Neutral Citation Number: [2019] EWHC 1647 (TCC)

Case No: HT-2019-000163

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2019

Before :

THE HONOURABLE MR JUSTICE STUART-SMITH

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Between :

ABB AB HVDC	**Claimant**
- and -	
MC LAREN CONSTRUCTION (MIDLANDS AND NORTH) LTD	**Defendant**

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- -

Lynne McCafferty QC and Richard Osborne (instructed by **Hogan Lovells LLP**) for the **Claimant**
Jonathan Selby QC (instructed by **Pinsent Masons**) for the **Defendant**

Hearing dates: 15th May 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE STUART-SMITH

Mr Justice Stuart-Smith:

1. The background to this ruling on costs is well known to the parties and, for present purposes, may be shortly stated. I shall refer to the sub-contract between ABB and McLaren as "the Contract". It concerns a major project that appears to be seriously in delay.

2. On 3 May 2019 ABB purported to terminate the Contract, relying on various provisions, including clauses 18.1.1, 18.1.2 and 18.1.3. It requested assignment of all sub-contracts "forthwith". On 7 May 2019 McLaren rejected ABB's purported termination and asserted that it constituted a repudiatory breach of the Contract which McLaren accepted. It is therefore common ground that the Contract came to an end either on 3 or 7 May. Also on 7 May, ABB wrote to McLaren's subcontractors assuring them that they would be paid for work that they did after the termination of McLaren's contract. These assurances did not (and did not purport to) enable ABB to proceed directly with McLaren's subcontractors.

3. Two contract provisions have been identified that are important:

    i) If ABB's reliance on Clause 18.1 was well founded, Clause 18.5 required McLaren to assign all of its agreements with its sub-suppliers, which would include McLaren's sub-contracts with its sub-contractors;

    ii) In any event, Clause 18.9 (18.10 in the conformed version) provided that, on termination of the Contract, McLaren "shall immediately deliver to [ABB] all specifications, programs and other information, data and [McLaren] documentation regarding the Works which exist in any form whatsoever at the date of such termination, whether or not then complete". On its face this provision survived termination for whatever reason and is at least arguably broad enough to include McLaren's sub-contracts with its sub-contractors, though this is not accepted by McLaren.

4. There followed a sequence of events during which ABB repeatedly pressed for assignment of McLaren's subcontracts and provision of sub-contract documentation and McLaren either equivocated or simply failed to assign or provide the sub-contracts and sub-contract documentation. Specifically:

    i) McLaren did not assign the sub-contracts until after ABB had issued these proceedings with its application for interim relief;

    ii) In correspondence McLaren adopted the position that it was not obliged to assist ABB by the provision of assignments or documentation. Whether because of confusion on its part or for some other reason, McLaren appeared to offer to novate subcontract agreements, which is materially different because it would require all McLaren's pre-novation obligations and liabilities to be assumed by or imposed on ABB.

5. In circumstances which (on the information available to the Court) justify the view that McLaren was dragging its heels and not cooperating, ABB issued these proceedings on 10 May 2019. It need hardly be emphasised that the collapse of the Contract was a critical event which was capable of doing enormous damage to the

continuation of the project by ABB, particularly if McLaren's subcontractors did not cooperate with ABB going forward or, worse still, went off site. It is therefore not surprising that, in the circumstances prevailing on and by 10 May 2019, ABB issued its proceedings and its application for interim relief including (a) that McLaren should be restrained from amending or terminating its sub-contracts with its sub-contractors and (b) that McLaren should be compelled to assign its sub-contracts with its subcontractors.

6. Very shortly before ABB began lodging its proceedings with the Court, McLaren indicated that it was prepared to assign its sub-contracts. Shortly after ABB started lodging its proceedings, McLaren provided a copy letter of assignment accompanied by a list of subcontractors whose sub-contracts were said to be assigned.

7. The application for interim relief was listed for 15 May. As that date approached, McLaren protested that it was cooperating with ABB though not obliged to do so. At 16.58 on Monday 13 May 2019 McLaren provided electronic copies of 33 agreements. As has subsequently become clear, this disclosure had the following features that rendered it materially incomplete:

   i) About 50% of the agreements, as provided, were unsigned and others had only one signature; and

   ii) It was immediately apparent that not all sub-contractors were covered by the disclosure.

8. ABB therefore requested confirmation that what had been provided was comprehensive and requested final (executed) copies of sub-contracts. It also requested confirmation that McLaren had told its sub-contractors to take instructions from ABB from now on. Late on 14 May McLaren wrote such a letter, but did not provide it until during the hearing on 15 May.

9. In the light of these developments, at the hearing on 15 May ABB sought an order:

   i) Compelling McLaren to provide the final signed and executed versions of all of its sub-contracts for the project and, in the case of any sub-contracts that were not signed, an assurance that those sub-contracts were in fact agreed in the form already provided to ABB; and

   ii) Compelling McLaren to inform all its sub-contractors that ABB and not McLaren now had the right to require performance of their sub-contract works.

10. At the hearing on 15 May I made the order that is a matter of record. In substance, it gave ABB what they required as summarised at [9(i)] above. I took the view that no order was required as summarised at [9(ii)] because of the terms of the letter that had apparently been sent the evening before and provided to ABB at the hearing. I expressly based my approach to the order I made on case-management considerations without purporting to resolve any contractual issues. This was overtly done in the hope that compliance with the interim order would effectively take the heat out of ABB's overriding concern, namely that it was not in a position to deal directly with and require performance of the sub-contractors and was still unclear about their identity or the reliability of the information that had been provided.

11. One of the matters that was raised at the hearing by McLaren was that some documents might be on site, from which they had been excluded. On the evidence, this was first raised by McLaren late in the afternoon of 14 May. At the hearing, ABB promptly agreed to give access to the site for the purpose of retrieving documents and this was done on 16 May 2019. McLaren had requested access to site by its letter of 7 May to enable personal and corporate property to be retrieved and to permit a review and record of the state of the works; but that was not specified as being necessary for the purposes of accessing sub-contract documentation. McLaren raised the issue of site access again in the morning of 14 May; but again it was in the context of general retrieval of property and files and was not specified to be necessary in order to provide sub-contract documentation. On the evidence available to the Court, it was not until 4.22 pm on 14 May that McLaren linked its request for site access to "its site files, which we understand are likely to contain, inter alia executed copies where such exist."

12. The results of the further steps taken by McLaren in the light of my order showed that the disclosure of agreements that they had given on 13 May was materially incomplete. On the evidence of Mr Pilgrim:

    i) McLaren provided 31 new or replacement agreements;

    ii) Of those 31, 8 were in respect of sub-contractors for whom no agreements had previously been provided and who had not been included on McLaren's previous lists of sub-contractors. Accordingly, these sub-contracts could not be and had not been included in McLaren's statement on 10 May that it would assign its subcontracts or the assignments that took place on 11 May 2019;

    iii) The visit to site enabled McLaren to retrieve 26 signed documents and;

    iv) It emerged that one sub-contractor's agreement (HIL) incorporated a term requiring HIL's consent to any assignment, which had not previously been sought by McLaren.

13. In the light of these further developments, ABB requested further information and clarification from McLaren on 20 May 2019. However, my preliminary order served its purpose in that (despite some reservations) ABB concluded that it now had sufficient information to make it unnecessary to return to the Court to seek further relief.

14. The issue now is costs.

15. ABB submits that it had to come to Court to get the relief that it had been requesting from McLaren. It points to the history (some of which I have summarised above) as showing that McLaren was dilatory in the extreme until forced into action by the proceedings. In summary, it submits that (a) it was always entitled to assignments and copy documents pursuant to clauses 18.5 and 18.9 of the Contract and that (b) it has substantially succeeded in its applications. On that basis it submits that its costs of the applications should be paid by McLaren.

16. McLaren submits that the proceedings were unnecessary and precipitous and that its compliance with the order of the Court was only possible on being given access to the

site after permission was given on 15 May. On this basis, it submits that it should be paid its costs incurred to date. In support of its position it submits that the circumstances of the termination of the contract are contentious and that it does not accept the applicability of clauses 18.5 or 18.9. Furthermore, it submits that sub-contract documentation does not fall within the terms of clause 18.9. It suggests that there is and was no material difference between novation (as offered by McLaren) and assignment (as requested by ABB) and submits that ABB had not made sufficiently clear that it was prepared to pay sub-contractors going forward. It relies upon the fact that it promised the assignment of 33 sub-contracts on 10 May and effected at least some of those assignments (with copies to ABB's solicitors) on Saturday 11 May 2019.

17. I do not accept that the issuing of proceedings on 10 May was precipitous. McLaren points out that this was "only" a week or four working days after McLaren's purported termination. That is true as a matter of simple chronology, but it does not recognise the critical urgency of ABB's position, faced with a project that was already very substantially in delay, the loss of McLaren and the potential loss of McLaren's sub-contractors.

18. I reject the submission that it would have made a material difference if ABB had waited until Monday 12 May as it would by then have known of the weekend's assignments. As I have outlined above, the weekend's assignments were substantially incomplete and did not address the full scope of ABB's difficulties. I also reject the suggestion that either the proceedings or the interim application was an abuse of process. On any view, the proceedings raised serious issues to be tried and the application for interim relief was an appropriate step to take in the state of continuing uncertainty and partial co-operation; and, in the event, the application for interim relief was substantially successful.

19. I recognise that the relief obtained by ABB on 15 May was different from the relief claimed in the Particulars of Claim or, at least in part, as originally claimed in ABB's application for interim relief. However, these differences reflect (a) the need to secure the position on an interim basis and (b) the proper flexibility that is often necessary in contested interim proceedings that need to reflect and react to the current situation. I reject the submission that it was inappropriate for ABB to continue with the proceedings after 10 May. As I have already said, the application was successful and led to the disclosure of further information that was necessary if only for the assurance it gave that ABB had all necessary documentation. ABB therefore succeeded both in form and in substance, though I accept that there is no direct evidence about the specific importance of the eight "new" subcontractors save that their contract values were relatively small in the overall scheme of this project.

20. Lastly, McLaren submits that the interim proceedings have not determined the major dispute between the parties, which is whether or not ABB was justified in its purported termination of the Contract and what the financial consequences of that termination may be. I agree; but that is not a necessary or determinative feature of an application for the costs of interim steps in proceedings. The starting point is that ABB succeeded on 15 May 2019 in its interim application as adjusted to meet the changing (but consistently urgent) circumstances. McLaren correctly submits that "the parties are large organisations, both represented by respected and sophisticated solicitors." However, the submission that "there was never any suggestion that

McLaren would not do what ABB wanted but, at every stage, ABB has nit-picked and demanded everything immediately, without giving any recognition for (a) the fact that McLaren may take time to consider its position or (b) the time that would be required for McLaren to do what ABB wanted or (c) McLaren's own position at this difficult time" is not, in my judgment a full or accurate summary of what was happening, for the reasons I have attempted to summarise above.

21. For these reasons, I conclude that McLaren should pay ABB's costs of and occasioned by its interim application up to and including 20 May 2019, to be assessed if not agreed. I impose that cut off because the Court's direct involvement covers the period to the making of the order and the immediate consequences of the order. I am not satisfied that I have sufficient information to enable me to reach a reliable judgment about what happened after 20 May or whether it may reasonably be said that what happened thereafter should properly be included within an order for costs of and occasioned by the interim application.

22. I have costs schedules from ABB that have been the subject of later clarification, for which I am grateful. The later of those two schedules is dated 21 May. My understanding is that the two schedules do not include for work after 20 May. On this basis the parties should seek to reach agreement on the costs included in the two schedules. If agreement is not possible, I will resolve disputes at a short hearing on hand-down of this judgment. The parties should also submit a draft order in the light of this ruling, which should be agreed if possible.