

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY & CONSTRUCTION COU



No. HT-2022-000424
HT-2022-000430

Rolls Building
Fetter Lane
London, EC4A 1NL

NCN: [2023] EWHC 1718 (TCC)

Wednesday, 14 June 2023

Before:

MR ADRIAN WILLIAMSON KC
(Sitting as a Deputy Judge of the High Court)

B E T W E E N :

ISG RETAIL LIMITED

Claimant

- and -

FK CONSTRUCTION LIMITED

Defendant

MR S BRANNIGAN KC (instructed by Mantle Law) appeared on behalf of the Claimant.

MR A HICKEY KC and MR M MESFIN (instructed by Addleshaw Goddard) appeared on behalf of the Defendant.

J U D G M E N T

THE DEPUTY JUDGE:

- 1 In these two Part 8 claims, the claimant, whom I will refer to as ISG, seeks declarations against the defendant, whom I will refer to as FK, in respect of two projects which, for shorthand, I will refer to as the Barberry Project and the Triathlon Project.
- 2 The parties entered into sub-contracts, in materially identical form, for both projects. Both disputes turn upon a proper construction of cl.2 of the Sub-Contract conditions, which deals with payment:

“(4) Not later than 9 days before the dates for payment set out in the Schedule of Due Dates referred to in the Numbered Documents or in the Sub-Contract Particulars (as the case may be) (in each case the "Application Date"), the Sub-Contractor shall submit applications for payment to ISG's financial manager/surveyor...

(6) The due date for payment of any interim payment shall be the relevant date set out in the Schedule of Due Dates referred to in the Numbered Documents or in the Sub-Contract Particulars (as the case may be) or, if the relevant application for payment issued by the Sub-Contractor is submitted after the date required for its submission by clause 2(4), the relevant due date shall be postponed by the number of days by which the application is late. Provided always that the last due date for payment of any interim payment shall not fall after the expiry of a 3 month period following practical completion of the Works, and the Sub-Contractor shall not be entitled to submit any application for payment in respect of any interim payment after expiry of that period...

(8) ISG shall notify the Sub-Contractor in writing within 5 days of the relevant due date for any interim or final payment of the amount ISG considers to be, or to have been, due at the due date and the basis on which such amount is calculated. The payee shall submit a tax invoice to the payer for payment of the notified amount. Subject to any Pay Less Notice issued in accordance with clause 2(10), the payer shall pay the payee the amount so notified on or before the final date for payment...

(10) The payer shall, if it intends to pay less than the sum stated as due from it in the relevant payment notice issued by it in accordance with clause 2(8), issue notice of that intention (a "Pay Less Notice") not later than 2 days before the final date for payment of the relevant notification of the amount specifying both the amount the payer considers to be due to the payee at the date the notice is given and the basis on which that amount has been calculated. Where a Pay Less Notice is given, the payment to be made on or before the relevant final date for payment shall be not less than the amount stated as due in that notice...

(17) The Sub-Contractor and where applicable ISG shall submit any application for payment or invoice in accordance with clause 31. In

relation to the requirements for giving notices under clauses 2(4), 2(8) or 2(10) it is immaterial that the amount then considered to be due may be zero. Payments shall be made by ISG to the Sub-Contractor if the relevant notice states that the amount is due to the Sub-Contractor, and by the Sub-Contractor to ISG if the relevant notice states that the amount is due to ISG.”

3 I turn then to the Barberry project. The background is that the parties entered into a sub-contract for roofing and cladding works in September of 2021. On 28 July 2022, FK submitted its application for payment number 14, which I will refer to as AFP 14, in the amount of £1.489 million with a due date of 6 August 2022. ISG did not submit a payment notice, and their purported Pay Less Notice dated 9 September 2022 was late.

4 ISG did not pay AFP 14, and so FK commenced an adjudication before Mr Shawyer in October 2022. By his decision dated 17 November 2022, the adjudicator concluded that AFP 14 was a notice which complied with s.110A(3) of the Housing Grants Construction and Regeneration Act 1996, which I will refer to as “the Act”. Thus, in the absence of a compliant pay less notice, the notified sum was due.

5 The dispute with which I am concerned therefore centres upon AFP 14 which, it is common ground, was submitted on 28 July 2022. It is also common ground that the combined effect of cl.2(4) of the Sub-Contract conditions and the Sub-Contract particulars was to oblige FK to submit this application not later than 27 July 2022 so that AFP 14 was submitted a day late.

6 In those circumstances, the key question between the parties is whether FK can avail themselves of the provisions of s.110B of the Act.

7 Section 110B provides as follows:

“(1) This section applies in a case where, in relation to any payment provided for by a construction contract—

- (a) the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but
- (b) notice is not given as so required.

(2) Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the date on which the notice referred to in subsection (1)(a) was required by the contract to be given.

(3) Where pursuant to subsection (2) the payee gives a notice complying with section 110A (3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given.

(4) If—

- (a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (1)(a) is required by the contract to be given, to notify the payer or a specified person of—
 - (i) the sum that the payee considers will become due on the payment due date in respect of the payment, and
 - (ii) the basis on which that sum is calculated, and
- (b) the payee gives such notification in accordance with the contract, that notification is to be regarded as a notice complying with section 110A (3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection),”

8 Reference should also be made to s.110A(3), which explains what is required of a notice to comply with that subsection:

“(3) A notice complies with this subsection if it specifies—

- (a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and
- (b) the basis on which that sum is calculated.”

9 Finally, it should be noted that the effect of s.111(1) and s.111(2b) of the Act is that where a payee gives a notice complying with s.110A(3), the payer is obliged to pay the sum so notified, subject to a pay less notice.

10 The question for me, therefore, is whether AFP 14 was, by virtue of the provisions of s.110B(4), to be regarded as a notice complying with s.110A(3).

11 Although in their evidence and skeleton arguments, various other issues were canvassed by the parties, leading counsel for the parties narrowed the question before me, essentially, to one of statutory interpretation, namely whether AFP was submitted “in accordance with the contract” as required by s.110B(4)(b) of the Act.

12 As to that, Mr Brannigan KC, who appeared for ISG, made the simple submission that AFP 14 was, by virtue of being sent a day late, not “in accordance with the contract.” Mr Hickey KC and Mr Mesfin, who appeared for FK, argued that AFP 14 was saved by the provisions of cl.2(6), which allowed a late application of payment, nonetheless, to be treated as valid.

13 It is, therefore, necessary to consider cl.2(6), which provides, so far as material, as follows:

“The due date for payment of any interim payment shall be the relevant date set out in the Schedule of Due Dates referred to in the Numbered Documents or in the Sub-Contract Particulars (as the case may be) or, if the relevant application for payment issued by the Sub-Contractor is submitted after the date required for its submission by

clause 2(4), the relevant due date shall be postponed by the number of days by which the application is late...”

- 14 In my view, this clause, although it allows a late application for payment to be treated as valid, does not render it an application “in accordance with the contract” for the following reasons:
- (1) the application is still late and therefore not in accordance with the contract. Indeed, cl.2(6) refers in terms to lateness;
 - (2) the application is by definition “submitted after the date required for its submission,” i.e., it is not in accordance with the contract.
- 15 As an alternative, FK submit that ISG is estopped from relying on the lateness of AFP 14 to assert that it is not “in accordance with the contract.” It was far from clear to me what species of estoppel was in play here and, in any event, I have considerable doubts as to whether a party can ever be estopped from relying on its statutory rights. See *Keen v Holland* [1984] 1 WLR 251 (CA), pp.251, 261 and 262, and *C Spencer Ltd v MW High Tech Projects UK Ltd* [2019] BLR 643 at para.68.
- 16 However, it is not, in my judgement, necessary to decide that point. Whatever form of estoppel was sought to be relied upon here, it is apparent that there was not the clear and unequivocal representation, convention or promise, which is the necessary first step in the finding an estoppel.
- 17 What would be necessary, in my view, would be a statement from ISG to the effect that although AFP 14 was late, they were treating it, nonetheless, as in accordance with the contract. There was no such statement. By contrast, in their pay less notice of 9 September 2022, ISG said in terms that AFP 14 was submitted on time on 22 July 2022. They were, in fact, in error in so stating, but they can scarcely be said to have been accepting that what was, in fact, a late application was on time. Moreover, and in any event, cl.2(6) permits non-compliant applications to be dealt with. Thus, even if ISG had been aware the application was out of time, their pay less notice was quite consistent with dealing with the application under cl.2(6) and not accepting that it was compliant with the terms of the contract.
- 18 For these reasons, in my view, the estoppel case does not begin to be established, and it is not necessary to consider issues such as reliance, change of position and the like. FK scarcely sketched their case on these issues in any event.
- 19 It follows that ISG are entitled to some or all of the declarations which FK seek, as set out at para.17 of the particulars of claim. ISG have accepted that they are not entitled to the declaration sought at para.14, which relates to a case in respect of natural justice, which has now been abandoned.
- 20 For completeness, I should note that Mr Brannigan KC submitted that a recent adjudication decision of Mr Molloy, dealing with the overall account between the parties, might affect the outcome of the Barberry Proceedings. I do not really understand why this is so, but I think that the point is an academic in view of my above conclusions.

- 21 Turning, then, to the Triathlon Proceedings, the background is that this project was for the construction by ISG for DHL of a distribution centre. In September 2021, ISG entered into a sub-contract with FK for associated roofing and cutting works.
- 22 On the 22 September 2022, FK submitted their application for payment, which I will refer to as AFP 15, to ISG in the sum of approximately £3.3 million. This was on the basis of a gross valuation of circa 7.1 million, retention of circa £0.2 million and previous payments of circa £3.6 million.
- 23 On 6 October 2022, ISG responded to AFP 15 with a payment notice showing a gross valuation of £4 million, allowing for retention of approximately £0.1 million, contra-charges of approximately £3.6 million and previously certified sums in a similar amount. The bottom line of this notice was, “Amount due to sub-contractor -£3,331,864.08.”
- 24 ISG submit that the effect of this notice was that FK thereby became the payer to ISG as payee of that sum. FK accept that under the Sub-Contract they could, in principle, be the payer of sums as notified, but submit that this was not an effective payment notice for that purpose.
- 25 This dispute, too, was the subject of an adjudication, this time initiated by ISG. By a decision issued on 26 January 2023, Mr Eyre concluded that this payment notice did not have the effect that FK became liable to pay the sum of £3.331 million to ISG.
- 26 I think that Mr Eyre was right to so conclude.
- 27 The starting point is cl.2(8) of the Sub-Contract, which provides that:

“ISG shall notify the Sub-Contractor in writing within 5 days of the relevant due date for any interim or final payment of the amount ISG considers to be, or to have been, due at the due date and the basis on which such amount is calculated. The payee shall submit a tax invoice to the payer of payment of the notified amount. Subject to any pay less notice issued in accordance with clause 2(10), the payer shall pay the payee the amount so notified on or before the final date for payment.”

- 28 Further, in approaching a payment notice or similar document, the court needs to bear in mind the relevant authorities helpfully summarised in the recent judgment of Joanna Smith J in *Advance JV v Enisca Ltd* [2022] EWCA 1152 (TCC) at para.47:

“In summary, the approach to be taken by the court as gleaned from these authorities is as follows:

- i) In considering the true construction of a contractual notice (including notices under the payment regime in the Act – see *Grove Developments* per Coulson J at [21]-[22] and *S&T* in the Court of Appeal at [58] per Sir Rupert Jackson), the question is not how its recipient in fact understood it. Instead “the construction of the notices must be approached objectively. The issue is how a reasonable recipient would have understood the notices”, i.e. a reasonable

recipient "circumstanced as the actual parties were" (see Mannai at 767 G-H and 768B-C per Lord Steyn).

ii) The notice must be construed taking into account the "relevant objective contextual scene", i.e. the court must consider "what meanings the language read against the contextual scene will let in" (see Mannai at 767H and 768A-B). This means that, amongst other things, the reasonable recipient will be credited with knowledge of the relevant contract (see Mannai at 768B-C).

iii) The purpose of the notice will be relevant to its construction and validity (Mannai at 768E).

iv) The court will be "unimpressed by nice points of textual analysis or arguments which seek to condemn the notice on an artificial or contrived basis" (Thomas Vale per HHJ Kirkham at [43]; Grove at [26]). Instead, as Sir Peter Coulson says in paragraph 3.36 of his book on Construction Adjudication (4th ed. 2018), focusing specifically on Pay Less Notices:

"The courts will take a commonsense, practical view of the contents of a payless notice and will not adopt an unnecessarily restrictive interpretation of such a notice...It is thought that, provided that the notice makes tolerably clear what is being held and why, the court will not strive to intervene or endeavour to find reasons that would render such a notice invalid or ineffective".

v) There is no principled reason for adopting a different approach to construction in respect of different kinds of payment notices (for example because some may give rise to more draconian consequences than others) as that would be contrary to the guidance in Mannai (see Grove at [27]). However:

"the particularly adverse consequences for an employer that follow from, say, a contractor's unanswered application/payment notice are relevant to the test of the reasonable recipient".

vi) To qualify as a valid notice, any payment notice must comply with the statutory (and, if more restrictive, the contractual) requirements in substance and form (Henia per Akenhead J at [17]). Payment notices and Pay Less Notices must clearly set out the sum which is due and/or to be deducted and the basis on which the sum is calculated. Beyond that, the question of whether a notice is or is not a valid notice is "a question of fact and degree" (Grove at [29] and S&T at [53]).

vii) Over and above the question of whether a notice has achieved the required degree of specificity, will be the additional question of whether the document that is alleged to constitute a valid notice was in fact intended to be such and whether it is "free from ambiguity" (Henia at [17] and Grove at [42]). The sender's intention is a matter to

be assessed objectively taking into account the context. (Jawaby at [43], [59] and [63]).

viii) Although in *Grove*, Coulson J observed that payment notices must make plain what they are, there is no requirement for a particular type of notice, such as a Pay Less Notice, to have that title or to make specific reference to the contractual clause in order to be valid: "[t]he question is whether, viewed objectively, it had the requisite intention to fulfil that function" (*Surrey & Sussex* at [65]).

ix) One way of testing the validity or otherwise of a Pay Less Notice will be to see whether it "provided an adequate agenda for an adjudication as to the true value of the Works..." (*Henia* at [32] and *Grove* at [26]).

29 I accept, of course, as Mr Brannigan submits, that clause 2(8) has the automatic effect that, where a compliant notification is given, the payer is obliged to pay the notified amount, subject only to any pay less notice.

30 However, I do not think that, viewed objectively in the relevant context, the document of 6 October 22 did notify FK that they were obliged to pay £3.331 million or any sum to ISG.

31 I say this for the following reasons:

- (1) The document is headed "Sub-Contractor Payment Notice," which suggests that it is concerned with what the Sub-Contractor is to be paid;
- (2) In the second paragraph, it is stated that "Actual payment will follow in due course," which is an odd phrase to use if the main contractor, ISG, was expecting payment to it;
- (3) As already noted, the bottom line of the document was that there is an "amount due to Sub-Contractor," albeit in a negative amount. If ISG had wanted to make clear to FK that they were now the payer, one would expect to see the phrase "amount due to contractor";
- (4) The breakdown at bundle B, p.255 states that the payment terms are "As Sub-Contract Conditions, Subject to receipt of invoice from Subcontractor in accordance with the subcontract terms and conditions." Why would the Sub-Contractor be raising an invoice if he was the payer and not the payee? Mr Brannigan submits that this was an inadvertent carry over from previous payment notices, but the wording scarcely made clear to FK that they were now expected to pay over £3 million to ISG.

32 Mr Brannigan submits that the negative figure can only mean that a sum was due from FK. He submits that if ISG had simply intended to say that nothing was due either way because the overall account was negative, they would not have issued a payment notice. There is some force in this submission but, in my view, it cannot outweigh the points set out above. Moreover, the context for the payment notice includes the fact that on 11 August 2022, ISG had sent a document to FK, variously described as a pay less notice and a payment notice, which showed an overall negative figure. It is not suggested that this amounted to a notification under clause 2(8) that the sum was due to ISG.

- 33 In summary, the payment notice of 6 October 2022 is a confused and confusing document. It is not at all clear to me, seeking to understand how a reasonable recipient might have viewed it in context, what this document was seeking to achieve but, in my view, what it does not do is communicate clearly or at all to FK that they were now liable to pay £3.3 million to ISG.
- 34 For completeness, I should say that Mr Hickey KC submitted that the backup to the payment notice of 6 October 2022, did not set out adequately, “to the basis on which such amount is calculated,” as required by clause 2(8). He submitted that sums were included which were speculative, unparticularised and the like. I do not agree with this criticism of the payment notice. It seems to me that all that is required for the party drafting the payment notice is to set out an outline agenda for an adjudication, which ISG did. They are not required to do so in the sort of detail that might be required in a TCC trial, nor are they advised only to include items which are properly analysed and developed. If the recipient disputes the merits, it can initiate an adjudication on the merits but a notice is sufficient, if it indicates, in general terms, the points being taken. See *Grove Developments Ltd v S&T (UK) Ltd* [2018] All ER 925 at para.26.
- 35 One final relevant point to note is that cl.2(8) contains the phrase:

“The payee shall submit a tax invoice to the payer for a payment of the notified amount.”

Both parties, for their own forensic reasons, submitted that such an invoice was not a condition precedent to payment, and I did not, therefore, hear full argument on this issue. In any event, my above conclusions are sufficient to dispose of the Part 8 claim. Now, as a matter of the impression, it seems to me that cl.2(8) envisages three distinct steps: firstly, notification of the amount given; secondly, submission of a tax invoice; and, thirdly, payment of the sum of the invoice. If that is right, then, in the absence of a tax invoice from ISG to FK, FK could not have become liable to pay any amount in any event.

- 36 For all these reasons, it follows that ISG were not entitled to the relief claimed in the Triathlon Part 8 proceedings. I will hear counsel as to the appropriate relief in view of my conclusions set out above.
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CERTIFICATE

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