ROK Build Ltd v Harris Wharf Development Company Ltd [2006] Adj.L.R. 12/15

JUDGMENT : JUDGE WILCOX: TCC. 15th December 2006

1. This is an application for summary judgment under Part 24 to enforce an adjudication award to the claimant in the sum of £940,927.

2. The background facts briefly are these. The claimant is a building company and is the contractor who performed building works under a contract dated 10th December 2003 with the defendant employer for the design and construction of a one form entry primary school, 24 one to three bedroom flats situated above including the associated drainage and external works at the St. Jude's and St. Paul's Church of England Primary School, King Henry's Walk, London N1. The contract was the Joint Contract Tribunal Standard Form Building contract, Contractors Design 1998 Edition (incorporating amendments 1, 2 and 3) in the sum of £3,999,812.

3. Practical completion of the works was achieved on 12th July 2005. The parties professional advisers met on 29th April 2006 to discuss aspects of a final account. There was a failure, it appears, to achieve any substantial measure of agreement, the claimants maintaining a substantial claim and the defendants resisting any claim, and indeed by 20th July 2006 maintaining that they had overpaid in the sum of £487,000.

4. The material parts of the contract are as follows: Clause 30.3.1: *"The contractor shall make applications for interim payments as follows",* and then it sets out the text of which applies in this case. 30.3.2: *"Each application for interim payments shall be accompanied by such details as may be stated in the Employer's Requirements".* The claimant's application for interim payment number 30 was issued to the defendant's agent in the form of three lever arch files on 29th June of 2006 seeking payment of £940,927 by the defendant. Clause 30.3.3 provides: *"Not later than five days after the receipt of an application for payment, the Employer shall give a written notice to the Contractor specifying the amount of payment proposed to be made in respect of that application, the basis on which such amount is calculated and to what the amount relates".* And subject to clause 30.3.4: *"Shall pay the amount proposed no later than the final date for payment".*

5. The defendants gave no written notice to the claimant under clause 30.3.3 within the prescribed five days and thus incurred a liability to pay the proposed amount no later than the final date for payment subject to clause 30.3.4, which provides that: *"...not later than five days before the final date for payment of an amount due pursuant to clause 30.3.3 the Employer may give a written notice to the Contractor which will specify any amount proposed to be withheld and/or deducted from that due amount with ground or grounds for such withholding and/or deduction and the amount withholding and/or deduction attributable to each ground".*

6. The amount claimed under 30.3.3 was £940,926. It included a sum of £350,000 for loss and expense, on account, and reference to *"submission to be issued".* It made no provision for any retention. Clause 30.3.5 of the contract provides that *"where the Employer does not give any written notice pursuant to clause 30.3.3 and/or to clause 30.3.4, the Employer should pay the Contractor the amount stated in the application for interim payment".*

   The final date for payment of an amount due in an interim payment by clause 30.3.6 was agreed to be 28 days from the receipt by the employer of the contractor's application for interim payment. In this case the date would be 27th July of 2006.

7. On 20th July 2006 the employer's agent wrote to the claimants acknowledging the interim valuation number 30 of 29th June in these terms: *"We have considered your submission and enclose our assessment and valuation together with our comments. You will see that we do not consider that a further payment to Rok Build is required and due under the contract. You will also see that it is our view that a payment of £8,487 is due to be paid by Rok Build to the Employer. Please accept this letter and contents as notices under clauses 30.3.3 and 30.3.4 of the Contract from the Employer."*

8. Whilst it could not have effect as a timeous compliance with clause 30.3.3, it was in part an effective notice under clause 30.3.4. The notice was in two parts, the first, purportedly under 30.3.3, challenged the contract sum claimed by Rok in its assessment of the interim valuation number 3, in particular discounting the contractor's loss and expense claim for £350,000 for which no particulars had been furnished by 4th July as promised, and challenged the value or valuations claimed in the sum of £202,000, and the value of contract instructions given, to the extent of £5,029. Thus, the challenge totalled £602,287.

9. That part of the letter or notice dealing with the sums within the withholding notice under clause 30.3.4 claimed a retention of 1.5%, namely £59,075, a deduction for liquidated damages in the sum of £201,000 and set off for breach being the alleged non-provision of training manuals (or manuels as it is expressed in the letter) in the sum of £18,000 totalling £278,450.

10. I turn to the reference. The claimants gave notice of intention to refer a dispute to adjudication on 7th July 2006 and sought the appointment of an adjudicator either lawyer or chartered surveyor under the RIBA scheme in accordance with the Housing Grants Reconstruction Act 1996 compliant scheme within the contract. The material parts of the notice of intention are: *"Rok Build trading as Llewellyn Rok Centre, Guardian Road, Exeter Business Park, Exeter, the referring party (and referred to herein as 'Rok') hereby give notice to Harris Wharf Development Company of 13-15 New Burlington Place, Regent Street, the respondent (and referred to herein as 'WHDC') of its intention to refer a dispute that has arisen out of the construction contract to adjudication. The matter in dispute is the employer's failure to comply with the requirements of clause 30.3.3 of the contract."*

    Details of when and where the dispute has arisen are given as: "The dispute has arisen at the school", and the date and the address is given. As to nature of the redress sought, it is put in these terms: "*Rok seeks of the*

adjudicator a direction that the employer should comply with the requirements of clause 30.3.5 of the contract and to make payment of the amount stated". The response asserts that the contractor under the contract is stated to be Walter Llewellyn & Sons Limited.

11. The defendant contends that the titular claimant, Rok Build Limited, has no standing since it is a separate legal entity to the named contractor in the contract and that no formal assignment under clause 18 of the contract was ever made. It is common ground that Rok Build Limited has been recognised as the contractor under the contract and has performed the work or some of the works under the contract. For how long the claimant has been so recognised and treated is not evident.

12. In the notice of intention to refer and in the referral document itself, the claimant describes itself as "Rok Build Limited trading as Llewellyn". Rok Build Limited was incorporated on 17th April 2003 and until 22nd December 2005 was known as Rok 015 Limited. It is wholly owned by Rok Development Limited which has as its ultimate owner Rok Plc.

13. Walter Llewellyn & Sons Limited has its registered office at Rok Centre, Guardian Road, Exeter Business Park, Exeter, Devon EX1 3PD. It traded from that address and from 16-20 South Street, Eastbourne, Sussex, BNQ1 4XE. Rok Build Limited has the same Exeter registered office address and Exeter trading address as Walter Llewellyn & Sons Limited. Walter Llewellyn & Sons Limited is wholly owned by Llewellyn Management Services Limited whose ultimate owner is Rok Plc. The contract details showing the address of the contractor were changed from the Eastbourne trading address of Walter Llewellyn & Sons Limited to the Exeter trading address shared by that company and Rok Build Limited. Manuscript changes on the contract were initialled by the parties.

14. The notices served by the defendant under claims 30.3.3, 30.3.4 of the contract were addressed to Rok Build Limited as the contractor under the contract. Similarly, it appears that substantial payments have been made to Rok Build Limited under the contract. What is not apparent from the evidence is when the de facto substitution of Rok Build Limited for the titular contractor, Walter Llewellyn & Sons Limited, occurred, and what were the circumstances giving rise to it, and what agreement or acquiescence was shown by the defendant to the changed state of affairs. The description of the referring party is Rok Build Limited trading as Llewellyn not as Walter Llewellyn & Sons Limited.

15. The adjudicator dealt with the matter in paragraph 22 of his reasons: *"The referring party is Rok Build. The notice of intention to refer a dispute to adjudication identifies Rok Build Limited as trading as Llewellyn. The response documents served by Harris states that under the contract in dispute the contractor is described as Walter Llewellyn & Sons Limited. The reply for response, paragraph 1 states that the contract was amended to include Rok Build Limited's address following the takeover of Walter Llewellyn & Sons Limited. The reply for response states the correspondence and previous payments have been addressed or made to Rok Build Limited. There are no further submissions on the identity of Rok Build save that the response to the referral cites the referring party as Rok Build Limited trading as Walter Llewellyn & Sons Limited."*

It does not in fact, it refers to Llewellyn not the full title of the associated company Walter Llewellyn & Sons Limited.

16. The adjudicator recites the basic facts save for the slight mistake that I have just recounted and went on to make his award to Rok Build Limited trading as Llewellyn. It is implicit that he considered the matter and proceeded on the basis that the proper identity of the contractor was the claimant. The defendant did not give consent to enable the adjudicator to determine this issue which, in my judgment, goes to jurisdiction. Only the parties to the contract have the contractual right to refer a dispute to adjudication or where there has been an assignment the assignee and assigner. The contract deals with assignment in clause 18.1: "Neither the employer nor the contractor shall without the written consent of the other assign this contract". Thus, the consent of the other party is necessary and it must be recorded in writing.

17. It is evident from the alteration at p.1 of the contract wherein the trading address of the contractor was altered that some change took place. That is equally consistent with the contractor regularising his trading address as any other change such as a de facto substitution. The date of the alteration does not appear to be recorded. The claimant company it is to be noted is not the parent company of Walter Llewellyn & Sons Limited, or Llewellyn Management Services Limited. None of the evidence filed in this application deals with this issue, in detail. Whilst the defendants by their response to referral and in correspondence reserves their position as to this issue, post adjudication, their views as to the proper party perhaps have been equivocal. By way of example, correspondence has been directed to Rok Build Limited trading as Llewellyn and negotiations as to the enforceability of the award seem to have been with the claimant, although no doubt within the Rok Plc Group personnel may be common to constituent companies.

18. This state of affairs has resulted in this jurisdictional issue being investigated, by searches of company registers, rather late in the day, and the issue was certainly late foreshadowed in the defendant's skeleton argument. Nowhere in the correspondence or in the responses to referral is there a denial that there was any consent to assignment. The form of words used is interesting. It was noted that the contractor was the claimant whereas in the contract it was Walter Llewellyn & Sons Limited.

19. As a result of these matters the claimants were offered an opportunity of an adjournment if thought appropriate to adduce responsive evidence perhaps as to the timing and significance of the agreed manuscript alterations which could be material to issues such as consent, agency or estoppel. They did not seek any adjournment. The

decision of the adjudicator as to the right of the claimant to refer a dispute under the contract was not an intra vires decision. On the present evidence before me it is reasonably arguable that the claimant as described in this enforcement action had no right to adjudication under the contract. It follows that it is arguable that the claimant is not entitled to summary judgment.

20. The defendants resisted enforcement of the award on a number of additional grounds. In deference to counsel's ingenuity and careful argument, I will make some reference to these briefly. I preface my consideration of those arguments by reference to ***Carillion Construction Limited v. Devonport Royal Dockyard*** [2005] 1 BLR p.310 and in particular the passage in the judgment of Jackson J. at paragraph 80: *"It is helpful to state to restate four basic principles. The adjudication procedure does not involve the final examination of anybody's rights unless all the parties so wish.*

2. The Court of Appeal has repeatedly emphasised that adjudicator's decisions must be enforced even if they result from errors, procedure, fact or at law." He cites ***BCC v. Levalux:***

*"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. (See **Discain, Balfour Beatty v. Pegram**)*

"4. The judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of 1996 Act. Errors of law fact or procedure by an adjudicator must be examined critically before the court accepts that such errors constitute excessive jurisdiction or serious breaches of the rules of natural justice."

I adopt that as being an appropriate approach to these matters. It is an approach that has been endorsed on a number of occasions by the Court of Appeal.

21. Mr. Sears submits that at the time of the referral there was no dispute. In ***Collins Limited v. Baltic Quay Management*** [2005] 1 BLR p.63. At p.74 the Master of the Rolls cites with approval the propositions at first instance of Jackson J. at paragraph 62 on:

"1. The word dispute which occurs in many arbitration clauses and also in s.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 existed in particular situations. This litigation has not generated any hard edged legal rules as to what is or is not a dispute. However, the accumulating judicial decisions have produced helpful guidance.

"3. The mere fact one party whom I shall call 'the claimant' notifies the other party who I shall the 'the respondent to the claim' does not automatically and immediately give rise to a dispute. It is clear both as to a matter of language from judicial decisions that a dispute does not arise unless and until it emerges the claim is not admitted.

"4. The circumstances from which it may emerge that a claim is not admitted are 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.

"5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is not well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

"6. If the claimant imposes upon the respondent a deadline for responding to the claim that deadline does not have the automatic effect of curtailing what would otherwise be a reasonable time for responding. On the other hand, a stated deadline and the reason for its imposition may be relevant factors when the court comes to consider what is a reasonable time for responding.

"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."

The Master of the Rolls went on to say: *"For my part I would accept those propositions as broadly correct.*

I entirely accept that it all depends upon the circumstances of the particular case. I would in particular endorse the general approach that while the mere making of a claim does not amount to a dispute, a dispute will be held to exist once it can reasonably be inferred that a claim is not admitted. I note that Jackson J. does not endorse a suggestion in some of the cases either that the dispute may not arise until negotiation or discussion has been concluded or that a dispute should not be likely inferred."

In my judgment or my opinion he would be right not to do so.

"It appears to me that negotiation and discussion are likely to be more consistent with the existence of a dispute albeit an as yet unresolved dispute than with the absence of a dispute. It appears to me that the court is likely to be willing readily to infer that a claim is not admitted and that a dispute exists so that it can be referred to arbitration or

adjudication. I make these observations in the hope that they may be of some assistance and not, as I detect, any disagreement between them and the propositions advanced by Jackson J."

22. It is right therefore to look at the factual matters in the round and with robust commonsense. Mr. Sears submits at the time of the referral on 7th July 2006 that there was no dispute since clause 30.3.6 of the contract provided that the final date of the amount due in an interim payment shall be 28 days from the date of receipt by the employer of the contractor's application for interim payment, and at the time of referral, 20 days before final payment, the claimant could not know whether or not the employer would make a payment.

23. In my judgment it was a proper inference to be drawn from the evidence by the adjudicator that from 29th April the defendant was expressing the belief that he did not accept the claimant's assessed claim, as he subsequently confirmed by the assertions in the correspondence and by submissions later that he, the defendant, was in fact owed money by the claimant. There was evidence of a dispute as to the account and it must be remembered that this was some 12 months after final completion. The fact that it was expressed in the referral notice in procedural terms as to the service of notices under clause 30 is not determinative as to the extent of the dispute. The labels do not matter. It is clear that both parties understood and made submissions on the basis that there was a dispute as to the account and the consequences flowing from the service of the notices as appropriate.

24. I note that for the purposes of an interim payment, clause 30.2(a) governs the assessment of the gross valuations. The adjudicator in his award included an element of loss and expense and retention. In relation to loss and expense, the claim was "on account" and subject to the provision of further details by the contractor. These were sums within and the subject of the proper withholding notice served on 20th July 2006. It would have been open to the adjudicator to take account in whole or in part of the defendant's withholding claims properly included in the withholding notice served under clause 30.3.4. In my judgment he should have done so and was in error in not so doing. These considerations, however, do not avail the defendant because they relate to a decision on matters properly within the remit of the adjudicator.

25. Mr. Sears further submits that there was in any event a binding agreement reached between the parties not to enforce the award so long as negotiations were continuing in respect of the final account. He referred to the evidence of Mr. Duggan of the defendants who in his first witness statement related that he had a meeting with the claimant's Mr. Brown, a director of the claimants, on 15th September 2006 and as a result of that meeting and in a subsequent telephone conversation they reached an agreement recorded in the letter of 28th September 2006:

"As agreed at our meeting on Friday 15th September 2006 and as subsequently discussed in our telephone conversation, I am arranging to transfer the sum of £100,000 on account of amounts which we anticipate will be due to you when outstanding works are completed. We trust that these outstanding works will now be put in hand.

"Our understanding is that whilst meaningful negotiations are in progress on the final account you will not seek to enforce an adjudication decision given in your favour. Similarly and on the same basis, we will not take any unilateral action in respect of the final account notice which has been served.

"We await hearing from you regarding mediation and hope that the differences between us have been amicably resolved."

26. The claimant's witnesses do not accept that there was such an agreement. This court is not in a position to find facts where there is such a dispute, but on the basis that there was such an agreement as evidenced in the letter of 24th September 2006, can it be said that there is an arguable case for specific performance not to enforce the adjudicator's decision, as claimed in the defendant's counterclaim?

27. It is perhaps self-evident that an application to enforce indicates that meaningful negotiations had broken down. Mr. Rowlands submits that the payment of £100,000 referred to in paragraph 1 was not inextricably linked with paragraph 2. He submits that there are mutual promises in paragraph 1, and payment is expressed to be on account. Paragraph 2 he says stands separate with mutual promises to forbear. I accept his submissions as to the construction of the letter. He goes on to submit that even if an agreement can be spelt out it would not be an enforceable agreement because of uncertainty. He relies upon the passage in the speech of Lord Ackner in ***Walford v. Miles*** [1992] 2 A.C. at p.128 in support of his submission. At paragraph 138:

"The concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it is appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen negotiations by offering improved terms.

Mr. Naughton, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations.

"That still leaves needs the vital question - how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to 'police' such an agreement? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment whilst negotiations are in existence either party is entitled to withdraw from these negotiations at any time for any reason. There can thus be no obligation to continue to negotiate until there is 'a proper reason' to withdraw.

Accordingly, a bare agreement to negotiate has no legal content. Putting matters at its highest, this agreement is such a bare agreement."

So it is in this case. It would be unenforceable in my judgment by reason of uncertainty.

28. Finally, Mr. Sears, relied upon a passage in the statement of Mr. Ginger, the defendant's agent that the original submission of the interim claim on 29th June 2006 was a draft claim and that he treated it as such. That it was not a clause 30.3.3 notice and 30.3 did not come into effect. There is no merit whatsoever in this submission. It is clear when considering how the parties dealt with this matter, and more particularly how the claim was considered by the adjudicator, that there is no basis for drawing an inference supporting the evidence of Mr. Ginger, it was clearly intended to be a submission under 30.3.3.

29. Mr. Rowlands characterised the submissions made on behalf of the defendants, in terms of the ***Carillion*** case, at paragraph 85 as a mere scramble to find reasons to defeat the claim for summary judgment. He was right to so characterise those attempts, save for the issue I dealt with first.

30. I will now deal with the question of costs.

MR. M. ROWLANDS appeared on behalf of the Claimant.
MR. D. SEARS QC appeared on behalf of the Defendant.