Citation number: [2020] EWHC 497 (TCC)

Case No: HT-2019-000431

IN THE HIGH COURT OF JUSTICE (QBD)
TECHNOLOGY AND CONSTRUCTION COURT

7 Rolls Buildings,
Fetter Lane, London,
EC4A 1NL

Date: Tuesday, 4th February 2020

Before:

MR JUSTICE WAKSMAN

Between:

McLAREN CONSTRUCTION (LONDON) LIMITED **Claimant**

- and –

GREYHOUND INVESTING CORPORATION **Defendant**

- -
- -

MR SIMON HARGREAVES QC (instructed by **Pinsent Masons LLP**) for the **Claimant**
THE DEFENDANT was not present or represented.

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APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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MR JUSTICE WAKSMAN:

1. This is an application for a summary judgment (not for a default judgment), albeit that the defendant has played no part in the underlying claim. It is an application to enforce by way of summary judgment the decision of the adjudicator dated 15th November 2019. Before the adjudicator, the defendant, which is a BVI company and which, as I shall explain hereafter, I am quite satisfied has been properly served in relation to this claim and this application, was fully represented by CMS It produced written submissions to the adjudicator in the usual way.

2. Let me, first of all, deal with the question of service. What has transpired is that after the defendant lost the adjudication, it made no attempt to pay the award which was in the sum of around £858,000. It did not make any attempt to pay the adjudicator's costs, which the adjudicator determined should be paid by the defendant but which in the meantime have now been paid by the claimant in the usual way.

3. The claim form and an application to serve out of the jurisdiction was issued and made on 28th November 2019. There was a clear case for service out because the underlying contract dated 26th November 2015 had an English law and English jurisdiction clause. There was no doubt about the jurisdiction clause which incorporated the relevant TeCSA Rules.

4. On 10th December O'Farrell J granted permission to serve the defendant out of the jurisdiction at its registered office, Ground Floor**,** Coastal Building, Carrot Bay, Wickhams Cay II, Tortola, BVI or elsewhere in the BVI, and stated that the defendant would have 31 days after service of the particulars of claim to file an acknowledgment, and the same for a defence or 45 days if it had filed the acknowledgment of service. On the following day Fraser J gave permission for the claimant to issue this application for summary judgment without an acknowledgment of service or defence and then gave directions leading up to the hearing of today.

5. There has been the relevant evidence as to service, including a first witness statement of Mr Collingwood, a solicitor acting for the claimants. But, in brief, the first affidavit of Mr Smith deposes to the fact that on 12th December at 9.50 am he served on the defendant at its registered office, as indicated in the order for service out, the claim form, the particulars of claim, the response pack, the application for permission to serve out, the first witness statement and the orders of O'Farrell J and Fraser J. The registered agent, on service, confirmed he was a person authorised to accept service. There is then the certificate of service which is also before me.

6. In addition to all of that, those acting for the claimants served on the directors by way of email, as an additional way of bringing these matters to its attention, all of the relevant documents. That has gone through to service of the application for summary judgment; the evidence that has been served in respect of that; the second and third witness statements of Mr Collingwood; and indeed a hearing bundle for today, which is accessible by an electronic platform. Mr Hargreaves tells me, and there is no reason to doubt it, that, as is usual these days, the software can detect if the documents have been opened, and indeed they were on 29th January. But nonetheless, the non-engagement on the part of the defendant has continued and the defendant does not appear today.

7. That is the position, therefore, so far as service is concerned. There are two possible glitches. The first glitch (which I do not consider requires any further order) is that there is an error in that the response pack indicates the usual (domestic) period for serving an acknowledgment of service or defence; whereas in fact, the order of O'Farrell J provided a somewhat longer period. There can be no possible doubt or prejudice to the defendants had they wanted to engage in this action, because they were served with the relevant orders and that makes it perfectly plain what the relevant dates are. I do not consider that the fact that they were not reproduced in the response pack is something which requires any form of amending order.

8. The second matter is that the form which is known as N1D, which is guidance for defendants who are served out of the jurisdiction, did not accompany the response pack. There appears to be no express requirement that it should, so far as this form of service out of the jurisdiction is concerned, either in a rule or in a Practice Direction. But, for the avoidance of doubt, the claimants ask me to make an order to say that, if there was such a requirement, it should be waived under CPR 3.10, which I have no difficulty in doing. The missing note really only sets out in a little more detail or at greater length what is apparent from the response pack and the orders already served, as to what the defendant must do if it wishes to defend the claim or if it wishes to admit the claim. There is nothing in these guidance notes in fact which deals with the question of what a defendant should do should it wish to challenge the jurisdiction. So it really is very little more than a repetition of what is in the response pack and the orders.

9. On that basis, again there is no conceivable doubt or prejudice to the defendant who has chosen not to engage in this process at all, and therefore I am quite content to make an order that any required failure to serve N1D is waived. At the same time, I have no difficulty in making the order that the claimant should adduce the evidence of the third witness statement of Mr Collingwood which deals with all of those matters.

10. There is no-one here on behalf of the defendant to oppose this application for summary judgment, but, for the sake of completeness, I am just going to rehearse the matters which were before the adjudicator. The essential claim was very straightforward. On this building contract there was a final valuation issued on behalf of the claimant against the defendant employer on 18th March for £858,097.50 plus VAT.

11. Under the provisions of the contract the last date for the exercising of any right to deduct liquidated damages by a notice was 5th April, and, equally, the last date for any pay less notice was 5th April. The defendant did not serve either of those notices on time, though both in fact arrived on 8th April by courier, although the liquidated damages notice was dated 1st April and the pay less notice was dated 4th April.

12. Therefore, from the claimant's point of view, this was all about whether it was entitled to the sums claimed in the final valuation and whether the defendant could challenge that before the adjudicator by reference to the notices which it had served. That is, effectively, one dispute between the parties, and the adjudicator so found. The reason why he had to find that was because certain jurisdiction points had been taken by CMS on behalf of the defendant at that stage. The first point was that there was really and in truth more than one dispute here, and therefore they invoke the rule that, if there is more than one dispute in truth, then it should give rise to two adjudications and not one, but yet there was only one here. The adjudicator decided, plainly correctly, that in essence there was only one dispute

here - which is whether the claimants were entitled to recover the money and whether the defendants could invoke either of the notices which they relied upon.

13. It is true that, in the course of argument, the claimant provided additional support for its position by saying that, in any event, one of the three notices which had to be served so far as claiming liquidated damages was concerned had not been served at all. All that means is that that was another reason why the notices which were served out of time were defective. The adjudicator was quite plainly correct to say that that is nothing more than an additional argument and it could not give rise to what would be described as a different dispute.

14. He dealt in the same way with an analogous jurisdictional argument, which was to the effect that the argument about the fact that one of the notices was missing had not properly arisen at that stage. That did not add anything to the defendant's position and the adjudicator was right so to find. The adjudicator did hold that whatever decision the adjudicator made about his jurisdiction was not irrevocably binding in that decision. But, in the event, that goes nowhere because there is no challenge to the jurisdiction now within these enforcement proceedings, and that really will be an end of it because, should the defendant choose later on to litigate the underlying dispute, by that time the question of the adjudicator's jurisdiction will have disappeared. But, in any event, no such argument has been raised.

15. All that left the adjudicator to do was to consider the adequacy of the notices. They were plainly out of time and defective and, on that basis and having considered the valuation, there was no option but for the adjudicator to make the decision which he did. That is all I need to say about the adjudication.

The position so far as money is concerned is that, as at today and including I think interest, the total amount due by 18th February from the defendant to the claimant is £1,062,565.06, and I will give judgment for that sum. I will now hear Mr Hargreaves just on the question of interest going forward and then costs.

(Submissions Continued)

16. I am quite content that this is a reasonable and proportionate sum at £66,000 (*£66,239.08(?)*). It might seem like a lot for what has turned out to be an uncontested application for summary judgment, but none the less the claimants have had to prepare this on the basis that they might need to prove their case to the hilt and, in any event, they needed to satisfy me of certain matters which I have dealt with in my judgment. So I will make an order in that sum.

This judgment has been approved by the Judge.

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