Neutral Citation Number: [2010] EWHC 2244 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date 3 September 2010

Before:

HIS HONOUR JUDGE PETER LANGAN QC

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Between:

MBE ELECTRICAL CONTRACTORS LIMITED	**Claimant**
- and -	
HONEYWELL CONTROL SYSTEMS LTD LIMITED	**Defendant**

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MR RUPERT CHOAT (Solicitor Advocate) (instructed by **Cameron McKenna LLP**) for the **Claimant**
MR JAMES BOWLING (instructed by **DWF LLP**) for the **Defendant**

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JUDGMENT

His Honour Judge Peter Langan QC:

Introduction

1. The claimant ("MBE") has applied for summary judgment in an action brought to enforce an award made in an adjudication under the Housing Grants, Construction and Regeneration Act 1996 ("the Construction Act"). The agreement between MBE and the defendant ("Honeywell") contained an arbitration clause. Honeywell has applied for a stay of the enforcement proceedings pursuant to section 9 of the Arbitration Act 1996. In essence, Honeywell wants to have certain matters which it raises in answer to the application for judgment determined by arbitration. The position of MBE is that the arbitration clause does not bite on the enforcement proceedings. This is my judgment on the application for a stay.

2. The application was argued elaborately on both sides, with extensive citation of authority, and on a scale which, I have to say, was out of proportion to the amount involved and to the temporary quality of an adjudicator's award. If one stands back from the detail of the case, the answer to the question which I have to decide appears to be quite simple: and I do not think that the appearance is deceptive.

Narrative

3. On or about 14 November 2007 Honeywell engaged MBE as a sub-contractor to carry out certain electrical works on a project known as Northern Rock, Rainton Bridge. The agreement between the parties was made on Honeywell's standard terms and conditions which were printed on a purchase order, which was one of the contractual documents. Two clauses in those terms and conditions are material in these proceedings.

4. Clause 17 provided that Honeywell might make changes to the purchase order, following which "an equitable adjustment" would be made to the price: but:

> "[a]ny claim for adjustment under this provision may, at Honeywell's option, be deemed to be waived unless asserted in writing (including the amount of the claim) and delivered to Honeywell within 30 days from the date of the receipt by Supplier of the Honeywell-directed change to the Purchase Order."

5. Clause 30.3 is the applicable law and arbitration clause. I must set it out in full.

> "If Honeywell is a legal entity formed in a European, Middle Eastern and African country, unless section 30.4 is applicable, the construction, interpretation and performance hereof will be governed by the laws of the country under which the Honeywell entity is formed, excluding the UN Convention on Contracts for the International Sale of Goods of 1980 and any amendments or successors thereof if applicable in such country, and any dispute arising out of or relating to this Purchase Order will be finally resolved by a panel of three arbitrators in accordance with the Rules for Arbitration of the London Court of International Arbitration and judgment upon the award may be entered by any court having jurisdiction thereof. The place of arbitration and the language of arbitration will be selected by Honeywell. Either party may apply to the arbitrator seeking injunctive relief until the arbitration award is rendered or the controversy is otherwise resolved. Either party may also, without

waiving any remedy under this agreement, seek from any court having jurisdiction any interim or provisional relief that is necessary to protect the rights or property of that party, pending the arbitrator's determination of the merits of the controversy".

Honeywell is a company registered in England, so clause 30.3 applied to the contract. Clause 30.4 was not applicable, because it relates to contracts made by a company called Honeywell Middle East Limited, such contracts being governed by the laws of Dubai.

6. The contract between MBE and Honeywell did not provide for the resolution of disputes by adjudication. Accordingly, if that contract was a construction contract within Part II of the Construction Act (which is a matter in dispute), the adjudication provisions of the Scheme for Construction Contracts were applicable by virtue of section 108(5) of the Construction Act.

7. MBE carried out electrical works pursuant to the contract but, at the conclusion of the works, the parties were unable to agree on the final account.

8. On 28 May 2010 Honeywell served a Notice of Intention to Refer a Dispute to Adjudication on Honeywell. Mr Andrew Dixon FRICS was nominated as adjudicator. In the exchanges between the parties prior to the hearing before the adjudicator, Honeywell

   (1) raised an objection to the adjudicator's jurisdiction on the ground that the Scheme did not apply because the contract between the parties was not an agreement in writing as required by section 107 of the Construction Act;

   (2) relied upon the time-bar in clause 17 of the terms and conditions; and

   (3) sought to set off amounts said to be due from MBE to Honeywell for labour and supervision supplied to MBE's workforce.

9. The adjudicator decided to continue with the adjudication notwithstanding the objection to jurisdiction. Thereafter the parties argued their respective cases before him at considerable length. On 8 July 2010 the adjudicator issued an interim decision by which he decided the clause 17 point in favour of MBE, with reasons to follow. The final decision was issued on 16 July 2010. In that decision, the adjudicator (1) gave his reasons for rejecting the defence based on clause 17; (2) found that MBE had a claim which he valued at £37,744.20; (3) found that Honeywell was entitled to a set-off of £11,050.13; (4) ordered that Honeywell should forthwith pay to MBE (i) the balance of £26,694.07, (ii) interest in the sum of £4,810.78, and £100 compensation for late payment; and (5) directed that his fees and expenses of £18,403.44 should be paid by Honeywell.

10. On 3 August 2010 MBE issued the present action, which is brought to enforce the award of the adjudicator and an application for summary judgment under CPR Part 24. The expedited directions which are usual in these cases were given by HHJ Grenfell, and the application for summary judgment came before me for hearing on 19 August 2010. By that time Honeywell had issued its own application for the following relief: (1) an order that the proceedings be stayed pursuant to section 9 of the Arbitration Act; (2) alternatively, and only in the event that the court does not grant (1), (a) a declaration that the award is void because the arbitrator did not have jurisdiction, there being no contract

in writing for the purposes of section 107 of the Construction Act; (b) a declaration that the adjudicator's interpretation of clause 17 was wrong and/or a declaration on the true meaning and effect of clause 17; and (c) an order that the proceedings be dismissed.

11. It was hoped that all these questions could be disposed of in one day. In the event, the submissions made on the first question, the application for a stay, occupied a full five hours of court time. The issues on jurisdiction and clause 17 will have to be debated at a later hearing if, at the conclusion of this judgment, I decline to order a stay.

Statutory provisions

12. By section 9(1) of the Arbitration Act:

> "A party to an arbitration agreement against whom legal proceedings are brought (whether by way of a claim or a counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other party to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter".

13. By section 114(1) of the Construction Act, the Minister required to make by regulations a scheme called "the Scheme for Construction Contracts." By section 114(4), where any provisions of the Scheme apply "in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned."

14. The Scheme is contained in the Schedule to The Scheme for Construction Contracts (England and Wales) Regulations 1998.

15. By paragraph 1 of the Scheme "any party to a construction contract may give written notice of his intention to refer any dispute arising under the contract to adjudication."

16. By paragraph 20 "[t]he adjudicator shall decide the matters in dispute."

17. By paragraph 21:

> "In the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the parties in accordance with this paragraph".

(Curiously, the paragraph does not in fact say anything about delivery of the decision).

18. Paragraph 23 is in these terms:

> (1) In his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily with his decision or any part of it.
>
> (2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties.

19. By paragraph 24, section 42 of the Arbitration Act, which gives the court power to require a party to comply with a peremptory order of an arbitral tribunal, is to apply to the Scheme subject to certain modifications.

Discussion

Preliminary

20. It will, I think, be helpful to begin by clarifying a few preliminary points.

21. First, it will be recalled that Honeywell maintains that the whole of the agreement between the parties was not in writing, with the consequences that the contract did not fall within the Construction Act, and that the adjudicator lacked jurisdiction. This point will be open to Honeywell if I refuse a stay and proceed to hear MBE's application for summary judgment. However, in dealing with the application for a stay, it seems to me that I have to assume in favour of MBE that the contract was one to which the Scheme applied.

22. Secondly, it is common ground that at least *ultimately* what I would characterise as *the merits of the dispute* between the parties must, if either so elects, be resolved by arbitration. The object of the stay which is sought by Honeywell is that *at this stage* what may loosely be regarded as *questions of jurisdiction* should go to arbitration. I have used the word "loosely" because, while the contract in writing question is undoubtedly a jurisdictional one, there may be room for argument (the point has not yet been debated) on whether the clause 17 or time-bar issue is a jurisdictional or merits question. In any event, Honeywell's position is that these two matters should now be determined by arbitration, with the enforcement proceedings being stayed in the meantime.

23. Thirdly, it is accepted by MBE that, if clause 30.3 entitles Honeywell to require arbitration on a jurisdictional question at this stage, the court must grant a stay in accordance with the decision of the Court of Appeal in *Halki Shipping Corporation v Sopex Oils Ltd*. It is not suggested that there is any special reason which would justify refusal of a stay.

24. Fourthly, it was suggested on behalf of Honeywell that this is a case with important implications for international construction contracts. I emphatically disagree. This case is about the scope of an arbitration clause which is found in the context of a wholly domestic English agreement, which incorporates provisions, namely the Scheme, which are peculiar to English law.

Interpretation

25. he essence of the submissions made by Mr Choat on behalf of Honeywell is simple. The right to a stay of proceedings under section 9(1) of the Arbitration Act arises where a claim is brought "in respect of a matter which under the agreement is to be referred to arbitration". Clause 30.3 provides that "any dispute arising out of or relating to this Purchase Order including the breach, termination or validity thereof, will be finally resolved by a panel of three arbitrators". MBE's claim in this action arises out of or relates to the Purchase Order, it therefore falls within clause 30.3 and is subject to

arbitration, and accordingly the right of Honeywell to apply for a stay under section 9(1) has been triggered.

26. As one would expect, several answers to this apparently neat and tidy analysis have been provided by Mr Bowling on behalf of MBE. Some of them are less impressive than others.

27. It is said that, because an adjudicator's decision is only temporarily binding, it falls outside clause 30.3 which expressly deals with the *final* resolution of disputes and does not (save in the concluding words of the clause, to which I will come in the next paragraph) set out to deal with anything else. I accept that the phrase "finally resolved" in clause 30.3 may be fairly be used as a signpost which points to the result for which MBE contends, but it is no more than that. If I may change the analogy, the phrase is not a peg which is sufficiently strong to bear the weight of the desired conclusion.

28. Next, reliance is placed on the concluding words of clause 30.3, which permit a party, notwithstanding the arbitration, to go to court for "any interim or provisional relief that is necessary to protect the rights or property of that party". While an award by an adjudicator is undoubtedly of an interim and provisional kind, I do not think that it is caught by the words "necessary to protect rights or property". That language appears to me to be apt to cover, rather, such matters as orders for the preservation of documents, the carrying out of works which require to be attended to urgently, or (perhaps) the lodging of moneys pending the award.

29. MBE stands, as I see the matter, on much stronger ground when it attempts a reconciliation of clause 30.3 on the one hand and the Scheme on the other hand. On behalf of Honeywell, Mr Choat said that MBE was making the "extraordinary suggestion" that "section 9 of the Arbitration Act is in some way trumped by the Construction Act". That is not, in my judgment, a fair representation of the way in which MBE's case was put by Mr Bowling. He started from the premise that the parties had made a contract which, by an express provision, contained an arbitration clause, and, by the statutory implication of terms, incorporated the Scheme. The relationship between arbitration and adjudication is dealt with in paragraphs 21 and 23(2) of the Scheme. These provide, respectively, that the decision of the adjudicator is to be complied with immediately, and that the decision is binding and is to be complied with "until the dispute is finally determined by legal proceedings, by arbitration or by agreement".

30. One has in the last-mentioned provisions what appears to me to be a clear articulation of the "pay now, argue later" policy which underlies Part II of the Construction Act and the Scheme itself. That policy would be stultified if a reference to arbitration under clause 30.3 were to put a brake, whether permanently or otherwise, on the carrying through of the adjudication process to enforcement. Honeywell is free to take any points which are open to it in the arbitration, but this does not entitle it to set on one side the Scheme which is part and parcel of the agreement into which it entered. Objections as to the adjudicator's jurisdiction, if they are to bar enforcement of his award, will have to be made in the enforcement proceedings. Questions which relate to the merits of the dispute must be left to the arbitration. In that way, proper weight is given both to the arbitration clause and to the importation of the Scheme into the contract.

31. On this basis, in my judgment, one has the simple and correct answer to the question

raised by the application for a stay which must, in consequence, fail.

Case law

32. The decision of Dyson J in *Macob Civil Engineering Ltd v Morrison Construction Ltd* appears to be clearly against the availability of a stay for arbitration in cases of this kind. In *Macob* the plaintiff brought enforcement proceedings following an adjudication. The contract contained an arbitration clause. The defendant asserted that the decision of the adjudicator was invalid as he had been in breach of the rules of natural justice, and sought a stay so that the question whether there was indeed a decision could be referred to arbitration. Dyson J refused the stay. Two courses were open to the defendant: to accept that there was a valid decision and to refer it to arbitration on the merits, or to contend by way of defence to the enforcement proceedings that there was no valid decision. The defendant could not "approbate and reprobate" by asserting both "that the decision was a decision for the purposes of being the subject of a reference to arbitration, but was not a decision for the purposes of being binding and enforceable pending any revision by the arbitrator". Once a party had "elected to treat a decision as one capable of being referred to arbitration, he was bound also to treat it as a decision which was binding and enforceable until revised by the arbitrator" and could not have the enforcement proceedings stayed.

33. There is also a decision of HHJ Wilcox in a case of *Absolute Rentals Ltd v Gencor Enterprises Ltd*, which was cited by Mr Bowling. This was another case in which a defendant failed to obtain a stay on enforcement proceedings pending arbitration. (It appears that the arbitration would deal solely with the merits of the dispute, an objection as to jurisdiction not having been pursued before the judge.) Judge Wilcox said:

> The purpose of the Scheme is to provide a speedy mechanism for settling disputes in construction contracts on a provisional interim basis and by requiring decisions of Adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement, whether those decisions are wrong in point of law or fact, if within the terms of the reference. It is a robust and summary procedure and there may be casualties although the determinations are provisional and not final.

34. These judgments were delivered in 1999 (*Macob*) and 2000 (*Absolute Rentals*) and were the subject of lengthy and critical analysis by Mr Dominic Helps and Mr Peter Sheridan in an article in the *Construction Law Journal* in 2002. I have to say that I find the assault on the reasoning of Dyson J and the attempt which the writers make to confine these decisions within narrow limits unconvincing. The decisions have stood for a decade and have not been overruled. More recently, Sir Peter Coulson, writing extra-judicially (*Construction Adjudication* (2007), paragraph 3.88), has said that it "would make a nonsense of the adjudication process if the losing party could avoid the consequences of an adjudicator's decision by claiming that he disputed the decision and that that dispute should be referred to arbitration". I respectfully agree.

35. Mr Choat submitted that the decision of the Court of Appeal in *Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd* somehow opens the door to a disputed claim to enforce an adjudicator's decision being amenable to reference to arbitration. I do not agree. First, there was in *Collins* no criticism of the decision in *Macob*. Secondly, as Sir Peter Coulson has pointed out, the claim which was stayed in *Collins* was an ordinary

civil action for sums due under the contractors' final account. For some unexplained reason the contractors had not pursued their claim to adjudication. If they had done so and obtained an award, they could "have commenced proceedings in the TCC, which could not have been defeated by an application for a stay" (*Construction Adjudication*, paragraphs 2.151, 3.88).

36. A further point taken by Mr Choat was that it is open to parties to a construction contract which contains an arbitration clause expressly to exclude the right to go to arbitration once an adjudicator had made an award, as had been done in *Ferson Contractors Ltd v Levolux Ltd* [2003] EWCA Civ 11. The point being made was, I think, that MBE and Honeywell could have, but did not, adopt that course. That would not, in my judgment, assist Honeywell, for the simple reason that the Scheme expressly requires compliance with an adjudicator's decision pending the outcome of litigation or arbitration.

37. Mr Choat also relied on a passage from the speech of Lord Hoffmann in *Premium Nafta Products Ltd v Fili Shipping Company Ltd*, in which, dealing with the construction of an arbitration clause, Lord Hoffmann said:

> "If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance by another, one would need to find very clear language before deciding that they must have had such an intention."

I cannot see how this passage is of value to Honeywell in this case. First, this is not a "no rational basis" case: there is rationality in committing the provisional process of adjudication and enforcement to the adjudicator and the court and the definitive process of arbitration to the tribunal of three arbitrators. Secondly, there is "very clear language" in the Scheme which is prescriptive of this division of functions.

A footnote

38. Mr Bowling had a fall-back position. He submitted that the adjudicator had made a peremptory order within paragraph 23(1) of the Scheme and that this could be enforced under section 42 of the Arbitration Act, as modified by the Scheme. I would not have found this argument attractive. I do not think that one can treat as peremptory an order which does not on its face state that it is made as a peremptory order: the fact that the order states that it is to be complied with forthwith does not make it a peremptory one. Further, I doubt whether a mandatory injunction would, as Mr Bowling suggests, be an appropriate method of enforcing a simple obligation to pay a sum of money.

Disposal

39. It follows from what I have said that Honeywell's application for a stay must be refused. The remaining questions raised by the two applications which are before the court should be listed for hearing as soon as possible.