Neutral Citation Number: [2023] EWHC 1653 (KB)

Case No: D60YM205
Appeal No QA-2021-000230

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 June 2023

Before :

MR JUSTICE CONSTABLE

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Between :

Safeera Akram	**Claimant/ Respondent**
- and -	
(1) Academy Doors and Windows Ltd **(2) Chander Shekhar Lal**	**Defendants/ Appellants**

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Rosana Bailey (instructed on direct access) for the Appellants/Defendants
James E. Petts (instructed by) for the Respondent/Claimant

Hearing date: 30 June 2023

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JUDGMENT

Mr Justice Constable:

A. Introduction

1. This is a renewed application for permission to appeal the judgment of His Honour Judge Hellman QC handed down following the trial between 17 and 21 May 2021 and 1 July 2021 and the cost orders which were made thereafter. The claim relates to a contractual dispute over construction works to a residential property in Academy Road, Isleworth ('the Property'). The Appellants/Defendants are Academy Doors & Windows Ltd (D1) and Chandler Shekhar Lal (D2). D2 owns and controls D1. The homeowner, Ms Sefeera Akram, is the Respondent/Claimant.

2. Judge Hellman QC awarded the Claimant £9,778.79 against D1 and £34,711.62 against D2. He dismissed the counterclaim against the Claimant. He also awarded her further sums under CPR Part 36 of £1,051 against D1 and £4,032 against D2. The Defendants were ordered to pay the costs of the proceedings, to be assessed on the standard basis until 10.11.20 and on the indemnity basis thereafter, plus interest on the costs. The Defendants were also ordered to make a payment on account of costs in the sum of £70,000. Judge Hellman QC's order was dated 9.9.21. It was subsequently amended twice, the final version being dated 29.9.21.

3. A stay of execution in relation to the judgment was initially granted by Knowles J on 15 December 2021, but was subsequently lifted nearly a year later by Ritchie J, on 2 December 2022. On 12 May 2023, permission to appeal the judgment of HHJ Hellman QC was refused by the Honourable Sir Stephen Stewart on the papers. An application to re-impose the stay was then refused by Bourne J on 24 May 2023. The procedural history of this appeal through 2022 to May 2023 is dealt with in the judgment of Bourne J, which I will not repeat.

4. The works contracted for comprised (1) the construction of a kitchen extension, (2) various works to the ground floor (3) the refurbishment of an upstairs bathroom (4) the supply and installation of replacement triple glazed windows for all the windows in the Property.

5. The Claimant contended that she contracted with D2 to carry out the main building works, i.e. the kitchen extension, ground floor works and bathroom refurbishment, for a contract price of £40,000. She says she contracted with D1 to manufacture, supply and fit six triple glazed windows, a skylight to the kitchen roof and a set of bifold doors for a contract price of £9,820.

6. By contrast, the Defendants contended that the Claimant contracted for all these works with D1 for a contract price of £47,000. The original price was £40,000 and that was later increased by £7,000 after the Claimant requested the additional supply of bifold doors and a skylight window. The identity of the contractor was relevant because D1 has ceased to trade and any award of damages made against it is likely to prove irrecoverable.

7. As to the substance of the contract, the Claimant contended that apart from the refurbishment of the bathroom, the contract price for all these works included both labour and materials. D2 argued that the cost of materials for the kitchen extension was not included. The Claimant also said that VAT was not payable on any of the

work. D2 says that the VAT at 20% was payable on all the work. It was common ground that the work was defective and incomplete. At the date of trial, some remedial work had already been undertaken and other remediable work remained to be carried out. The Claimant contended that D2 was liable for the defects. The Defendants contended that the Claimant was responsible because she permitted her friend, Mr Anil Popat, to act as de facto project manager, a task for which he lacked the necessary experience, and failed to consult an architect or engineer when this was required.

8. The Defendants counterclaimed for breach of contract. They contended that the relevant defendant, whether D1 or D2, was entitled to treat the contract as at an end because the Claimant refused to pay for it. They claimed the outstanding monies said to be due under the contract in the sum of £26,145.32.

9. As summarised by Judge Hellman QC at paragraph 12 of his judgment, the issues for the Court below to resolve were the identity of the contracting parties, the material terms of the contract, the causation of any damage, whether there was a repudiatory breach of contract, and the amount of damages.

B. The Judgment Below

10. The Judge commenced his analysis by determining that it was, in circumstances where at all material times the Claimant dealt directly with D2, for D2 to prove that he was acting on behalf of D1. This starting point is not the subject of appeal. The Judge found, for reasons that will be explored in the context of this appeal, that D2 had failed to prove that when he agreed the contract for building works he was acting for D1; and, moreover, that he was satisfied that D1 was acting on his own behalf. The Judge therefore accepted the Claimant's analysis of the identity of the contracting parties and concluded that the building works contract was with D2 and the window supply contract was with D1.

11. In relation to VAT, the Judge concluded that as D2 was not VAT registered, no VAT was payable with respect to the contract for the building works. In relation to the issue over labour and materials, he concluded that the building works contract was, apart from the upstairs bathroom, for both labour and materials. In terms of the cause of defective work, the Judge rejected D2's case that they were caused by the Claimant and/or Mr Popat, and concluded that they were caused by D2's own shortcomings. He concluded that D2 failed to establish that there were any payments outstanding when he stopped work on the project and determined that, even if there had been, that would not necessarily have been a repudiatory breach. As D2 had failed to establish a repudiatory breach by the Claimant, the Judge concluded that he was not entitled to terminate either contract.

12. The Claimant's claim for breach of contract against DI and D2 was therefore allowed, and the counterclaim dismissed. The sums awarded have been set out in paragraph [2] above.

C. The Grounds of Appeal

13. There are 18 grounds of appeal. In her helpful written skeleton argument and oral submissions, Ms Bailey for the Appellants, contended that 'adopting a broad approach', there were in fact 7 issues before the Court, as follows:

    i. Who were the contracting parties? (see Section E below)
    ii. Was VAT payable on the building services contract or on the element of the contract relating to building services? (see Section E below)
    iii. Given the number of builders who had visited the site since the parties parted company, can it be said that the Appellants or each of them are liable for the findings of the experts? (see Section G below)
    iv. Was it reasonable for the court to make findings about the work in question given that the Respondent had taken years to appoint experts to survey the works after several builders had attended the Property and carried out their own works? (see Section G below)
    v. Were the figures, as calculated by the Court, in keeping with realistic costings? (see Section F below)
    vi. Was it necessary to remove the entire skylight given that the limited nature of the complaint made with regards thereto? (See Section G below)
    vii. Was the costs order disproportionate to the claim? (see Section H below)

14. It is not necessarily easy to overlay each of these broad issues to the underlying grounds of appeal, which themselves are in certain respects unfocussed, repetitive and generalised.

15. Nevertheless, as fairly agreed by Ms Bailey in oral submissions, it seems appropriate to consider the appeal by reference to the way it is advanced in Ms Bailey's skeleton argument and oral submissions rather than to consider in turn each of the 18 grounds of appeal which, to the extent they are not the subject of submission within the skeleton argument, have not been pursued.

D. The Test

16. In accordance with CPR 52.6(1) permission to appeal may be given only where (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard. The present appeal is brought under 52.6(1)(a). The '*real prospect of success*' test is the same as that applied when the courts consider summary judgment. The court has to consider whether there is a realistic, rather than a fanciful, prospect of success.

17. Where the basis of a permission to appeal application is a challenge to a trial judge's findings of fact, there must be a real prospect of success that the appeal court will be satisfied that those findings were either unsupported by evidence before the judge or that the decision subject to challenge was one that no reasonable judge could have reached (see *The Mayor and Burgesses of the Haringey LBC v Ahmed & Ahmed* [2017] EWCA Civ 1861, CA at [29]-[31].

18. This is a difficult test to satisfy. See, for example, *Cook v. Thomas* [2010] E. W. C. A. Civ. 227:

> *"An appellate court can hardly ever overturn primary findings of fact by a trial judge who has seen the witnesses give evidence in a case in which credibility was in issue."*

19. See also *Re: B* [2013] 1 WLR 1911:

> "*[The appellate court] can and sometimes does test the judge's factual findings against the contemporaneous documentation and inherent probabilities. But where findings depend on the reliability and credibility of witnesses, it will generally defer to the trial judge who has had the great advantage of seeing and hearing the witnesses give their evidence. The question is whether the findings made were open to him on the evidence*".

E. The identity of the contracting parties and VAT

20. This issue is dealt with at paragraphs 18 to 49 of the Appellant's skeleton and was the issue which featured centrally in oral submissions. It is said, in summary, that the Judge erred when he found that D2 was the contracting party in the building contract, as opposed to D1, in circumstances where both parties agreed that there were discussions regarding VAT and the obtaining of relief from the VAT which was due. It is argued that such discussions would not have occurred if VAT had not been an important factor to the Claimant and her consistent and often repeated position that she was not liable to pay the same, as the building works were for the benefit of her mother. It is also pointed out, forensically, that it was only by amendment that she advanced a case against D2.

21. In oral submissions, Ms Bailey developed this argument by contending that the Judge wrongly approached the analysis by taking into account subjective matters, rather than objectively. She drew to the Court's attention the case of *Lumley v Foster & Co Group Ltd and Others* [2022] EWHC 54(TCC), which itself drew upon *Hamid v Francis Bradshaw Partnership* [2013] EWCA Civ 470, in which Jackson LJ stated that the relevant test was, '*...what a reasonable person, furnished with the relevant information, would conclude. The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible.'* There was unsurprisingly no dispute from Mr Petts, on behalf of the Respondent, in respect of this principle. It was pointed out that this 'error of law' articulation of the ground of appeal was new. It undoubtedly was. I have, nevertheless, dealt with the point on its merits allowing the Appellants the maximum degree of latitude.

22. In my judgment, it is clear that the Judge did not ignore or otherwise err, legally or factually, in relation to the VAT point, the common thread running through Ms Bailey's submissions on this issue. He did not fail to explain the potential conflict between the VAT point and the other factors he considered, which I refer to below. He did so clearly, albeit briefly, by finding that the Claimant did not necessarily know that D2 was unregistered for VAT. The Appellants are wrong to characterise the Judge's finding in this regard as being that '*the Respondent may not have been*

acquitted with the requisite knowledge about VAT". This is not what the Judge found. He simply found that she did not necessarily know that D2 was not VAT registered. Ms Bailey did not suggest that this was not a factually justified finding (there is nothing in the transcript that suggests that this information 'crossed the line' or that the Claimant was aware of whether D2 was or was not VAT registered); rather it was characterised in oral argument as something which was subjective and therefore to be ignored as a matter of law.

23. It is plain that the effect of the Judge's conclusion was that the subjective knowledge of D2 that D2 was not VAT registered and D1 was VAT registered was not a fact which 'crossed the line' between D2 and the Claimant. This is plainly what the Judge meant when he said that '*C would not necessarily have known* [that D1 was not VAT registered]'. As such it is not a factor which the objective observer would take into account as being relevant to (let alone determinative of) the objective analysis of who the contracting party was. In any event*, even if* the Claimant did know that D2 was not VAT registered, in circumstances where D2 was VAT registered the fact that the Claimant was regularly asking for the VAT relief documentation or otherwise saying that she should not be charged VAT is in no way inconsistent with the Judge's conclusion as to the contracting party. It is simply consistent with wanting VAT relief on those parts of the overall arrangement where VAT would be due.

24. It is clear therefore that the Judge correctly considered the VAT treatment point as one point in all the circumstances. The other of the circumstances considered by the Judge were:

(1) that the Claimant dealt at all times with D2. Note the Judge did not find that this was necessarily inconsistent with the contracting party being D1; merely that in these circumstances it was for D2 to establish that he was acting on behalf of D1;

(2) the absence of evidence from D2 as to the accountant's advice in relation to the establishment of D1, and the apparent inconsistency in D2's evidence in this regard (paragraph 16 of the Judgment);

(3) the oddity of the name of D1 if it was in fact a company undertaking general building work, and the absence of anything on D1's business card suggesting general building work (paragraph 17 of the Judgment);

(4) the fact that D1 only issued one invoice to the Claimant, which would be inconsistent with its obligations being VAT registered (paragraph 18 of the Judgment);

(5) the fact that the Claimant paid D2 in cash, which was more consistent with dealing with a sole trader than a VAT registered business (paragraph 19 of the Judgment); and

(6) the absence of evidence that D1 had been involved in any prior building project as general builder as opposed to supplier of windows. By contrast, D2 had been a builder for many years (paragraph 20 of the Judgment).

25. There is no real prospect of establishing that these factors were (a) not open to the Judge on the evidence and (b) were findings that no reasonable judge could make.

The Appellant tackled each individually through Ms Bailey's written submissions, stating in different ways that the factors were each insufficient to rebut the implication which may be drawn from the VAT aspect of the case. This mischaracterises the Judge's reasoning, because it is clear that he did not consider any single point to 'trump' the VAT point. Even if each individually might arguably be insufficient to conclude that D2 was the contracting party, the judge plainly took all the factors together, as he was entitled to. All these circumstances were plainly sufficient to permit the Judge to draw the conclusion he did.

26. As to the other points raised, the fact that the case against D2 was advanced by way of amendment is a forensic point which is fair to make; but it does not assist with the substantive question of whether the Judge erred in concluding that in fact and law the contracting party for the building work was D2. For the reasons set out above, there is no real prospect of such an appeal succeeding.

27. The evidence of Mr Popat is simply not relevant to the Judge's analysis and was not, in any event, inconsistent with the conclusion of the Judge when read as a whole.

28. Finally, there is no real prospect of success in arguing that the Judge wrongly '*pierced the corporate veil*'. He did no such thing. He decided, on the evidence before him, that D2 was the contracting party was in relation to the building works contract. For the reasons set out above, he was entitled to do so.

29. Therefore, there is no real prospect of the Appellant's argument that the Judge erred, in fact or law, in relation to the identity of the contracting parties and the related VAT issue.

F. The Figures

30. At paragraphs 50 to 52 of her skeleton, Ms Bailey argues for the Appellant that the Judge erred in relation to the inclusion of materials within the contract price. The Judge concluded:

> *24. C says the building works contract was for labour and materials. D2 says it was for materials only. It is common ground that part of the contract, for the renovation of the upstairs bathroom, was for labour only. C and Mr Popat were inexperienced when it came to building works. Whereas it would have been credible for C to agree to supply some items such as kitchen units, it is not, in my judgment, credible that she would have agreed to supply all the materials. None of the quotes from other builders which she had obtained for building works before instructing D2 were obtained on that basis. If C had agreed to provide all the materials, then D2's quote, would have been much less competitive[.]*
>
> *25. It is, in my judgment, more likely that the building works contract was, apart from the upstairs bathroom, for both labour and materials, and that is what I find. It follows that I accept C's evidence that materials which she purchased for the project were on account of sums owed to D2 and that she has therefore paid £38,917.53. This consists of £24,500 in direct payments and £14,417.53 in materials.*

31. The Appellant argues that they '*do not match the commercial reality as to what was achievable for the prices charged. This meant that the Learned Judge was unable to see the Counterclaim in the proper perspective*'.

32. The Judge's finding was a finding of fact. There is no real prospect of disturbing this factual finding. The purported difference with the prices from builders coming after is of little probative value in circumstances where it is well known that prices from contractors required to complete others' work and/or correct defects are often significantly more than would have been the case for taking single point responsibility for completing the whole scope from the outset, because of the risks involved in such completion/correction work. Moreover, the conclusion of the Judge was amply justified by the inference drawn from the evidence that all of the other, prior, quotes obtained by the Claimant were for labour and materials. This made it inherently unlikely that the quote from D2 was of a fundamentally different nature.

G. The Defective Works

33. The skeleton argument is no more than an attempt to re-argue points raised in the Court below rather than a focussed identification of the specific finding(s) of the Judge about which complaint is made and a clear articulation of the way in which it is said that the finding(s) were not open to the Judge on the evidence or were finding(s) that no reasonable judge could have reached. The overall conclusion that the defective works about which complaint was made by the Claimant were the responsibility of D2 is one which was open to the Judge on the evidence before him. It is clear that he preferred the evidence of the Claimant and considered that aspects of D2's evidence was 'evasive', even accounting for the fact that D2 was giving evidence through an interpreter.

34. Paragraphs 53 and 54 of the skeleton argument disclose no basis upon which the Court could conclude there is a real prospect of an appeal succeeding. The Judge hearing the evidence considered that Mr Popat was merely a go-between rather than a project manager, and rejected D2's evidence in this regard. The Judge was best placed to assess that evidence and there is no real prospect of disturbing that finding. In relation to the existence of an architect/engineer, the Judge again rejected D2's case on the reasoned ground that there was no evidence within D2's witness statement that he had asked either the Claimant or Mr Popat for such a professional to be involved.

35. The specific point about the skylight at item (vi) of paragraph 8 of the Appellant's skeleton was not elaborated, but does not disclose any sound basis of appeal.

36. There is no real prospect of challenging the award of damages for discomfort in circumstances where the Claimant had to endure remedial work which the Court determined was the responsibility of the Defendants.

The Counterclaim

37. The finding of the Judge in relation to the Counterclaim was entirely consistent with the findings about which complaint is made in the Appellant's grounds of appeal already considered. In light of the fact that the Appellant has no real prospect of success in relation to such prior findings, there is equally no prospect of success in relation to an appeal against the dismissal of the Counterclaim.

Costs

38. The Judge ordered £70,000 to be paid on account of costs. It is said that this sum is totally disproportionate to the true nature and size of the Claimant's case. It is said that no reasonable District Judge at a costs budget hearing would have permitted the Claimant to spend costs in the region of £140,000 in order to pursue damages of £44,338.00. It is not suggested there was such a cost budgeting exercise, merely that if there had been, this level of cost would not be sanctioned. It is also said that the Judge omitted to consider the degree and extent to which the level of costs that the Claimant had incurred made it impossible to settle the case in any sensible manner.

39. In dismissing the application for permission to appeal in relation to the costs order, I respectfully adopt and repeat the reasons given by Sir Stephen Stewart whilst refusing permission on the papers, namely that:

(1) The best person to evaluate the incurring of costs, having regard to the written submissions was the trial judge who had sat through 4 days of the trial. He was also in the best position to evaluate who was more correct in the submissions about the alleged inflation of the costs (D2's submission, Bundle page 95 para 18, C's response, Bundle pages 142 -144 paras 20-26)

(2) Further, (from Rule 44.3) (a) proportionality to the matters in issue is disregarded for costs awarded on an indemnity basis (after 11 November 2020, which period would include the costs of preparing for and conducting the trial), (b) any doubt as to reasonableness of costs incurred are, when assessing on the indemnity basis, resolved in favour of the receiving party and, (c) in any event, proportionality to the sums in issue in the proceedings is only one of the 6 factors to which the court is to have regard in Rule 44.3(5). C relied on the factors at 44.3(5)((c) & (d).

The Authorities

40. For completeness, I note that Ms Bailey cites 4 cases at the conclusion of her skeleton argument without identifying the purpose of the citations. The first three relate to piercing the corporate veil. They are simply irrelevant for the reason set out above. The fourth relates to proportionality of costs and ATE premiums. No particular principle is at stake and nothing in the case is inconsistent with my conclusion above.

Conclusion

41. For the reasons set out above, I therefore refuse permission to appeal.