Case No: HT-2014-000030

Neutral Citation Number: [2014] EWHC 4007 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

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

Date: 3 December 2014

Before :

MR. JUSTICE EDWARDS-STUART

- -

Between :

	ISG Construction Ltd	**Claimant**
	- and -	
	Seevic College	**Defendant**

- -
- -

Alexander Hickey Esq (instructed by **Pinsent Masons LLP**) for the **Claimant**
Rupert Choat Esq (instructed by **Birketts LLP**) for the **Defendant**

Hearing dates: 14th November 2014

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Judgment **Mr. Justice Edwards-Stuart:**

Introduction

1. This is an application for summary judgment by the Claimant ("ISG") to enforce an adjudicator's decision dated 5 September 2014 ("Adjudication No 1") and for a declaration that a decision by the same adjudicator (dated 10 October 2014) following a Notice of Adjudication dated 1 September 2014 ("Adjudication No 2") is invalid for want of jurisdiction.

2. In Adjudication No 1 the adjudicator, a Mr. Robert Juniper, decided that ISG was entitled to £1,097,696.29, being the sum claimed in ISG's Application No 13 plus interest, because the Defendant ("Seevic") had not served either a payment notice or a pay less

notice in accordance with the provisions of the contract.

3. The Notice of Adjudication in Adjudication No 2 was served four days before Mr. Juniper made his decision in Adjudication No 1. It is clear that Seevic, aware that it had not served the relevant notices in time, was seeking to frustrate or reduce the impact of the likely decision in Adjudication No 1 in the hope that it could obtain a decision in Adjudication No 2 that the value of ISG's works up to the date of the application was less than the amount claimed by ISG.

4. In that it succeeded. By his decision dated 10 October 2014 (as corrected under the slip rule on 13 October 2014) the adjudicator decided in Adjudication No 2 that the value of ISG's works as at the date of Application No 13 was £315,450.47 . In fact, the adjudicator accepted ISG's valuation of its measured works but did not accept the sum claimed by ISG for loss and expense, which was a little over £1 million. He concluded that the true value of the loss and expense claim was a little over £300,000 so that ISG had been overpaid. He therefore directed, on the assumption that Seevic had already paid ISG against Adjudication No. 1 that ISG should repay the difference, which was £768,525.36..

5. Seevic did not comply with the decision in Adjudication No 1, although it now accepts that it must do so, subject to the decision in Adjudication No 2. On 15 October 2014 Seevic issued a cheque in the sum of £315,450.47 in favour of ISG.

6. Mr. Alexander Hickey, instructed by Pinsent Masons, appeared for ISG. Mr. Rupert Choat, appeared for Seevic, instructed by Birketts,

The contract

7. A contractor's right to payment for work carried out depends on the terms of the contract. Prior to the passing of the Housing Grants, Construction and Regeneration Act 1996 ("the Act"), a builder who agreed to construct the building on the employer's land was not entitled to any payment if the work was abandoned before completion: *Sumpter v Hedges* [1898] 1 QB 673 (which is still good law - see Keating on Construction Contracts, 9th edition, at 4-003). In order to alleviate this position and to provide the contractor with adequate cash flow standard forms of building contract usually made provision for the contractor to receive payment by instalments. There is now a statutory right to payment by instalments under section 109 of the Act (as now amended by Part 8 of the Local Democracy, Economic Development and Construction Act 2009).

8. The contract in this case is the JCT Design and Build Contract 2011. In accordance with the Act, this provides for interim payments to the contractor at defined intervals. The

provisions are compliant with the statutory requirements.

9. The Contract Particulars provided that interim applications for payment were to be at monthly intervals from the date of possession, which was 11 February 2013. By clause 4.7.2, the sum due as an interim payment is an amount equal to the gross valuation of the work properly executed, as assessed by the contractor, less the sums already paid (and one or two other items, such as retention). The application by the contractor has to state the amount that the contractor considers to be due to him, and the basis on which that sum has been calculated. Following practical completion, applications are to be made at intervals of two months until the expiry of the Rectification Period.

10. The final date for payment of an interim payment is 14 days from its due date (which is the later of the specified date and the date of receipt by the employer of the interim application). If the employer disagrees with the amount of the contractor's interim application, it can serve a payment notice stating the amount that it considers to be due and the basis on which that sum has been calculated. That payment notice has to be served not later than five days after the due date.

11. The sum due to the contractor on an interim application is either the amount stated in the application or the lesser amount stated in the employer's payment notice, if it has served one. If the employer intends to pay less than the sum stated in the payment notice or interim application, as appropriate, because it claims to be entitled to withhold money on other grounds, it may give the contractor notice of that intention by serving a pay less notice no later than five days before the final date for payment. So, if the employer either does not agree with the sum claimed by the contractor in an interim application, or in any event does not intend to pay it, it must serve either a payment notice or a pay less notice, or both.

12. The only other circumstance under which the contractor is entitled to payment follows the submission of the Final Statement by the contractor. That sets out the Contract Sum, as adjusted in accordance with the provisions of the contract, and the sum of the amounts already paid. The Final Payment is the difference between these two sums (and so it may be a repayment).

13. There is no other entitlement to payment under the contract. The regime for payment under interim applications is set out in clauses 4.7 - 4.10. There are ancillary provisions in clauses 4.13 and 4.14 (which are the two alternative bases for valuation) and clause 4.15 (in relation to payment for off-site materials). The regime for the Final Payment is set out in clause 4.12.

14. It follows that the contractor has no entitlement to be paid the value of his work at any arbitrary date during the course of the contract. His only entitlement to payment is either

through the machinery for interim applications or, at the end of the project, following issue of the Final Statement. Conversely, if it has not complied with the notice provisions the employer has no right to seek a repayment of money paid to the contractor on the ground that either at the date of the last interim application or some subsequent date, the true value of the contractor's work was less than the gross amount stated in that application.

15. Section 108(1) of the Act gives a party to a construction contract the right to refer a dispute "arising under the contract" to adjudication at any time. This wording is reflected in Article 7 of the present contract, which provides that the parties may refer to adjudication any dispute that "arises under this contract".

The issues

16. In this application for summary judgment ISG seeks, not only to enforce the decision in Adjudication No 1, but also a declaration that the adjudicator in Adjudication No 2 had no jurisdiction to decide the matters referred in that adjudication because those matters are the same or substantially the same as those decided in Adjudication No 1.

17. The Contract Particulars state that any disputes were to be resolved finally by litigation and not by arbitration. There is, therefore, no jurisdictional impediment to the court making a final decision and giving a declaration on the rights of the parties in relation to the dispute that was the subject of Adjudication No 2.

18. Seevic has now accepted that, subject to the decision in Adjudication No 2, it has no defence to the application in respect of Adjudication 1. In relation to Adjudication No 2, ISG submits that, as between ISG and Seevic, the value of ISG's works as at the date of Application No 13 has been agreed because, in the absence of any notices served by Seevic, the value must be taken to be that stated in the application. Alternatively, ISG submits that, for essentially the same reason, there can be no dispute between the parties forming the subject matter of Adjudication No 2.

19. I now turn to ISG's first argument.

The value has already been determined

20. On behalf of ISG Mr. Hickey submitted that the question of the value of the works which Mr. Juniper decided in Adjudication No 2 had necessarily been decided by in Adjudication No 1 because the effect of the payment notice regime meant that there could be no dispute about the value of the work the subject of Application No 13.

21. Mr. Choat submitted that the valuation of ISG's works had been specifically excluded from Adjudication No 1. This submission is correct insofar as Mr. Juniper stated expressly in Adjudication No 1, at paragraph 5.9, that:

> "For the avoidance of doubt I record that I have made no decision as to whether or not that is the correct value of work undertaken by ISG."

22. The facts of this case are very similar to those of *Watkin Jones & Son Ltd v Lidl UK GmbH* [2002] EWHC 183 (TCC), a decision of His Honour Judge Humphrey LLoyd QC. Watkin Jones contracted with Lidl to build a new retail store at Bangor on the JCT Standard Form Building Contract for Contractor's Design, 1998 edition. The scheme for interim payments in that contract was very similar to that of the contract in this case in that it contained a provision for the service of payment and pay less notices. Watkin Jones submitted its valuation No 11 in the sum of £340,182. The first of the supporting documents attached to the application was headed "draft final account". Lidl neither served a payment or pay less notice nor paid the sum claimed. It submitted that the application was in truth the submission of a final account, in respect of which the contract did not require the service either a payment or pay less notice.

23. The adjudicator found in favour of Watkin Jones, in that he concluded that the application was "both a draft Final Account as well as an Application for Interim Payment" but that it was subject to the notice provisions of the contract. Lidl then referred a separate dispute to adjudication, namely: what was the "… properly calculated sum which ought to have been applied for in Watkin Jones' Application number 11 dated 17 July 2001?". The first adjudicator appointed by the RICS resigned as he concluded that he had no jurisdiction. Lidl then made a second application to the RICS who appointed a second adjudicator who decided that he did have jurisdiction. Watkin Jones brought Part 8 proceedings seeking a declaration that the second adjudicator appointed by the ICS had no jurisdiction and seeking an injunction to restrain Lidl from continuing with the adjudication.

24. The judge decided this issue in favour of Watkin Jones. At paragraphs [18] to [23] he said this:

> "18. I have come to the conclusion that Watkin Jones is right and the second, or in this case, the third adjudicator does not have jurisdiction. The point is a simple one. The jurisdiction of an adjudicator stems from the notice of adjudication. In this case, as I have recounted, the notice of adjudication referred to the amount which is the subject or should have been the subject, according to Lidl, of application number 11. It said that there were, or had been, differences about that sum.
>
> 19. The contract, in my judgment, makes it clear that when a contractor applies for payment it expresses its view as to the gross valuation required by clause 30.2A. To that extent this contract does not differ from many other contracts. This contract provides that the employer then has within five days

to decide whether that opinion as to the valuation is acceptable or not. If it is not acceptable then a notice must be given under clause 30.3.3. That will specify 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 (as provided by clause 30.3.3). In other words, the employer is to set out its view of what is due for the purposes of the gross valuation under clause 30.2A.

20. Although it is not material to the decision but it emphasises the commercial structure created by the provisions to which I have referred and does affect clause 30, an amendment was made to clause 30.3.2 deleting the existing clause and adding a new clause:

> 'Each application for an interim payment shall be accompanied by a detailed priced statement of work executed and material supplied referenced to the contract sum analysis'.

This enables the employer both to understand the contractor's valuation and to provide a reasoned statement of where its valuation departs from the contractor's valuation.

21. The contract is thus precise. If a notice is not given under 30.3.3 or 30.3.4 then the amount applied for must be paid. Watkin Jones' entitlement under those provisions was settled by the first adjudication. Lidl's attempt to avoid the absence of the notices by trying to characterise the application as one for a final account was rejected by the first adjudicator, who upheld Watkin Jones's view of the contract and the facts.

22. I do not consider that it is open to either party to this contract thereafter to go back over such ground, and certainly not the employer in this case, and thus to say that the valuation which ought to have been the subject of the payment stemming from an application number 11 was other than that applied for by Watkin Jones. Under this contract the route by which that contention may be raised is the route provided by clause 30.3.3. Its provisions are not therefore the same as those considered by Lord Macfadyen in *SL Timber*.

23. It is not possible, in my view, to avoid those consequences under this form of contract where no notice has been given by then asserting that the dispute, which undoubtedly does exist, is justiciable as it concerns prior questions namely what ought to have been applied for, what the valuation was, etc, since they are the rationale for clause 30.3.3. What Lidl might have done, after Mr. Bergin's decision, was to have sought a declaration from an adjudicator as to what is quite clearly in dispute which is the true value of the final account. In reality Watkin Jones' application was tantamount to a Final Account and Final Statement, as Mr. Bergin recognised. But I do not consider that Lidl's notice of adjudication can be read in that way in the light of the first adjudicator's decision, which decided that application number 11 was a reference to an application for an interim payment and not a reference to a

Final Account."

25. As paragraph [22] of the judgment makes clear, the judge concluded that it was not open to either party to "go back over such ground" in order to revisit the amount of the valuation in Application number 11. It seems to me that another way of putting this is to say that, as between contractor and employer, in the absence of any notices the amount stated in the contractor's application as the value of the works executed is deemed to be the value of those works so that the employer must pay the sum applied for.

26. Like His Honour Judge LLoyd QC, I consider that the starting point must be the Notice of Adjudication. That was dated 1 September 2014. The dispute was stated to be "… the value of the works carried out by ISG under the Contract". However, the Notice then made clear that the decision actually sought was:

> "A declaration as to the contractual value of ISG's works as at 13 May 2014 (being the date of ISG's Application Nr 13)".

27. In my view this can only be read as requiring the adjudicator to determine the true value of ISG's works at the date of Application No 13.

28. I agree also with His Honour Judge LLoyd's conclusion that if the employer fails to serve any notices in time it must be taken to be agreeing the value stated in the application, right or wrong. In my judgment, therefore, in that situation the first adjudicator must be in principle taken to have decided the question of the value of the work carried out by the contractor for the purposes of the interim application in question.

29. However, there is one small wrinkle. ISG's Interim Application No 13 was, correctly, in respect of the period ending on 11 May 2014. As I have said, Seevic's Notice of Adjudication dated 1 September 2014 sought a declaration as to the contractual value of ISG's works as at 13 May 2014, which was said to be the date of ISG's Application No 13 but was in fact two days later. It seems that 13 May 2014 was the date on which Seevic received the application.

30. Mr. Choat submitted that the difference between the two dates was important, although I did not understand his reason for asserting this - I think that it was to reinforce his point that this was not the same dispute.

31. As a matter of principle, I agree with Mr. Choat that if, contrary to his primary submission, the amount stated in an interim application is deemed to be the agreed value of the contractor's work as at the date of the application, it cannot of itself be the agreed value of the work at some other date. However, it seems to me that what Seevic was really asking the adjudicator to do was to value the work that was the subject of Application No 13. I say that because in the Notice Seevic treated the date of 13 May

2014 as being the date of ISG's Application No 13. This is put beyond doubt by paragraph 2.5 the Referral, which states that the adjudication was brought by Seevic to obtain a declaration "… as regards the correct value of ISG's works as at the date of Application No 13 (being 13 May 2014)".

32. Accordingly, I consider that ISG is entitled to a declaration that the decision of Mr. Juniper in Adjudication No 2 is invalid for want of jurisdiction. He decided a question that, as between the parties, must be taken to have been decided by him in the first adjudication.

33. However, in case I am wrong about this, or in relation to the relevance of the difference between the dates of 11 and 13 May 2014, I will consider the second way in which Mr. Hickey puts ISG's case.

Want of jurisdiction - no dispute

34. Mr. Choat submitted that if one party asserted that it had a right under the contract and the other party disagreed, then there is a dispute that can be referred to adjudication: that is the end of the matter. It is irrelevant if in truth the asserting party has no cause of action because there is a dispute about whether or not he has one.

35. Accordingly, Mr. Choat submitted, the adjudicator had jurisdiction to determine the value of the contractor's works at the requested date and then to decide the amount which is due to the contractor in the light of it. If that amount is less than the sum due under the last interim application, then the adjudicator can direct that the contractor is to repay the difference. Mr. Choat submitted, in effect, that it is irrelevant if, in spite of the fact that the contractor has no cause of action, the adjudicator makes a decision in his favour because that will simply be a case of an adjudicator giving the wrong answer to a question referred to him. It is a valid decision that is capable of being enforced.

36. In the context of arbitration clauses a similar submission has been upheld: see *Hayter v Nelson* [1990] 2 Lloyd's Rep 265. In that case Saville J (as he then was) held that it was no answer to a reference to arbitration that a claim is said to be indisputable so that there can be no dispute to refer to arbitration. If it were otherwise, he pointed out, it would mean that a claimant with an indisputable claim could not refer it to arbitration either and that an arbitrator who made an award in favour of such a claimant would have no jurisdiction to do so (at page 268).

37. However, these observations were made in the context of a policy in relation to arbitration that there is no good reason for the courts to strive to take matters out of the hands of the tribunal into which the parties have by agreement undertaken to place them

(page 269).

38. In the context of adjudication it may be said that the position in relation to policy is quite different. The policy of the legislation is to provide the parties with a swift and possibly rough, but effective, machinery for enforcing their entitlements under a contract on a provisional basis. To this end the courts tend to uphold adjudicators' decisions save in limited situations, such as where there has been a breach of natural justice or a want of jurisdiction.

39. In *David McLean Housing Ltd v Swansea Housing Association Ltd* [2002] BLR 125, His Honour Judge Humphrey LLoyd QC said, at paragraph 15, that the Scheme did not confer on an adjudicator a right to adapt, vary or otherwise modify the contract. That, I think, is a reference to jurisdiction, not to the exercise of a power. He then said, at paragraph 17:

> "If, for example, proceedings are necessary to enforce the award the defendant cannot be allowed to allege that the decision was incorrect, i.e. that the claimant has not got a right or cause of action as some necessary fact or aspect of the law is missing, and is in effect temporarily estopped by its agreement from doing so. But ultimately the claimant will, if necessary, have to establish its right and cause of action."

40. I am not sure quite what the learned judge meant by this paragraph. He seems to be saying that the defendant cannot challenge the decision of the adjudicator on the ground that some ingredient of the claimant's (otherwise good) cause of action is missing. However, he does not appear to be going so far as to say that a defendant cannot challenge the decision on the ground that it is based on a right or cause of action that does not exist as a matter of principle.

41. Whilst I would be very tempted to hold that an adjudicator does not have jurisdiction to decide that a party has a cause of action under a contract when in truth it does not have one, I do not consider that there are policy considerations relating to adjudication that would justify the court in departing from the principle stated by Saville J in *Hayter v Nelson*.

Is ISG entitled to the declarations sought?

42. In relation to Adjudication No 1, it is no longer disputed that ISG is entitled to summary judgment to enforce the decision.

43. Since the only issue referred to the adjudicator in Adjudication No 2 was the value of ISG's works at the date of Application No 13, and since I have concluded that this

question was decided in Adjudication No 1, that conclusion disposes of the dispute referred in Adjudication No 2. Accordingly, ISG is entitled to a declaration to that effect.

44. However, if I am wrong about the issue referred to the adjudicator in Adjudication No 2 as being the value of ISG's works on the valuation date for Application No 13, there is another route to the same result. On this application for summary judgment the court is being asked, in effect, to decide the rights of the parties in relation to the dispute raised by Adjudication No 2. In my judgment, the court is entitled to do just that (because, as I have already mentioned, there is no arbitration clause).

45. For the reasons that I have already given under this form of contract the employer has no right to demand a valuation of the contractor's work on any date other than the valuation dates for interim applications specified in the contract. Accordingly, if and in so far as in Adjudication No 2 Mr. Juniper was purporting to determine the valuation of the works at a date other than a valuation date (ie. 13 May 2014 instead of 11 May 2014), and then to make a financial award on the basis of it, he was in my judgment wrong to do so. Seevic had no contractual entitlement to such a valuation, still less to any financial award as a consequence of it.

46. I would therefore give summary judgment against Seevic in relation to Adjudication No 2 on this basis also.

The practical consequences if Seevic were right

47. The statutory regime would be completely undermined if an employer, having failed to issue the necessary payment or pay less notice, could refer to adjudication the question of the value of the contractor's work at the time of the interim application (or some later date) and then seek a decision requiring either a payment to the contractor or a repayment by the contractor based on the difference between the value of the work as determined by the adjudicator and the sums already paid under the contract.

48. If this were permissible, any such decision by an adjudicator would trump the contractor's interim application because the contractor would then be entitled to an amount representing the value of the work properly executed, as determined by the adjudicator, less the sums already paid. Of course, the amount determined by the adjudicator could be more than the amount claimed by the contractor in his last interim application, but in the nature of things this will not often be the case.

49. But this would give rise to an anomaly. If, following such a referral, the contractor were to refer a further dispute to adjudication, namely the sum due on the last interim application, the adjudicator would have to decide it. If, having done so, the adjudicator were to conclude that the employer had failed to serve a valid payment or pay less

notice, the sum due to the contractor would be the amount stated in the interim application and the adjudicator would have to decide accordingly. The employer would have to comply with that decision.

50. This is because of the well-known rule, which was explained by Jackson J (as he then was) in *Interserve v Cleveland Bridge* [2006] EWHC 741 (QB), at paragraph 43, in the following terms:

> "Where the parties to a construction contract engage in successive adjudications, each focused upon the parties' current rights and remedies, in my view the correct approach is as follows. At the end of each adjudication, absent special circumstances, the losing party must comply with the adjudicator's decision. He cannot withhold payment on the ground of his anticipated recovery in a future adjudication based upon different issues. I reach this conclusion both from the express terms of the Act, and also from the line of authority referred to earlier in this judgment ..."

51. If the outcome of the dispute about how much the contractor is entitled to be paid depends solely on the order in which the adjudications take place, then it looks as if something might have gone wrong. In my view it would have done.

52. This is for the simple reason that there is no freestanding entitlement to payment under this form of contract outside the framework of interim applications and the final application. The contractor's only entitlement to payment during the course of the project is by way of an interim application. Absent fraud, in the absence of a payment or pay less notice issued in time by the employer, the contractor becomes entitled to the amount stated in the interim application irrespective of the true value of the work actually carried out. The employer can defend itself by serving the notices provided for by the contractual provisions.

53. Accordingly, if either the contractor or the employer asserts that the contractor's right to payment at any particular time in the contract is a sum equal to the value of the work properly executed up to that time, less any sums already paid, that in my view would be to assert an entitlement that does not arise under the contract. In fact, it does not arise at all.

Seevic's request for guidance

54. In section G of his skeleton argument Mr. Choat asked the court to give guidance on what is alleged to be a practice by which the responding party serves its response to the referral later than the deadline directed by the adjudicator and, therefore, much closer to the deadline for the adjudicator's decision.

55. I am reluctant to accede to this request for two reasons. First, it involves embarking on a detailed analysis of the cases exchanged in the adjudication and their timing, which I do not regard as a proportionate use of judicial time. Second, from what little I have seen of the papers in the adjudication, there is at least a possibility that at one point or another both sides may have sought to obtain a tactical advantage from the timing of the service of submissions or in relation to the deadline for the decision. In those circumstances, it would be unsatisfactory to focus on the conduct of one party to the exclusion of that of the other.

56. However, I am prepared to repeat what Akenhead J said in *CJP Builders Ltd v William Verry Ltd* [2008] BLR 545, at [80], namely:

> "It is course open to any adjudicator in setting his or her procedure under Clause 38A to impose 'unless order' type arrangements, provided that the parties are given the right first to argue whether that is appropriate. It is sometimes said by some commentators that adjudication is or can be 'rough justice'. There is no need to make it even rougher by construing provisions such as those contained in Clause 38A as circumscribing a party's basic right to be heard."

57. I would only add that I agree with Mr. Choat's observation that, whilst the right to be heard is important, it is also a right to a reasonable opportunity to be heard. The essential feature of this is that both sides must be given the same or a similar opportunity having regard, of course, to the nature of their different cases. But in my view adjudicators have a difficult enough job as it is without the court seeking to impose further constraints or requirements on how they do it.

Conclusion

58. For these reasons I consider that ISG is entitled to summary judgment in the terms sought.

59. Subject to anything that counsel may say, I would have thought that ISG is entitled to its costs of the application assessed on the standard basis.

60. If the costs or the basis on which they should be assessed cannot be agreed, I will decide this and assess them on paper. To this end, Seevic may make brief submissions on ISG's costs, limited to two pages of A4 (twelve point font, 1.5 spacing, with one-inch margins). Those submissions are to be served within five days of the handing down of this judgment in draft. ISG may respond, at no greater length, within two working days.