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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY & CONSTRUCTION COURT (QBD)
[2020] EWHC 1320 (TCC)



No. HT-2020-000118

Rolls Building
Fetter Lane
London, EC4A 1NL
(Sitting remotely by Skype for Business)

Thursday, 2 April 2020

Before:

MRS JUSTICE JEFFORD

B E T W E E N :

MILLCHRIS DEVELOPMENTS LTD

Claimant

- and -

FIONA SELSKI WATERS

Defendant

MR N. TOWERS (instructed by Boys & Maughan Solicitors) appeared on behalf of the Claimant.

THE DEFENDANT did not attend and was not represented.

J U D G M E N T
(via Skype Conference)

MRS JUSTICE JEFFORD:

- 1 This is an application for an interim injunction. It is made without notice although, in fact, the respondent has notice of the application and has instructed solicitors who have indicated their opposition. They are not, however, representing the respondent on this hearing. I am told that they have been contacted and have indicated that, if this hearing were to be adjourned to a later date as an on notice application, they would then seek instructions from their client as to whether they were to represent her. That explains the nature of this hearing.
- 2 The applicant, Millchris Developments (“Millchris”), was, until November 2019, trading as a construction company. It carried out works to the property of Ms Waters at Pembroke Avenue in Margate. This is a residential property to which the adjudication requirements of the Housing Grants, Construction and Regeneration Act 1996 do not apply. The contract between the parties, however, included provision for adjudication.
- 3 On 23 March 2020, Ms Waters commenced an adjudication in relation to alleged overcharging on the final account, being a claim for about £45,000, and defects in the property, a claim for about £14,000. Mr Rayner was appointed by the RICS as the adjudicator.
- 4 By this application, Millchris seeks a prohibitory injunction prohibiting Ms Waters from continuing with the present adjudication, commenced by a reference dated 23 March 2020, and prohibiting her from submitting any further reference to adjudication against the applicant in relation to the contract. Millchris further seeks a mandatory injunction that, within 48 hours of being served with this order, Ms Waters must write to Mr Rayner withdrawing the reference to adjudication dated 23 March 2020.
- 5 The background is as follows. As I have said, Millchris is a construction company. It was incorporated in 2012. In the statement of Mr Champ, Millchris' solicitor, he explains that there were four directors of the company, including a Mr Millwater and a Mr Christian. From about October 2018, Mr Christian acted as managing director. Mr Millwater was not involved in the running of the company. Mr Millwater is, in the company returns, described as an insurance broker, and he appears to have only provided financing for the company. By November 2019, in light of the company's poor financial state, the work force was laid off and the company is no longer trading. It is still, however, an extant company and, for the avoidance of doubt, it has not been dissolved and it is not in liquidation.
- 6 Works to Ms Waters' property commenced in December 2017. It was not until 2 March 2018 that a written contract was entered into. The contract was made on the standard form JCT Homeowner Contract, which includes, at section K, provision for adjudication under an adjudication scheme for this contract. There are a number of such schemes, one being that administered by the RICS, which is the scheme that has been engaged on this adjudication.
- 7 A Mr Mark Cotton was the project manager on the correspondence. As I will come to Mr Millwater has made reference to Mr Cotton's attention to detail, and production of comprehensive a comprehensive file. Mr Cotton communicated with Mr Christian about alleged defects and the final account. It is Millchris' case that at a final account meeting on 19 August 2019 Mr Rigden agreed with Mr Christian that all matters had been resolved

other than the external works and that any remaining dispute was limited to a sum of £17,978.

8 Ms Waters denies that Mr Rigden had any authority to enter in such an agreement. It is Millchris' case that this is a central issue in this dispute and that Mr Christian is the only person on behalf of Millchris who could give evidence about it.

9 Sometime after that, it appears that Ms Waters met and then engaged a second surveyor who advised her that she had been substantially overcharged for the works. From October 2019, she has corresponded with Millchris about this, informing Mr Millwater of the advice that she has received from the second surveyor, and telling him that her surveyor was drawing up a final account.

10 By email dated 5 January 2020 Mr Millwater suggested a compromise between the parties. In that email he also told Ms Waters that the company was "closed" at the end of November, and he continued as follows:

". . . If you had met with me as agreed I would have been happy to inform you of this and the compromise we were proposing as the only client to continue to owe the company money.

I have been through the file in some detail. One of Mark's [Mr Cotton's] strengths was his attention to detail, and so the file is comprehensive."

11 On 6 January 2020, Ms Waters cancelled a meeting to discuss this proposed compromise on the basis that her surveyor was drawing up new accounts.

12 Then, on 20 March 2020, Ms Waters wrote indicating her claim of £45,000 for overcharging and providing her surveyor's final account and statement of defects. She said that many of these had been identified by the previous surveyor, although there were a few more. She indicated her intention to refer the matter to adjudication if she did not receive a positive response within 14 days. Despite that indication she then commenced this adjudication on 23 March 2020.

13 The adjudicator appointed, Mr Rayner, set out a timetable for the submissions of the parties allowing him to give his decision within the 21 days provided for in the contract. That included provision for the service of Ms Waters' submission by 30 March - I have not been told whether that has, in fact, been done - and for Millchris' response by 3 April, which is tomorrow.

14 On 26 March 2020, Mr Champ, on behalf of Millchris, wrote to the adjudicator arguing that it would not be possible to comply with these deadlines, particularly at a time of national crisis, and that because of the nature and complexity of the underlying dispute the matter was not suitable for adjudication and proceedings ought to be issued in the County Court. I pause there to observe that the sums involved are, by any measure, small against the background of many construction adjudications, and that the very reference to the issuing of proceedings in the County Court was some indication of that.

15 Millchris then required Ms Waters to withdraw the reference to adjudication on the basis that it would inevitably lead to a breach of natural justice. Mr Champ set out his position

more fully the following day in an email to the adjudicator which made many of the points which have subsequently been raised in his witness statement on this application and, to some extent, relied upon in Mr Towers' submissions. In that email Mr Champ said this:

"The respondent does not seek to escape its contractual agreement to adjudicate or rewrite the contract, but seeks the postponement of any adjudication proceedings until such time as the Covid-19 lockdown can be sensibly lifted."

- 16 The adjudicator recognised the difficulties posed by the Covid-19 crisis, but did not consider that he should not proceed. In summary, however, he proposed a two week extension to the time for his decision. Ms Waters agreed to this. Millchris did not agree, Mr Champ saying in his email of 28 March:

"I could not advise my client to even consider agreeing to an extension under 3 months at least but even that may not be enough as some reports are saying that it could take several months if not longer to get this situation under control."

In other words, Mr Champ's position was that this adjudication could not properly proceed until after the Covid-19 crisis, and the restrictions that the Government had imposed or advised in consequence, were over. Since then, the applicant's efforts would appear to have been directed to this application and not to the preparation of its submissions in the adjudication, other than in the respects that I shall come to.

- 17 With that background, I turn to the nature of the application for an injunction. Paragraph 9.4.1 of the TCC Users' Guide indicates that the court may grant declaratory relief expeditiously and at the outset of an adjudication if, for example, the adjudicator lacks jurisdiction and it would be a waste of time and resource for the parties to engage in an adjudication that would result in an inevitably unenforceable decision. A small number of examples of that sort of case, where it may be appropriate to grant declaratory relief, are given in the Guide. It is not in issue, however, that the court also has jurisdiction to grant an injunction which will inhibit or stop the progress of an adjudication, which is, as it were, the flipside of declaratory relief.

- 18 It is useful to refer to the notes in the *White Book* which summarise the position as follows:

"Interlocutory relief or declaratory relief for the same effect will rarely be granted to interfere with an ongoing adjudication but the court has jurisdiction to grant such relief and will do so in unusual circumstances."

I do not propose to recite the entirety of the note or the cases is referred to but, as I have said, examples are then given. The examples are: a declaration that the adjudicator did not have jurisdiction and the adjudication must be aborted; unreasonable and oppressive conduct; and where the adjudicator is appointed pursuant to a provision that was not a term of the contract so that no useful purpose would be served by allowing the adjudication to proceed where the decision would be unenforceable. Finally, there is reference to the decision of the Court of Appeal in *Bresco Electrical Services Limited in Liquidation v Michael J Lonsdale Electrical Ltd* [2019] EWCA (Civ) 27 where the company was in

insolvent liquidation and seeking to refer a dispute to adjudication but the adjudication would be futile because the decision could not be enforced.

- 19 I pause there to say that so far as the reference to unreasonable and oppressive conduct is concerned, it is taken from the case of *Mentmore Towers Ltd v Packman Lucas* [2010] EWHC 457 (TCC). That case was concerned not with the issues that arise in this case but with a case where a party had been prohibited from bringing further court proceedings in relation to particular disputes and had then sought to adjudicate the same matters.
- 20 The note to the *White Book* is an accurate summary of the law. Mr Towers also specifically refers to the first instance decision in *Bresco* in which Fraser J said that such injunctions ought only to be granted very rarely and in very clear cut cases. The passage in the *White Book* that I have referred to also reflects that. Fraser J's decision at first instance was upheld in the Court of Appeal and I agree with his summary that such injunctions ought only to be granted very rarely and in very clear cut cases.
- 21 There was some suggestion in Mr Towers' skeleton argument that there was a jurisdictional objection because two disputes had been referred to adjudication rather than one. Mr Towers' submissions have been focused far more on the argument that there are exceptional circumstances which mean that this injunction should be granted.
- 22 It is also relevant to say something about Mr Champ's approach, as set out in his witness statement, insofar as it informs my own approach. By reference to the *American Cyanamid* principles, Mr Champ argues that there are serious issues to be tried as to the claim for damages in the total sum of £60,000; as to whether Ms Waters is bound by the concession of Mr Rigden; and as to whether she has, in law, a claim for overcharging. All of these matters are susceptible to determination in adjudication and are within the jurisdiction of the adjudicator. They are not jurisdictional objections.
- 23 In this case, in considering whether there is a serious issue to be tried, I am concerned not with the underlying dispute but with whether there is a serious issue to be tried as to whether the adjudication should not proceed. In other words, I am concerned with whether there is a serious issue that the adjudication will necessarily be conducted in breach of natural justice with the inevitable result that any adjudication decision will be unenforceable for breach of natural justice. As the passage I have referred to in the *White Book* indicates it would be wholly exceptional and unprecedented for such an injunction to be granted on that basis. It may be possible to conceive of circumstances in which the court could reach the conclusion that the adjudication would inevitably be conducted in breach of natural justice - for example if the adjudicator had made plain that he only intended to hear from one party - but that is far from the present case.
- 24 The position is that in any adjudication the issues are addressed on a short timescale: that is the nature of adjudication. As I have said, Millchris, however, argues that the position is so exacerbated by the Covid-19 crisis, coupled with the particular circumstances of Millchris and, indeed, its solicitor, that the adjudication cannot be conducted fairly and in accordance with the rules and principles of natural justice. These are the exceptional circumstances that Mr Towers has relied upon in his submissions.
- 25 So far as Mr Champ, the solicitor, is concerned, for personal reasons, which I do not intend to recite in this judgment, he is largely self-isolating. He has rarely gone into his office, and the first time that he had done so in some considerable time was Monday of this week. No

possible criticism can be made of him for the care that he is taking for the protection of his own family and his own health, and I want to make it clear in this judgment that I make absolutely no such criticism of him in that respect. It would be wholly wrong of me to do so. However, he says that, as a result, he cannot obtain the necessary paperwork and he cannot take a proof of evidence from Mr Christian, the relevance of whose evidence I have already alluded to.

- 26 Instructions having been taken during the course of this hearing, I am told that the comprehensive file of papers to which Mr Millwater had referred in his email is with Mr Millwater, who is at his home in Kent. No explanation has been offered as to why those papers could not be transported from Mr Millwater to Mr Champ or, indeed, to anyone else who may be instructed to advise in this matter. No thought appears to have been given to scanning these papers or to going through them in a remote conference. Mr Champ has said that he cannot take a proof of evidence from Mr Christian. Again, further instructions were taken during the course of the hearing. It appears that Mr Millwater has attempted to contact Mr Christian but without success. That, it seems to me, is the reason that a proof cannot be taken from Mr Christian and that has nothing to do with the Covid-19 crisis. It is simply a function of the short timescales in adjudication which would apply anyway, and the difficulty, for whatever reason, in contacting a potential witness during that short period.
- 27 So far as Mr Millwater is concerned, although I recognise that this is not a point that Mr Towers has prayed in aid in his oral submissions, Mr Champ says that Mr Millwater is responsible for organising 10,000 people at 300 locations in the United States to work remotely. Mr Millwater is an insurance broker. He was not involved in the project day to day, and there is no evidence before me as to the evidence relevant to this dispute that Mr Millwater could give and is inhibited in giving in the current circumstances.
- 28 No reference at all is made to Mr Cotton, the project manager, who had been praised for his attention to detail. There is no evidence that any attempts have been made to contact him or proof him or otherwise engage him in this adjudication. It would be speculation to suggest that there might be a reluctance to approach him because he was made redundant, or that he might be reluctant to be involved because he was made redundant, but if either of those matters was the case that would always have been the position and nothing to do with the Covid-19 crisis.
- 29 Mr Champ has also said in his statement that he is very busy working for other clients remotely. The interrelationship between a quick adjudication and heavy workloads is often an issue for someone with a busy practice. This is not unusual and there is no explanation for why a colleague or counsel could not be engaged to deal with this matter. Again, this is nothing to do, or very little to do, with the Covid-19 crisis. In any event, the adjudicator has offered a two week extension of time to which Ms Waters has consented. It may well be the case that some of the matters such as the taking of the proof and contacting witnesses could have been ameliorated by accepting that two week extension but Millchris' position has remained bluntly that no adjudication in accordance with the rules of natural justice could take place before the end of the Covid-19 crisis.
- 30 Lastly, and Mr Towers places particular emphasis on this, the adjudicator has indicated that he wishes to undertake a site visit on 14 April. He has said that he will do so bearing in mind the Covid-19 guidelines on social distancing. Millchris argues that this is wholly unfair because neither Mr Champ, nor counsel, nor any party representative could attend. Further, Mr Towers submits that fairness dictates that Millchris should have the opportunity

to instruct their own independent surveyor, who should also be in attendance at such a site visit, but that there is insufficient time to do so, particularly in light of the health crisis. He submits that it would be wholly unfair for a site visit to take place without a surveyor in attendance representing Millchris.

- 31 It seems to me, with respect, that these submissions are misconceived. There is no right for the parties to be present at a site visit. There is no right for other surveyors to be present at a site visit. The site visit and inspection could be conducted by the adjudicator perfectly properly on his own. It is, of course, Ms Waters' property and she is likely to be present for some or all of the time, and it may assist the adjudicator to have particular matters pointed out to him, but the parties could list the matters they wished the adjudicator to see and he could then observe them alone. The entire visit could be recorded. There could be some form of remote attendance, for example the adjudicator could use his phone or other device to show the parties remotely what he is looking at, and seek their assistance in observing the matters that are in issue between the parties.
- 32 All of these are options. No thought appears to have been given to any of these as options. They have simply been disregarded on the basis that nothing other than a site visit attended by party representatives and, in particular, surveyors, would comply with the rules of natural justice. That simply does not follow. It does not represent some principle of the fair conduct of adjudication - indeed, it flies in the face of the nature of an adjudication - and it does not follow that adopting one of the options that I have indicated, or some other option that the adjudicator may see fit to adopt, would necessarily result in a breach of natural justice.
- 33 It follows, in my judgment, applying the *American Cyanamid* principles, that there is simply no serious issue to be tried in this case. Looking at the matter another way, and as Mr Towers has put it in this application, there are no exceptional circumstances that mean that this injunction ought to be granted. Accordingly, in my view, this injunction should not be granted, and the adjudication should proceed.

CERTIFICATE

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