



Neutral Citation Number: [2017] EWHC 2394 (TCC)

Case No: HT-2017-000231
Case No: HT-2017-000190

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/09/2017

Before :

MRS JUSTICE O'FARRELL DBE

IN AN ARBITRATION CLAIM

Between:

SQUIBB GROUP LIMITED

Claimant

- and -

POLE 2 POLE SCAFFOLDING LIMITED

Defendant

IN THE MATTER OF AN ARBITRATION

Between:

POLE 2 POLE SCAFFOLDING LIMITED

Claimant

- and -

SQUIBB GROUP LIMITED

Defendant

Paper application determined without a hearing
in accordance with CPR PD62

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.

.....

MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell:

1. This is an application by the claimant in Claim No HT-2017-000231, Squibb Group Limited (“SGL”), for an extension of time for appealing against an arbitration award dated 27 April 2017 made by Mr John L Riches, FRICS, FCInstCES, FCIOB, FCIArb, MAE (“the Award”) and for permission to appeal on a point of law pursuant to section 69 of the Arbitration Act 1996 (“the Act”).
2. The application is opposed by the defendant, Pole 2 Pole Scaffolding Limited (“P2P”), on the grounds that the appeal was brought outside the 28 day time limit for such applications provided by section 70(3) of the Act and there are no sufficient grounds for extending the time limit.
3. There is also an application by SGL, the defendant in Claim No HT-2017-000190, to set aside this court’s order dated 17 August 2017 granting P2P permission to enforce the Award and seeking an order staying P2P’s application for permission to enforce the Award pending SGL’s application for permission to appeal and the determination of any appeal.
4. This matter arises out of a contract entered into by the parties in about June/July 2014 under which P2P agreed to provide scaffolding in respect of demolition works carried out by SGL at 28 Great Tower Street, London.
5. A dispute arose between the parties as to sums claimed by P2P in respect of additional scaffolding works carried out and sums counterclaimed by SGL in respect of delays and defective work.
6. On 13 January 2016 the parties entered into an *ad hoc* arbitration agreement in respect of the disputes and Mr Riches was appointed as the arbitrator.
7. On 27 April 2017 the Award was made, directing that SGL should pay P2P £87,052.43 plus interest in the sum of £10,567.76, a total of £97,620.19 plus VAT, in respect of P2P’s claims. No sums were awarded in respect of SGL’s counterclaims.
8. On 27 April 2017 the arbitrator sent an email to the parties’ representatives, informing them that the Award had been completed and that it would be released following payment in respect of his fees and expenses.
9. On 5 May 2017 P2P paid its half share of the arbitrator’s fees and expenses but SGL failed to pay its share until 26 June 2017, following an indication by the arbitrator that he would commence legal proceedings to recover them.
10. On 26 June 2017, following receipt of his fees and expenses, the arbitrator published the Award.
11. In accordance with section 70(3) of the Act, the statutory 28 day period for an application for permission to appeal under section 69 of the Act expired on 25 May 2017.
12. On 11 August 2017 P2P issued an Arbitration Claim Form, seeking permission to enforce the Award pursuant to section 66 of the Act. On 17 August 2017 an order was

made, granting P2P permission to enforce the Award in the same manner as a judgment or order of the court to the same effect.

13. On 17 August 2017 SGL issued an Arbitration Claim Form, seeking an extension of time and permission to challenge the award.
14. On 31 August 2017, SGL issued an application seeking to set aside the order dated 17 August 2017 and for a stay of P2P's application pending determination of SGL's application for permission to appeal and any appeal.
15. The issues to be determined are whether it is appropriate to extend the period for issuing the arbitration claim and, if so, whether permission to appeal should be granted. Further, the court must consider whether the order of 17 August 2017 should be set aside and whether there should be a stay on enforcement of the award pending determination of any appeal.

Arbitration Act 1996

16. The material provisions of the Act are as follows:

69 Appeal on points of law

- (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings...
- (2) An appeal shall not be brought under this section except –
 - (a) with the agreement of all the other parties to the proceedings, or
 - (b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

- (3) Leave to appeal shall be given only if the court is satisfied –
 - (a) that the determination of the question will substantially affect the rights of one or more of the parties,
 - (b) that the question was one which the tribunal was asked to determine,
 - (c) that, on the basis of the findings of fact in the award-
 - (i) the decision of the tribunal on the question is obviously wrong, or

- (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
- (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

70 Challenge or appeal: supplementary provisions

- (1) The following provisions apply to an application or appeal under section 67, 68 or 69...
- (3) Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellants was notified of the result of that process...

80 Notice and other requirements in connection with legal proceedings.

- (5) Where any provision of this Part requires an application or appeal to be made to the court within a specified time, the rules of court relating to the reckoning of periods, the extending or abridging of periods, and the consequences of not taking a step within the period prescribed by the rules, apply in relation to that requirement.

- 17. CPR 62.9 and CPR 3.1 make provision for the court to extend time for making an application for permission to appeal even after the 28 day period has expired.

The applicable principles to the application for an extension of time

- 18. The principles applicable to the court's discretion to extend time in respect of such arbitration claims were set out by this court in *Rollitt v Ballard* [2017] EWHC 1500, although it should be noted that the application in that case should have been made and determined under section 80 of the Act and not section 79: *AOOT Kalmneft v Glencore International AG* [2001] EWHC 464 per Colman J at paras.43 – 48.
- 19. I have considered the application for an extension of time by reference to the relevant factors identified by Popplewell J. in *Terna Bahrain Holding Co. WWL v Al Shamsi* [2012] EWHC 3283 at [27] to [31]:

“27....

- (1) Section 70(3) of the Act requires challenges to an award ... to be brought within 28 days. This relatively short period of time reflects the principle of speedy finality which underpins the Act, and which is enshrined in section 1(a). The party seeking an extension must therefore show that the interests of justice require an exceptional departure from the timetable laid down by the Act. Any significant delay

beyond 28 days is to be regarded as inimical to the policy of the Act.

(2) The relevant factors are:

- (i) the length of the delay;
- (ii) whether the party who permitted the time limit to expire and subsequently delayed was acting reasonably in the circumstances in doing so;
- (iii) whether the respondent to the application or the arbitrator caused or contributed to the delay;
- (iv) whether the respondent to the application would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were permitted to proceed;
- (v) whether the arbitration has continued during the period of delay and, if so, what impact on the progress of the arbitration, or the costs incurred in respect of the arbitration, the determination of the application by the court might now have;
- (vi) the strength of the application;
- (vii) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined.

(3) Factors (i), (ii), and (iii) are the primary factors.

28. I add four observations of my own which are of relevance in the present case. First, the length of delay must be judged against the yardstick of the 28 days provided for in the Act. Therefore a delay measured even in days is significant; a delay measured in many weeks or in months is substantial.

29. Secondly, factor (ii) involves an investigation into the reasons for the delay. In seeking relief from the Court, it is normally incumbent upon the applicant to adduce evidence which explains his conduct, unless circumstances make it impossible. In the absence of such explanation, the court will give little weight to counsel's arguments that the evidence discloses potential reasons for delay and that the applicant "would have assumed" this or "would have thought" that. It will not normally be legitimate, for example, for counsel to argue that an applicant was

unaware of the time limit if he has not said so, expressly or by necessary implication, in his evidence. Moreover where the evidence is consistent with laxity, incompetence or honest mistake on the one hand, and a deliberate informed choice on the other, an applicant's failure to adduce evidence that the true explanation is the former can legitimately give rise to the inference that it is the latter.

30. Thirdly, factor (ii) is couched in terms of whether the party who has allowed the time to expire has acted reasonably. This encompasses the question whether the party has acted intentionally in making an informed choice to delay making the application. In Rule 3.9(1) of the Civil Procedure Rules, which sets out factors generally applicable to extensions of time resulting in a sanction, the question whether the failure to comply is intentional is identified as a separate factor from the question of whether there is a good explanation for the failure. This is because in cases of intentional non-compliance with time limits, a public interest is engaged which is distinct from the private rights of the parties. There is a public interest in litigants before the English court treating the court's procedures as rules to be complied with, rather than deliberately ignored for perceived personal advantage.
31. Fourthly, the court's approach to the strength of the challenge application will depend upon the procedural circumstances in which the issue arises. On an application for an extension of time, the Court will not normally conduct a substantial investigation into the merits of the challenge application, since to do so would defeat the purposes of the Act. However if the Court can see on the material before it that the challenge involves an intrinsically weak case, it will count against the application for an extension, whilst an apparently strong case will assist the application. Unless the challenge can be seen to be either strong or intrinsically weak on a brief perusal of the grounds, this will not be a factor which is treated as of weight in either direction on the application for an extension of time. If it can readily be seen to be either strong or weak, that is a relevant factor; but it is not a primary factor, because the court is only able to form a provisional view of the merits, a view which might not be confirmed by a full investigation of the challenge, with the benefit of the argument which would take place at the hearing of the application itself if an extension of time were granted.”

Length of delay

20. In this case the delay after the expiry of the statutory period was from 25 May 2017 until 17 August 2017, a period of 84 days. That is a substantial delay compared with the yardstick of 28 days provided for in the Act.

Explanation for the delay

21. The delay from 25 May 2017 until 26 June 2017 arose as a result of SGL's failure to pay its share of the arbitrator's fees and expenses prior to expiry of the statutory period, for which no explanation has been provided.
22. When the Award was completed, the arbitrator stated clearly that he required payment of his fees and expenses before the Award would be released. The arbitrator was entitled to exercise a lien over the Award, pending receipt of his fees and expenses pursuant to section 56 of the Act.
23. The onus was on SGL to take appropriate steps to ensure that it preserved any right to challenge the Award. Failure on the part of a party to pay for an arbitration award, without any explanation, is not a reasonable excuse for delay in issuing its challenge: *S v A&B* [2016] EWHC 846; *The Faith* [1993] 2 Lloyd's Rep 408.
24. By 6 July 2017 SGL had decided to appeal the Award, as set out in the email of that date from SGL's solicitors, Pinder Reaux, to P2P's solicitors, Palmers. In response, Palmers drew attention to the fact that any appeal would be outside the statutory 28 day period. The arbitration claim was not issued until 17 August 2017. No explanation has been provided for the additional period of delay.
25. In the witness statement of Jack Swaddling of Palmers Solicitors dated 7 September 2017, it is suggested that SGL's motive in seeking to appeal is simply to delay enforcement of the Award. Reliance is placed on the fact that SGL issued its claim form on the same date that the order permitting enforcement of the Award was sealed and served. However, SGL had already indicated that it intended to appeal and there is no evidence that the delay was deliberate, rather than careless.
26. There is no reasonable explanation for the delay of 84 days following expiry of the statutory period for issuing a challenge to the Award.

Contribution to delay by others

27. There is no evidence that P2P or the arbitrator caused or contributed to the delay in issuing a challenge to the Award.

Irremediable prejudice to P2P

28. In his witness statement, Mr Swadling submits that P2P would suffer substantial prejudice if SGL were granted an extension of time to challenge the Award. P2P is a modest company with a turnover of £400,000 approximately in comparison with SGL, a company with a turnover of £40 million approximately. P2P's claim in the arbitration was for outstanding invoices in the sum of just over £100,000 in respect of works carried out in 2014-2015. The Award is for the modest sum of £97,620.19. In those circumstances, it is submitted that any further delay in enforcing the Award,

together with any requirement to respond to an appeal, would place considerable financial strain on P2P.

29. The general principles of the Act, as set out in section 1, are that parties to arbitration should have autonomy and finality in the determination of their disputes. Those principles are reflected in the short time limits for any party to raise a challenge to an award. I am satisfied that any delay in receiving payment of the sum awarded and any additional expense incurred in enforcing the Award would cause irremediable prejudice to P2P. That is a very significant factor in this case.

Strength of the application

30. The application by SGL is defective in that no skeleton has been filed as required by PD 62 Para.12. However, I have considered the merits of the proposed legal challenge to the Award as a relevant factor in the application for an extension of time.
31. The arbitrator determined that both parties' terms and conditions were incorporated by reference into the scaffolding contract. SGL seeks permission to appeal on the ground that the arbitrator erred in law in reaching such conclusion. On behalf of SGL, Rupinder Kaur Bains of Pinder Reaux explains in her witness statement dated 16 August 2017 that this ruling affected the arbitrator's findings in relation to the following items:
- i) P2P's claim for £1,800 in respect of an abortive site visit requested by SGL; and
 - ii) P2P's claim for £780 in respect of the removal of windows not shown on the drawings issued by SGL.
32. Applying the requirements of section 69(3) of the Act, if an extension of time were granted, it is unlikely that permission to appeal would be granted. The issue was one which the arbitrator was asked to determine. However, the issue raises mixed questions of law and fact which fall outside the proper scope of a challenge under section 69 of the Act. It was open to the arbitrator to find that the parties accepted both sets of terms and conditions on an analysis of the evidence and no challenge has been made to his finding that there were no conflicting provisions in the composite terms and conditions. The determination is not obviously wrong. The two claims identified by Ms Bains were determined by the arbitrator as findings of fact based on his acceptance of the evidence of P2P's factual witnesses. More importantly, given the minimal sums that would be affected if the arbitrator were wrong, SGL could not establish that the question of law identified would substantially affect the rights of one or more of the parties.
33. It follows that, even if the application for leave to appeal had been made in time, it would not be just and proper for the court to determine the question and it would be refused on its merits.

Conclusion

34. For the reasons set out above, there was substantial delay for which SGL has no reasonable excuse, the merits of the arbitration claim are weak and P2P would suffer irreparable prejudice if the application were to be granted.
35. Therefore, I refuse to exercise my discretion to grant an extension of time for bringing the arbitration claim and the application for permission to appeal pursuant to section 69(2) of the Act is refused.
36. The application by SGL, to set aside the order dated 17 August 2017 and grant a stay of P2P's application for permission to enforce the Award, is dismissed.
37. SGL must pay P2P's costs of responding to the applications, such costs to be summarily assessed on paper if not agreed.