the Claimant
Daniel Goodkin (instructed by Blake-Turner LLP) for the Defendant

Hearing dates: 24 September 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR ADAM CONSTABLE QC

Mr Adam Constable QC :

Introduction

1. This is an application for summary judgement by the Claimant, LJH Paving Limited ('LJH') in relation to the enforcement of four adjudicators' decisions relating to three different construction contracts, each of which was entered into with the Defendant, Meeres Civil Engineering Limited ('Meeres'). There is no dispute that three of the Awards ought to be enforced. This application relates to the Westfield Final Account Adjudication, which decided the true value of LJH's works following its Final Payment Claim. Meeres was ordered to pay £132,410.83 plus VAT to LJH and the adjudicator's fees of £11,434.50 ('the Decision'). Meeres' application for a stay of execution has not been advanced.

2. Meeres resists enforcement of the Decision on two grounds:
(1) Crystallisation.
The alleged dispute had not crystallised at the time when the Notice of Intention to Refer a Dispute to Adjudication was served. It is contended that a contractor claiming payment must provide sufficient information for its claim to be assessed by the paying party before a dispute can crystallise. In this case, Meeres allege that LJH failed to provide such information prior to service the Notice, and that therefore, the Adjudicator lacked jurisdiction.

LJH contend that the point is bad in law and fact. They also contend that this way of putting its jurisdictional dispute was not advanced in front of the Adjudicator, and so Meeres has waived its right to do so upon enforcement.

(2) Multiple Contracts:
Meeres contend that in the Westfield Final Account Adjudication, LJH claimed the value of works totalling £2,463.75 carried out on a different site and which was, as a matter of fact, arguably carried out under a different contract (the Highbury & Islington Contract). Since Meeres has an arguable defence to a part of the claim which, it was submitted, could not be severed, LJH is not entitled to summary judgment.

LJH contends that the Adjudicator's finding that the sum was owed was not outside his jurisdiction; that the point was not taken as a jurisdiction defence in the Adjudication, so that Meeres has waived its right to do so on enforcement; and finally that if (contrary to the foregoing) there was no jurisdiction in relation to this part of the claim, the sum could be severed and the decision enforced save for the disputed sum.

No Crystallised Dispute

<u>The Facts</u>

3. The Westfield Works were completed in February 2018.

4. At the beginning of March 2018, LJH and Meeres jointly prepared an interim application, prior to applying for payment from its employer. The value of the account was stated to be £776,397.04, and taking account of payments made to date LJH sought payment of £213,397. On 7 March 2018, Meeres issued a revised version of the application with a column showing the sums it certified. It valued the work at

£761,720.80, and appeared to suggest payment in the sum of £198,720.80 was due. Meeres paid £100,000 on account.

5. There were attempts by the parties to agree the final account. These were not successful. On 25 July 2018, Meeres wrote to LJH suggesting that it had overpaid by £260,794.08. There was a separate adjudication between the parties as to whether the final account had been agreed, which Meeres was successful in. There was no agreed final account.

6. On 14 December 2018, Meeres issued what it called an 'Interim Completion Certificate'. In the accompanying letter, Meeres indicated that if LJH wished to make any further claim, it should provide all the necessary detail and substantiation in the appropriate submission and format within 28 days. On 21 December 2018, Meeres provided a 'Summary of Monies' in relation to all the contracts. This claimed that, in relation to the Westfield account, £249,874.23 was due from LJH to Meeres.

7. On 14 January 2019, LJH submitted its Final Payment Claim. This claimed that the value of the works was ££817,942, approximately £40,000 more than had been applied for in the March 2018 Interim application. The Final Payment Claim consisted of a summary sheet setting out the sub-totals for the various heads of claim, and around 140 pages of back up spreadsheet with the numerous line items which made up the claim.

8. In response to this, on 17 January 2019, Meeres sent three letters to LJH. In one of these, it expressly rejected the Final Payment Claim on grounds that it was not a valid application because it failed to comply with the requirements of the sub-sub contract. Meeres also claimed that, in any event, insufficient substantiation had been provided. In another letter, Meeres set out a number of preliminary queries about the Final Account Claim relating to the measured works, measured variations, dayworks and pallet pushing.

9. In response, on 21 January 2019, LJH, through GNI, its claims consultant, denied that the Final Payment Claim was invalid, and also sought agreement of the name of an adjudicator 'should the need arise'. The queries were not responded to in substance.

10. On 28th January 2019 Meeres wrote again, identifying the fact that various requests remained unanswered, and that the information had been previously requested during the course of the works, and throughout the second and third quarters of 2018. The following day, Meeres wrote:

> "*We have attempted to engage with LJH in a constructive way in order to reach agreement on the Westfield Account, and in particular the value of the works done. We have had no reply from LJH, despite us requesting further information…*
>
> *In the absence of responses, input or positive contribution from LJH in relation to the evaluation of the LJH sub-sub0contract works…we have carried out a further review of the sub-sub-contract works completed by LJH and generated an assessment of the evaluation of those works, which we consider to be fair and reasonable in all the circumstances…..reference is …made*

> *in the alternative to our Payment Notice Nr 11 dated 21st December 2018.*
>
> *We enclose for LJH's further action the Pay Less Notice, including contract charges….which shows an amount of monies due from LJH to [Meeres]."*

11. The accompanying Pay Less Notice, relating to the 21 December 2018 account, showed the same figure of £249,874.23 as owing to Meeres.

12. On the same day, Meeres sent a further letter seeking documentation (allocation sheets for LJH labour and Daywork Sheets).

13. The request was not responded to. On 12 February 2019, the Notice of Adjudication was served. On 15 February 2019, LJH served the Referral Notice. On 19 February 2019, GNI on behalf of LJH responded to the various requests for information. In large part, the letter denied that any further information on the basis that LJH was relying on information or quantities which had been provided by Meeres, or because the documentation had already been provided (for example, it stated that the daily allocation record sheets '*were produced by Meeres site supervisor….and you already have multiple copies in your possession….')*.

Discussion

14. The law relating to the circumstances in which it can be argued that a dispute has not crystallised is now well established. The starting point is HHJ Thornton QC's statement in Fastrack Construction Ltd v Morrison Construction Ltd [2000] BLR 168 at [27] that:

> "A 'dispute' can only arise once the subject-matter of the claim, issue or other matter has been brought to the attention of the opposing party and that party has had an opportunity of considering and admitting, modifying or rejecting the claim or assertion."

15. In Amec Civil Engineering Ltd v Secretary of State for Transport [2004] EWHC 2339 (TCC), Jackson J as he then was stated seven principles at [68] (endorsed by the Court of Appeal: [2005] EWCA Civ 291) including:

> "(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.
>
> (2) Despite the simple meaning of the word 'dispute', there has been much litigation over the years as to whether or not disputes exist in particular situations. That litigation has not generated any hard-edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions has produced helpful guidance.
>
> (3) The mere fact that one party notifies the other party of a claim does not automatically and immediately give rise to a dispute. It is

> clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted.
>
> (4) The circumstances from which it may emerge that a claim is not admitted were Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent 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.
>
> …
>
> (7) If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication."

16. In this case, Mr Goodkin, for the Defendants, seeks to bring his case under sub-section (7). He points out, rightly, that the words 'nebulous' and 'ill-defined' are themselves to be construed by reference to the words which follow: '*that the respondent cannot sensibly respond to it*'. However, it is plain from the judgment of Coulson J, as he then was, in AMD Environmental Ltd v Cumberland Construction Ltd [2016] 165 Con LR 191 that it will be an 'unusual' case which meets the test.

17. Mr Frampton relies upon the guidance in AMD as a complete answer to the case against him. He relies upon paragraphs 14 to 16, in which Coulson J said:

> "Whatever the precise factual position, I consider that it is wrong in principle to suggest, as Cumberland must do, that a dispute had not arisen until every last particular of every last element of the claim had been provided. When a contractor or a sub-contractor makes a claim, it is for the paying party to evaluate that claim promptly, and form a view as to its likely valuation, whatever points may arise as to particularisation. Efforts to acquire further particularisation should proceed in tandem with that valuation process…..
>
> …
>
> In an ordinary case, a paying party cannot put off paying up on a claim forever by repeatedly requesting further information; a fortiori, a paying party cannot suggest that there is no dispute at all because the particularisation of the claim is allegedly inadequate….

> Accordingly, in my, the alleged absence of particularisation is not a proper ground for resisting enforcement of an adjudicator's decision."

18. Given that Coulson J admitted to the exception to this general rule presented by sub-paragraph 7 of Amec, it remains, lest it be suggested otherwise, a question of fact in each case. That said, it seems very unlikely in the ordinary case that it will be relevant or appropriate, in seeking to demonstrate that a dispute has not crystallised, to look at the requests for information which have followed the presentation of a claim, and draw an inference about crystallisation from the purported reasonableness of those requests and the absence of response.

19. Indeed, in this case, the types of requests made were, in my judgment, clear evidence that the claim present was far from nebulous and ill-defined. The claim was well understood. Meeres asked, as it was entitled to, to see the sort of supporting evidence it considered should exist. However, it was able to ask the specific questions it did because the claim was *not* nebulous or ill-defined. The fact that it considered that there should be supporting evidence which it claimed it had not seen might well be a justification for disputing the claim: it is not a reason to argue that no dispute exists.

20. The overt undercurrent of Mr Goodkin's submissions relied not just on the fact that the requests were not answered (on its case) prior to the commencement of adjudication, but on the fact that the requests were responded to immediately after the commencement. This fact was relied upon ostensibly to demonstrate an apparent acceptance on the part of LJH that the information was, in fact, reasonably required to make the claim comprehensible. However, it was also argued that were the Award to be enforced, it encouraged the tactics of ambush – to fail to engage with reasonable requests for information prior to an adjudication only to provide that information in an adjudication in a timeframe that limits proper response.

21. This argument conflates two separate, but often interrelated, issues. The first is whether a dispute has arisen. The second is one of natural justice. Mr Goodkin expressly disavowed that he was taking any 'natural justice' point in relation to the conduct of the adjudication (and, for what it is worth, rightly so). However, having done so, it rather blunts the relevance of how LJH responded to the requests after the commencement of the Adjudication.

22. In any event, the argument was wholly without merit on the facts. It is abundantly clear from the response which was submitted on LJH's behalf that in the large part, LJH disputed the accuracy or relevance of Meeres' contentions as to the need for further information. It is not for a Court upon an application for enforcement to engage with the detailed merits of each sides' stated position as to what substantiation was or was not provided or relevant. It is simply enough to conclude, as I do, that there was unarguably a clear dispute between the parties, part of which centred (and had done through 2018) over the need for and existence of supporting documents.

23. Although unnecessary in light of my finding above, I also find that Meeres unequivocally rejected the claim on grounds that the claim has not been validly submitted in accordance with contractual provisions. This was sufficient to create a dispute which entitled LJH to refer its Final Payment Claim to adjudication. It would be wholly artificial to regard, as Mr Goodkin urged upon the Court, there being at this

point one crystallised dispute about the contractual validity of the Final Payment Claim, and a separate dispute, about the true value of the Final Payment Claim, which had not yet crystallised. The dispute was LJH's right to payment of its Final Payment Claim, and its unequivocal rejection by Meeres, even if premised on one particular ground properly created a dispute in respect of all aspects of that claim.

24. It follows that Meeres' defence to summary judgment on the grounds of a dispute not having crystallised is rejected.

Waiver

25. Had I not concluded as set out above, I would in any event have rejected the defence on grounds that it had not been properly raised in the Adjudication itself as a jurisdictional defence and as a result its right to do so upon enforcement was lost.

26. Following the commencement of the Adjudication, Meeres wrote a long letter disputing the jurisdiction of the Adjudicator. There is no dispute that the letter clearly contended that there was no jurisdiction because of what Meeres contended were the contractual non-compliance issues. The question is whether it properly objected to jurisdiction (or reserved its right to do so) on the grounds that no dispute had crystallised due to insufficient substantiation. The letter contained the following passages, a number of which are relied upon by Meeres as providing what it described as a 'quasi-specific' objection:

> "*Secondly, it is denied absolutely that [Meeres] has taken no steps to agree LJH's purported Final Payment Claim in the way alleged by LJH, and it is in fact LJH that has sought to circumvent the contractual procedures by bringing these matters which it alleges have crystallised to a dispute, which for the avoidance of doubt is denied by [Meeres]. Furthermore, LJH has sought to make up the deficiencies in its purported Final Payment Claim many weeks after it was first submitted, and it does that as purported evidence presented in this adjudication in its attempts at Adjudicating its full Final Account (which was startlingly devoid of evidence and explanation so as to show any liability to pay).*"
>
> *It is [Meeres]'s position, with due respect to the Adjudicator that there is no crystallised dispute on the grounds contended for by LHJ, until the question (which has not been referred) as to whether what LJH no claims as a compliant Final Payment Claim was, and is, in fact a Final Payment Claims [sic] submitted in accordance with the terms of the sub-sub-Contract.*
>
> *[Meeres]... reserves its rights to maintain its position both on the matters submitted below and on further issues which either may have arisen and are not addressed herein, or which may yet arise in the course of any continuance.*
>
> *...It is [Meeres] position that LJH has failed to issue a valid Final Payment Claim Notice ()which is at the base of its claim)*

> *and has, for that reason and others, failed to sufficiently crystallise a dispute on the matters that it wishes to refer to you, not least due to the absence of a valid Final Payment Claim.*
>
> *…*
>
> *[Meeres] respectfully submits to the Adjudicator that:*
>
> *LJH's purported Final Payment Claim fails to comply with the terms of the sub-sub-contract as a Final Payment Claim, for the following reasons, not in limitation:*
>
> *…*
>
> *C. LJH's purported Final Payment Claim consisted only of its email submission, without any supporting explanation or evidence. That fails the normal requirements for burden of proof., where LJH has failed to show entitlement to most, if not all, of what it is no claiming …*
>
> *What LJH has then attempted to do, to make up the shortfalls in its claimed account, is to shoe-horn further information and detail, which should have been included in a Final Payment Claim (and [Meeres] does not say that what has been provided meets evidential requirements for a Final Payment Claim) into a premature Adjudication.*
>
> *…*
>
> *In the event that you are not with [Meeres] on the status of the Final Payment Claim said by LJH to have been submitted, and you consider that it is valid under the terms of the sub-sub-contract, [Meeres] wishes to make further short submission to you in connection with the alternative position which would run where LJH's submission would alternatively be a valid Final Payment Claim (a position that [Meeres] says also goes to crystallisation of a dispute on the Final Payment Claim)*'

27. The Adjudicator rejected the jurisdictional challenge. Thereafter, Meeres made no further jurisdictional challenge or reservation, and did not submit any 'further short submission' as foreshadowed in the last paragraph of the letter quoted above.

28. It is clear from an objective reading of the letter that whilst in two places (underlined above, particularly relied upon by Meeres), Meeres made reference to the inadequacies of information provided to support the claim, it was expressly doing so as part of its jurisdictional challenge that the Final Payment Claim was contractually deficient and therefore invalid as a matter of principle. It formed part, therefore, of a very different specific objection which was not that raised in these proceedings, relating to whether the Final Payment Claim was so '*nebulous and ill-defined*' so as to be incapable of any proper response. No specific objection was made in relation to such a point and Meeres is precluded from taking the argument upon enforcement (see Coulson LJ in Bresco

Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd [2019] 182 ConLR 1 at paragraph 92(iii)).

29. Insofar as general reservations were made (e.g. '*reserves its rights to maintain its position both on the matters submitted below and on further issues which either may have arisen and are not addressed herein'*), they were so vague as to be ineffective (see Bresco paragraph 93).

Multiple Contracts

30. There is no dispute that Meeres had engaged LJH under a different contract, in addition to the Westfield contract, to carry out works at a site in Highbury & Islington. Meeres states that, a conversation between personnel for each company, Meeres engaged LJH to carry out about two days of works at the Highbury & Islington site.

31. In the Westfield Final Account Adjudication, LJH claimed the value of works carried out at the Highbury & Islington site. Item 4.6 of the "*Instructed Variations*" was "*Highbury & Islington labour allocation 29.01, 18-02.02.18*", in the sum of £2,463.75.

32. Mr Goodkin argues that there is a dispute of fact between the parties on the basis that LJH's witness evidence that "*there was no formal contract for*" the Highbury & Islington Contract works, allowing the sums alleged to fall due within the Final Payment Claim. It is said that, because it is arguable that LJH has purportedly referred disputes under two different contracts in a single adjudication, Meeres has an arguable defence.

33. Mr Frampton contends that no jurisdiction point was taken in this respect in the adjudication; the allegation that the sum was due under a different contract was advanced as a substantive, rather than a jurisdictional, defence. As such, the point cannot now be taken to defeat enforcement. This submission is clearly correct. I have already found that any general reservation was ineffective.

34. However, even if the point was open to argument before this Court, it would be rejected. In line with the analysis of HHJ Havelock-Allan QC in RWE NPower Plc v Alston Power Limited [2009] EWHC B40, the scope of the jurisdiction of the Adjudicator is derived from the Notice of Adjudication. This was plainly limited to claims under the Westfield Contract. It was contended, in the adjudication, that a particular sum fell due for payment pursuant to that Contract. As a matter of substantive merit, that allegation may have been right or wrong; it was for the Adjudicator to decide. If he was incorrect (as Meeres alleges), that was not an error that went to his jurisdiction.

35. Finally, it is plain that even if the Adjudicator had not had jurisdiction to decide the entitlement to this particular sum, it would have been appropriate for the Court simply to deduct the specific sum from the amount otherwise ordered to be paid, by way of severance. It would be an affront to common sense if a flawed decision relating to a readily identifiable sum representing less than 2% of the total amount awarded could undermine the enforceability of the Award as a whole.

Conclusion

36. The Court grants summary judgment in respect of the four adjudicator's decisions, in the sum of £223,414 (including VAT), together with interest.