



Neutral Citation Number: [2023] EWHC 1473 (TCC)

Case No: HT-2022-000467

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

Royal Courts of Justice
Rolls Building, London, EC4A 1NL

Date: 23/06/2023

Before :

Jason Coppel KC
(sitting as a Deputy High Court Judge)

Between :

ANDREW BELLIS

Claimant

- and -

SKY HOUSE CONSTRUCTION LTD

Defendant

The **Claimant** (in person)
Simon Bradshaw (instructed by Summerfield Browne for the **Defendant**)

Hearing date: 11 May 2023

APPROVED JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 23 June 2023 at 10.30am

Jason Coppel KC:

Introduction

1. This is the hearing of a Part 8 claim brought by the Claimant, Andrew Bellis, against the Defendant, Sky House Construction Ltd in order to challenge certain findings made in an adjudication on 28 April 2022 (“the adjudication”).

2. The adjudication was of a dispute between the parties which concerned the Claimant’s termination of a contract for the construction of an extension to his property at 19B Queen’s Road, Weybridge, Surrey KT13 9UE (“the contract”), and the Defendant’s right to payment under the contract. The adjudicator (Frank Rayner) found, in short, that the Claimant had wrongfully terminated the contract, as a result of issuing a notice of termination before the time when that could lawfully be done, and in circumstances where the Defendant had not previously repudiated the contract. The adjudicator also found that the Defendant had not made a valid application for payment under the contract, and so was not owed any money at that stage. The Defendant subsequently issued a final account, which the Claimant did not pay, and a second adjudication was decided on 12 December 2022 (“the second adjudication”). In the second adjudication, the Claimant was found liable to pay the Defendant £30,735.49 plus VAT (where applicable) and interest. The adjudicator relied upon his previous finding that the Claimant had wrongfully terminated the contract when rejecting a claim by the Claimant that he was entitled to set-off the sum of £25,135.57 which he had allegedly incurred in putting right defective work done by the Defendant (§§101-102 of the second adjudication).

3. The second ruling of the adjudicator prompted the Claimant to take action to challenge the outcome of the first adjudication, and he issued the present claim on 28 December 2022. By the Claim, the Claimant invites the Court to correct alleged errors of the adjudicator in the first adjudication and to determine (a) that he had terminated the contract correctly, and did not repudiate the contract, and (b) that the Defendant did repudiate the contract. Following a delay in service of the Claim Form, the Defendant filed a witness statement of Spyros Bekiaris which invited the Court to dismiss the Claim. However, as a result of an oversight on the part of the Defendant's solicitors, an Acknowledgment of Service was not filed and served with the witness statement.

4. At the outset of his submissions at the hearing before me, the Claimant accepted that the Court was not in a position, on a Part 8 claim, to determine whether or not the Defendant had repudiated the contract. That issue turned on detailed allegations regarding the quality of the Defendant's performance of the contract. Those allegations are fact-sensitive and hotly contested, and could only be determined on the basis of oral evidence. The Claimant therefore restricted the Claim to the question of whether the adjudicator had erred in concluding that he had terminated the contract wrongfully as a result of serving a notice of termination before that could lawfully be done. Prior to considering that substantive question, I was also required to determine whether the Defendant should be granted relief from sanctions in relation to its default in filing its Acknowledgment of Service.

The Defendant's application for relief from sanctions

5. The prescribed consequences of the Defendant failing to file and serve an Acknowledgment of Service within 14 days after service of the Claim Form were that the Defendant was not permitted to rely on Mr Bekiaris's witness statement (see PD8A, §7.3, which requires that witness evidence be filed with an acknowledgment of service) nor permitted to participate in the hearing (CPR 8.4(2)). The Defendant applied for relief from these sanctions.
6. With reference to the three *Denton v White* criteria, the Defendant accepted that its default was serious and significant and also that there was no good reason for its default, which was down simply to an error on the part of solicitors. However, under the third criterion, "all the circumstances of the case", it was submitted that the practical effect of its default was minimal because the Claimant had been made well aware that the Defendant intended to defend the Claim, through the Defendant initially disputing effective service and then filing the statement of Mr Bekiaris, and the Claimant had indeed responded to the witness statement of Mr Bekiaris by filing witness statements in reply.
7. I indicated at the hearing that I would grant relief from sanctions, and permit the Defendant to rely on its witness statement and participate in the hearing, essentially for that reason. The Claimant has not been prejudiced by the Defendant's default. He was fully aware that the Defendant intended to defend the Claim and I reject his submission that he did not know the case that he had to meet. He did know, because that case was, so far as it was appropriate to do so, set out in Mr Bekiaris's witness statement and he replied to that case with extensive further evidence of his own. In my judgment, it

would have been overly technical, and harsh, to exclude the Defendant from participating in hearing, and to rule out Mr Bekiaris's statement, in particular as the Claimant's own evidence was not compliant with CPR requirements in a variety of respects (such that he was also dependent, to some extent, on the Court's indulgence). As matters turned out, there was very little in the evidence which was of assistance in determining the issue of construction of the contract which was pursued by the Claimant.

The issue of unlawful service of the notice of termination

The basis for the Court's jurisdiction to determine the issue

8. The first question which arose when considering the issue of whether the adjudicator had erred in ruling that the Claimant had wrongfully terminated the contract by serving a notice of termination prematurely was whether it was appropriate at all for the outcome of the first adjudication to be challenged in this way. It is trite that the outcome of an adjudication may only exceptionally be challenged by court proceedings.
9. As O'Farrell J stated in *Global Switch Estates 1 Ltd v Sudlows Ltd* [2020] EWHC 3314 (TCC), §44: "*It is important to emphasise that the courts take a robust approach to adjudication enforcement*". She cited the well-known summary of the relevant legal principles given by Jackson J in *Carillion v Devonport Royal Dockyard* [2005] EWHC 778 (TCC), who had stated (§80, with citations omitted):

"1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish)";

2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law;

3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision.

4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the [Housing Grants, Construction and Regeneration Act 1996]. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice."

10. The Court of Appeal in *Carillion* endorsed the summary of Jackson J and added, materially (§§85, 87):

“The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator...

In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position.

To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense ...”

11. In *Willow Corp. SARL v. MTD Contractors Ltd* [2019] EWHC 1591 (TCC), Pepperall J stated (§§28-30):

“28. Summary judgment is of course the usual means by which parties enforce adjudication decisions in their favour made pursuant to the statutory scheme in the Housing Grants, Construction & Regeneration Act 1996. By section 108(3) of the Act and regulation 23(2) of The Scheme for Construction Contracts (England & Wales) Regulations 1998, the decision of the adjudicator is binding upon the parties and must be complied with unless or until their underlying dispute is finally determined whether by litigation, arbitration or agreement. Adjudication is founded on the “pay now, argue later” principle: per Dyson J (as he then was) in *Macob Civil Engineering Ltd v. Morrison Construction Ltd* [1999] B.L.R. 93 and Coulson J (as he then was) in *Mead General Building Ltd v. Dartmoor Properties Ltd* [2009] EWHC 200 (TCC), at [5]. As Chadwick LJ put it in *Carillion Construction Ltd v. Devonport Royal Dockyard Ltd* [2006] B.L.R. 15 at [86], the need to have the “right” answer has been subordinated to the need to have an answer quickly.

29. In *Caledonian Modular Ltd v. Mar City Developments Ltd* [2015] EWHC 1855 (TCC), Coulson J reiterated the general principle, but added, at [12]:

“That is, of course, the general rule and it will apply in 99 cases out of 100. But there is an exception. If the issue is a short and self-contained point, which requires no oral evidence or any other elaboration than that

which is capable of being provided during a relatively short interlocutory hearing, then the defendant may be entitled to have the point decided by way of a claim for a declaration.”

30. In *Hutton Construction Ltd v. Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC), Coulson J indicated that where a defendant seeks to argue such a short and self-contained point, it should issue a Part 8 claim seeking declaratory relief. He added:

“17. ... there is a dispute between the parties as to whether or not the defendant is entitled to resist summary judgment on the basis of its Part 8 claim. In those circumstances, the defendant must be able to demonstrate that:

(a) there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest;

(b) that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing set aside for the enforcement;

(c) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore.

18. What that means in practice is, for example, that the adjudicator’s construction of a contract clause is beyond any rational justification, or that the adjudicator’s calculation of the relevant time periods is obviously wrong, or that the adjudicator’s categorisation of a document as, say, a payment notice when, on any view, it was not capable of being described

as such a document. In a disputed case, anything less than that would be contrary to the principles in *Macob*, *Bouygues* and *Carillion*.

19. It is axiomatic that such an issue could still only be considered by the court on enforcement if the consequences of the issue raised by the defendant were clear-cut. In *Caledonian Modular*, it was agreed that, if the document was not a payment notice – and it plainly was not – then the claimant’s case failed. If the effect of the issue that the defendant wishes to raise is disputed, it will be most unlikely for the court to take it into account on enforcement. Any arguable inter-leafing of issues would almost certainly be fatal to a suggestion by the defendant that their challenge falls within this limited exception.”

12. The present case did not fit neatly into the more common categories of case which were dealt with in *Global Switch* and *Hutton*. This case was not, as in *Global Switch*, an application by the successful party in an adjudication for summary judgment on the adjudicator’s award. The Claim concerns the first adjudication which did not award money to either party and which the Defendant has taken no steps to enforce. The Defendant has recently taken action to enforce the outcome of the second adjudication but those proceedings are at an early stage and were not before this Court.

13. Nor is the Claim like that in *Hutton*, where the successful party had brought proceedings to enforce an adjudication and the losing party had countered with a Part 8 claim challenging certain findings of the adjudicator, and thereby raising the issue whether the Part 8 claim should operate as a defence to summary judgment. In *Willow* also, the Court had before it both a Part 8

claim which had been issued proactively to challenge the outcome of an adjudication, and an application for summary enforcement of the adjudication. The Part 8 claim did not seek merely to resist summary judgment but also sought final declaratory relief. Pepperall J held that it was appropriate for him to determine, and grant declaratory relief in relation to, an issue of construction which was “*short, self-contained and well-suited to being determined in Part 8 proceedings*” (§31). Other issues raised in the Part 8 claim were not appropriate for determination, including an allegation of breach of natural justice which needed to be considered in the enforcement proceedings.

14. I consider that the issue of construction of the contract which is raised by the challenge to the adjudicator’s finding of wrongful termination is, like that in *Willow*, short, self-contained and well-suited to being determined in Part 8 proceedings. The Claimant is entitled to seek a declaration in relation to the construction of the contract. He has taken legal proceedings “*in order to establish the true position*” (see §87 of *Carillion*) and provided that the issue in question is suitable for determination in Part 8 proceedings, the fact that the issue has already been decided by the adjudicator is no obstacle to me deciding it.
15. Mr Bradshaw, who appeared for the Defendant, accepted during argument that the wrongful termination issue was suitable for determination in these proceedings and that I should decide it. He submitted that the issue should be resolved in the Defendant’s favour either because the adjudicator’s conclusion was correct or because even if the adjudicator was wrong, his conclusion was

not irrational (relying upon the dictum in §18 of *Hutton*, set out in §11 above). I do not accept that that I could find in favour of the Claimant on the grounds that the adjudicator had made an error but not an obvious one. This is a freestanding Part 8 claim raising an issue of construction which is suitable for determination by the Court in these proceedings. It seems to me that what is required is a declaration one way or the other as to whether the Claimant wrongfully terminated the contract by serving a notice of termination prematurely, and that the guidance given in §18 of *Hutton* is explicable on the basis of the circumstances of that case, which raised the question whether a Part 8 claim should operate as a defence to summary judgment. It makes sense in that context that there should only be a defence to summary judgment if it can be established that the adjudicator has gone obviously wrong. My approach reflects that of Pepperall J in *Willow*, who proceeded to decide the issue of construction before him without reference to any higher hurdle of obviousness of an adjudicator's error (see §51 of his judgment).

Relevant facts and contractual provisions

16. The contract was based on the JCT Minor Works Building Contract 2016 edition. clause 6.4 of the contract permitted termination by the employer on account of default by the contractor, in the following circumstances:

“6.4.1 If, before practical completion of the Works, the Contractor:

6.4.1.1 without reasonable cause wholly or substantially suspends the carrying out of the Works; or

6.4.1.2 fails to proceed regularly and diligently with the Works; or

6.4.1.3 fails to comply with clause 3.9,

the Architect/Contract Administrator may give to the Contractor a notice specifying the default or defaults (a 'specified' default or defaults).

6.4.2 If the Contractor continues a specified default for seven days from receipt of the notice under clause 6.4.1, the Employer may on, or within 10 days from, the expiry of that seven day period by a further notice to the Contractor terminate the Contractor's employment under this Contract.”

17. Clause 6.2.3 of the contract laid down procedural requirements for the giving of notices under clause 6:

“Each notice referred to in this section shall be delivered by hand or sent by Recorded Signed for or Special Delivery post. Where sent by post in that manner, it shall, subject to proof to the contrary, be deemed to have been received on the second Business Day after the date of posting”.

18. By email sent on Wednesday, 1 September 2021 at 5.52pm, the Claimant gave notice purportedly pursuant to clause 6.4.1 of the contract warning the Defendant that the contract would be terminated unless a number of points listed in the email were addressed. The Claimant warned that a notice confirming termination would be sent “*if these points are not addressed by Wednesday 8 September 2021*” (“the warning notice”). A notice of termination of employment, purportedly pursuant to clause 6.4.2, was sent by the Claimant by email on Wednesday, 8 September 2021 at 7.20am (“the termination notice”).

19. The Defendant argued to the adjudicator, amongst other things, that the warning notice and the termination notice were invalid because they had been sent by email, which was not a permissible mode of service under clause 6.2.3. The Claimant told the adjudicator that each email had been put into letter format and taken to the Defendant's offices on the day that it was sent. The email of 8 September stated that that would be done and indicates the Claimant's awareness of the requirements of clause 6.2. The adjudicator did not find against the Claimant on this issue, and I apprehend that he must have accepted, or at least assumed, that the Claimant had indeed served the notices by hand on 1 and 8 September 2021 respectively. I shall do likewise.

20. The Defendant next argued that the termination notice was invalid because it had been sent too early, as the Claimant was required to wait for seven clear days after the date of the warning notice and could only serve a termination notice on 9 September. The Defendant relied upon clause 1.4 of the contract, entitled "Reckoning periods of time", which stated, materially:

"Where under this Contract an act is required to be done within a specified period of days after or from a specified date, the period shall begin immediately after that date. Where the period would include a day which is a Public Holiday that day shall be excluded."

21. The adjudicator accepted this argument of the Defendant. He stated (§§64-67):

"64. Clause 1.4, which refers to 'Reckoning Periods of days' and confirms that: *"Where under this Contract an act is required to be done within a specified period of days after or from a specified date, the period shall begin*

immediately after that date. Where the period would include a day which is a Public Holiday that day shall be excluded.” By reference to this clause, I accept that as the 1st Notice was served on 1 September 2021, based on clause 1.4, Day one was 2 September 2021 and Day seven was 9 September 2021.

65. Mr Bellis’ purported 2nd Notice was served on 8 September 2021 and I therefore accept the 2nd Notice was one day too early to be an effective notice under clause 6.4 of the Contract. I further accept that the effect of this is to invalidate the purported termination under the express termination provisions of the Contract.

66. I further accept that Mr Bellis’ email timed at 16:49hrs on 8 September 2021 clearly brought the Contract to an end and I accept that Sky House’s conduct in carrying out no further work on the project evidenced Sky House’s election to accept the termination.

67. Therefore any termination reliant on clause 6.4 was not effective.”

22. It can be seen that the adjudicator applied clause 1.4 and reasoned that for a warning notice served on 1 September, day one of the seven day period provided for in clause 6.4.2 was 2 September, the day immediately after the date of service of the notice. He said that day seven was 9 September 2021, which appears to have been a typographical error, as day seven would in fact be 8 September 2021, and it is clear from §65 of his reasons that he regarded 9 September 2021 as the first day on which the termination notice could lawfully have been served.

23. Clause 1.4 of the contract reflects a common approach to the calculation of time periods, namely that periods of days are to be calculated as clear days, to the exclusion of the day on which a relevant event occurs and from which a period of days is to be calculated. A similar rule applies under the CPR, which also state that “clear days” excludes the day on which the relevant period ends: see CPR 2.8(2)-(3).

24. Clause 1.4 applies where “*an act is required to be done within a specified period of days after or from a specified date*”. It is not entirely obvious that it applies to the period between service of a warning notice under clause 6.4.1 and a termination notice under clause 6.4.2. That is because these provisions do not refer in terms to any act which is required to be done. A warning notice does not, strictly, require the contractor to rectify the defaults specified in the notice, but confers a right of termination upon the employer if the defaults are continued. In common sense and commercial terms however, what is in substance being conveyed by a warning notice is that the contractor is required to address the specified defaults. There is, moreover, every reason why the draftsman of the contract would have wished there to be certainty about the length of the important period in which defaults must be addressed, lest the contractor be at risk of termination, and therefore would have wished for the only contractual provision on reckoning of periods of days to be applicable.

25. There is another sense in which clause 6.4.2 might be said to prescribe a period within which an act is required to be done: an employer who has acquired the right to terminate the contract, because defaults have continued beyond the seven day period in clause 6.4.2, is required to exercise that right

within 10 days from expiry of the seven day period. Therefore, the right of termination is required to be exercised, by sending a termination notice, within 17 days of sending the warning notice. This point is not conclusive. It is conceivable that the 10 day period is to be calculated in accordance with clause 1.4, but the seven day period, and therefore the day on which the right of termination is triggered, is to be calculated by some other method. But that would be a strange, and far from obvious, construction which I would not attribute to the draftsman of the contract without a clear indication that that is what was intended.

26. The Claimant submitted that clause 1.4 did not apply to the calculation of the period allowed by clause 6.4.2 because the date of giving of the warning notice was not a “specified date” under the contract. He drew a distinction between the dates identified in the Contract Particulars (such as the works commencement date and date for completion) and the date referred to in clause 6.4.1 which could be any date after commencement of the contract. I reject that submission. The words “specified date” are perfectly capable of being interpreted as including the date of an event which is specified in the contract, whatever that date turns out to be. If the Claimant were correct, it would substantially reduce the effect and the utility of clause 1.4, as there are in truth only a few instances in the contract of periods starting with identified dates. There are several other instances where, as in clause 6.4.1, a time period of days runs from the day of an event which is provided for in the contract, whatever that day turns out to be (see, for example, clauses 2.10 on rectification of defects, 3.5 on non-compliance with instructions and 4.3 on the due date for the making of interim payments). It would be odd, and confusing,

if periods of days were to be reckoned differently in these far more numerous cases than in the few cases where the contract specified the relevant date and it is difficult to identify any good reason why that would have been intended by the draftsman.

27. On the other hand, there is a substantial downside to the construction which is proposed by the Claimant, whereby he was entitled to give the termination notice at any time on 8 September 2021, which is that it may result in the contractor having less than seven days in which to address the alleged defaults set out in a warning notice. The warning notice was sent by email in the early evening of 1 September and, I apprehend, hand-delivered in accordance with clause 6.2 later that evening, after business hours. The Claimant then considered that he was entitled to terminate the contract by the early morning of 8 September, approximately 6 days and 13.5 hours after the warning notice was emailed, and less still since the warning notice had been validly given. It is not clear at precisely what time the termination notice was delivered to the Defendant's office, but it is reasonable to assume – having regard, in particular, to correspondence later that day – that this was during business hours, and so less than seven days after the warning notice had been delivered. Indeed, as the Claimant accepted during argument, on his case, a warning notice could have been served at 11.59pm on 1 September, and a termination notice lawfully served at 12.01am on 8 September, giving the Defendant a fraction over six days to comply with the warning notice.
28. The essence of clause 6.4.2 is that the contractor has seven days in which to put right the default of which it has been notified by the warning notice. That

is a short period (not least as the defaults of which the contractor is notified may be extensive), as well as a potentially critical one, and the contract should be read so as not to reduce the already short period and also so as to give both parties certainty as to how long the contractor has to act, and when the employer's right to terminate will arise. Against that background, it is not, in my judgment, a legitimate construction of clause 6.4.2 that a termination notice could lawfully be given less than seven whole days after the warning notice.

29. The Claimant's only discernible response to the point that the contract should not be read as giving the Defendant less than seven days to comply with the warning notice was that, pursuant to clause 1.4, he had been required to serve the termination notice before seven days had expired in order that it could take effect upon the expiry of the seven day period. That is plainly not the effect of clause 1.4. There are other provisions in the contract concerned with service of notices, in particular clauses 1.6 and 6.2, the latter of which provides that a clause 6 notice sent by Special Delivery post shall be deemed to have been received on the second day after the date of posting. That conventional rule did not apply to the notices served in the present case, as they were hand-delivered and – I will assume - received by the Defendant on the date of delivery. I do not accept that clause 1.4, or any other provision of the contract, can be invoked in order to cut down on the seven day period for compliance to which the contractor is entitled under clause 6.4.2.
30. Indeed, it is not straightforward to identify an alternative method of calculation which the draftsman of the contract could have intended to apply

to clause 6.4.2 and which is consistent with the key objective of allowing the contractor seven days in which to comply with a warning notice. One possible alternative is that seven days simply means seven whole days, so that in the case of a warning notice served by hand, the period expires seven days later from the time of delivery. That seems unlikely, not least because there may be uncertainty as to the time of day at which a notice was delivered, and so the time from which the seven days starts to run and at which it will end (or, the time that the notice was seen by the contractor, if that is the meaning of “receipt” in clause 6.4.2). This construction would also would produce a potentially undesirable distinction between warning notices which are served by hand, and those which are posted (where the receipt is deemed to have been on a particular day, rather than at a particular time, and the seven day period would very likely have to be calculated as calendar days).

31. In the light of the importance of ensuring that the contractor has a full seven days in which to address the issues specified in a warning notice, I would have construed clause 6.4.2 as referring to a period of seven clear days, ending in this case at midnight on 8 September 2021, even if there were some reason why clause 1.4 was not applicable. On that analysis also, the Claimant’s termination was premature and invalid. My primary reasoning, however, is that clause 1.4 does apply to the interpretation of the reference to seven days in clause 6.4.2, with the result that the earliest day on which a termination notice could have been given by the Claimant was 9 September 2021.
32. Finally, I should reiterate that, as the Claimant accepted that any allegations regarding the quality of the Defendant’s performance of the contract could not

be pursued in this Part 8 claim, I have not examined the potentially important issues of whether the Claimant had sufficient grounds for sending the warning notice, or the termination notice. My ruling is strictly confined to the issue of the timing of the termination notice.

Conclusion

33. For those reasons, I conclude, on the only issue which was pursued by the Claimant, that the adjudicator was correct in ruling that the Claimant's purported termination of the contract pursuant to clause 6.2.4 was invalid, and unlawful, because the termination notice was sent before any right to send such a notice could have arisen. I will dismiss the claim.