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IN THE HIGH COURT AT LONDON
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Rolls Building
Fetter Lane
London
EC4A 1NL

Before

MRS JUSTICE O'FARRELL

ACTAVO UK LIMITED

- v -

DOOSAN BABCOCK LIMITED

MR S TOWNEND appeared on behalf of the Claimant

MR D CROWLEY, MR M HIRST appeared on behalf of the Defendant

JUDGMENT and DIRECTIONS
12th OCTOBER 2017, 12.20pm to 1.20pm

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Mrs Justice O'Farrell:

1. This is the claimant's application for summary judgment to enforce the decision of an adjudicator, namely, Mr Raymond Nash, made on the 11th August 2017. I will refer to this as the first adjudication.

2. The background is uncontroversial. The claimant operates a business as a scaffolding and building services sub-contractor. The defendant is a contractor serving principally in the energy sector. On the 3rd of September 2015, the parties entered into a sub-contract under which the claimant Actavo agreed to carry out provision of scaffolding, pipe work and steel work and touch up painting in accordance with the scope of work document, comprising scaffolding and painting works to an ethane tank in respect of a project at Innis in Grangemouth in Scotland, for the sum of £367,457.29.

3. It is common ground, at least for the purposes of today's proceedings, that that sub-contract is a construction contract for the purposes of the Housing Grants Construction and Regeneration Act 1996 ("The Act)", and that the adjudication provisions of the Scheme for Construction Contracts apply.

4. The sub-contract works commenced in or around late August 2015. A dispute arose between the parties in respect of the claimant's application for payment number 10, made on the 30th March 2017 in the sum of £630,629.99.

5. The defendant, Doosan Babcock Limited, failed to make payment in respect of the application but failed to issue a valid payment notice or valid pay less notice. As a result, there was a dispute in relation to that payment and on the 23rd June 2017, the claimant issued a notice of adjudication and Mr Raymond Nash was appointed as the adjudicator.

6. On the 11th August 2017 the adjudicator made and issued his decision in which he ordered that the defendant should pay to the claimant £630,628.99 plus VAT, £100 by way of fixed sum for late payment, that is a total sum of £774,037.24. In addition, he ordered that the defendant should pay to the claimant the sum of £7,535.96 inclusive of

VAT in respect of the adjudicator's fees and expenses which were paid directly by the claimant to the adjudicator.

7. In accordance with paragraph 23 of the Scheme the parties were required to comply with that adjudication decision as it was binding on an interim basis pending final determination by legal proceedings, arbitration or agreement.

8. The defendant failed to pay the sums awarded by the adjudicator and so on the 31st August 2017, the claimant issued these proceedings seeking enforcement of the adjudicator's decision by way of summary judgment.

9. Whilst those proceedings were ongoing, the defendant asserted that a dispute had arisen in relation to the value of the final account for the works. Accordingly, on the 31st August 2017, the defendant issued a notice of adjudication referring to a claim in respect of alleged over-payment made by the defendant to the claimant in the sum of £166,725.15, i.e. the second adjudication.

10. Mr Bunton was appointed as the adjudicator in the second adjudication. On the 5th October 2017, Mr Bunton issued the decision in adjudication number two determining that the final value of the works was £586,674.93. As a result, there was no repayment due to Doosan. It is common ground that Doosan has already paid the claimant £526,199.59 and therefore, the sum that is currently outstanding in respect of the principle sum due under the sub-contract by the defendant to the claimant is £60,475.34, significantly lower than the sum awarded in adjudication one which the claimant now seeks to enforce by way of summary judgment.

11. Following that decision, on the 10th October 2017, the defendant filed an amended defence raising both its defence in relation to the enforcement by raising the issue of interest which had been set out in the un-amended version of the defence, but introducing by way of the amendment, a reliance on the decision in adjudication two and seeking to reduce the net sum due to the claimant by reliance on the adjudicator's finding as to the proper value of the final account.

12. Therefore, the court in this case is faced with an application by the claimant to enforce, by way of summary judgment, the decision in its favour in adjudication number one and a defence raised two days ago by the defendant relying on the decision in adjudication two reducing the value that is due to the claimant by reference to the proper valuation of the final account.

13. The defendant has also issued Part 8 proceedings seeking firstly, a declaration that the true value of the final account, price of the works is £586,674.93 and therefore, the sum to be paid to the claimant is £60,475.34; and secondly, a declaration that the claimant is not entitled to interest under the Late Payment of Commercial Debts Interest Act 1998 ("the Late Payment Act").

14. First of all, I must consider the claim by the claimant, Actavo, that it is entitled to summary judgment in respect of the full sums awarded by the adjudicator in adjudication one. It is trite law that an adjudication decision when issued is binding on an interim basis pending final determination by way of litigation, arbitration or agreement. In this case the Scheme applies and therefore, in normal circumstances the claimant would be entitled to enter judgment for the full amount.

15. However, there are two issues that have to be considered. Firstly, the court must consider the defence that was raised in the unamended defence and in the defendant's evidence, namely, the question of interest that was awarded by the adjudicator. Secondly, the court must determine the effect, if any, of the decision recently received in respect of adjudication number two.

Interest

16. The defendant's case is that the adjudicator's finding that the Late Payment Act applied, was wrong. The claimant relied upon the case of Yuanda UK Co. Limited -v- WW Gear Construction Limited [2010] EWHC 720 as authority for the proposition that the contractual provisions contained in the sub-contract did not provide a substantial remedy, thus, giving rise to the application of the interest and compensation set out in the Late Payment Act.

17. The defendant submits that the facts of the Yuanda case can be distinguished in that in this case the interest rate expressly contained at Rule 17.4 of the sub-contract was set at 1% per annum above the Bank of England base rate for any period of delay of payment of any disputed invoice and not 0.5% as was the case in Yuanda. Therefore it is not directly applicable.

18. Secondly, the interest provision in this case provided a substantial remedy for the purposes of the Late Payment Act, the rate contained therein was reasonable. It is submitted by Mr Crowley that it is not out of kilter with that which is contained in many other commercial contracts or awarded by the court and should not have been ousted by the adjudicator.

19. Thirdly, the rate contained in the sub-contract was the product of genuine consensual agreement. This was borne out by the fact that such a provision was well known and accepted by the claimant as there was a previous course of dealing between the parties and unlike in the Yuanda case, in this case the interest provision set out in the standard form contract was un-amended.

20. As a result, the defendant contends that in respect of the application for summary judgment the adjudicator was wrong to find that £17,182.50 plus the £100 compensation pursuant to s.5(a) of the Late Payment Act was payable to the claimant by way of interest.

21. Mr Townend, for the claimant, submits first of all that if and to the extent that the adjudicator was wrong in awarding interest pursuant to the Late Payment Act that was an error of fact and/or law falling within his jurisdiction. Reliance is placed on, in particular, the judgment of Dyson J (as he then was) in Macob Civil Engineering Limited -v- Morrison Construction Limited [1999] BLR 93 at pages 98 to 99, and of Edwards-Stuart J in Urang Commercial Limited -v- Century Investments Limited [2011] 138 Con LR 233 at page 238 to the effect that an error of law or fact made by an adjudicator when deciding an issue referred to him is no defence to an application to enforce the award, provided of course, that it was within his jurisdiction.

22. In my judgment, the error, if there were an error on the part of the adjudicator, was clearly one of fact and/or law. The matters that have been raised by the defendant are matters that go to the proper construction of the contractual provision and the application of the Late Payment Act to the contractual provisions, namely whether or not a previous course of dealing between the parties gave rise to an argument that there was agreement between the parties as to the application of the contractual rate, thus making it wrong as a matter of fact or law to apply the Late Payment Act. That was clearly a matter which was within the jurisdiction of the adjudicator and therefore, the normal position would be on enforcement that the claimant would be entitled to enforce the award in full leaving the defendant to effectively pay now and argue later.

23. However, in this particular case, I have to go a little bit further because the proceedings that were issued two days ago seek a declaration in relation to the application of the Late Payment Act. The defendant has urged the court today to determine the issue as matter of substance, relying on the guidance provided by Coulson J in the case of Hutton Construction -v- Wilson Properties Limited [2017] EWHC 517.

24. The guidance that was issued is set out at paragraphs 14 to 18. The learned judge stated:

> "Many defendants consider that the adjudicator got it wrong…in 99 cases out of 100, that will be irrelevant to any enforcement application. If the decision was within the adjudicator's jurisdiction, and the adjudicator broadly acted in accordance with the rules of natural justice, such defendants must pay now and argue later".

25. At paragraph 15 he stated,

> "The first requirement is that the defendant must issue a CPR Part 8 claim setting out the declarations it seeks or at the very least, indicate in a detailed defence and counterclaim to the enforcement claim, what it seeks by way of final declarations".

Pausing there, it seems to me that the defendant did raise in its defence its interest argument and has issued a Part 8 claim setting out those arguments in similar terms.

26. At paragraph 17 of the Hutton decision, Coulson J stated that, where there was a dispute as to whether the defendant was entitled to resist summary judgment on the basis of its Part 8 claim, the defendant must be able to demonstrate that:

> "a) there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest;
>
> b) that issue requires no oral evidence or any other elaboration beyond that which is capable of being provided during the interlocutory hearing set aside for the enforcement;
>
> c) the issue is one, which on a summary judgment application, it would be unconscionable for court to ignore."

27. At paragraph 18, the learned judge continued,

> "What that means in practice is, for example, that the adjudicator construction of a contract clause is beyond any rational justification or that the adjudicator's calculations of the relevant time periods is obviously wrong or that the adjudicator's categorisation of the document as say a payment notice, when on any view it was not capable of being described as such a document. In a disputed case, anything less would be contrary to the principles in Macob v Carillion*".*

28. Mr Crowley, for the defendant, submits that the issue on interest was raised in his defence. It has been raised by way of Part 8 proceedings and it is a short and self-contained issue which arose in the adjudication. The issue does not require any oral evidence and is one which on a summary judgment application it would be unconscionable for the court to ignore.

29. Mr Townend, for the claimant, submits that the test set out by Coulson J in Hutton -v- Wilson is not satisfied because further oral and/or written evidence would be required, particularly having regard to the contention by the defendant that the interest rate was agreed by reference to a previous course of dealing. Further, there is no suggestion that it would be unconscionable for the court to ignore any dispute on the issue in this summary judgment application. In the second adjudication the defendant made the same claim relying on the application of the Late Payment Act. The claim for interest is set out in the referral notice attached to the defence, relying on the principle in Yuanda and setting out the defendant's assertion that the contractual rate would not be a

substantial remedy and that interest should therefore be calculated by reference to the Late Payment Act.

30. In my judgment, it is not appropriate for the court to determine the issue of interest by way of a Part 8 declaration today. That is for two main reasons. The first is that I accept the submission of Mr Townend that the issue cannot be resolved simply by reference to the documents that are currently before court. It is quite clear that where a defendant relies on a previous course of dealing between the parties it is necessary to at least give the other side an opportunity to put in substantive evidence addressing that particular contention. Secondly, Mr Townend makes a good point that it cannot be said that the defendant continues to contest the application of the Late Payment Act to these disputes in circumstances where it relied on the very same arguments, the same case and the application of the Late Payment Act in its referral in adjudication two.

31. For those reasons, I reject the defendant's application for the court to deal with the dispute on interest by way of a declaration in Part 8 proceedings.

32. It follows, having determined that even if the adjudicator was wrong on this matter, either as a matter of fact and/or law, it was still a matter within his jurisdiction, that there is no defence to the application for summary judgment in relation to adjudication number one.

Impact of Adjudication 2

33. That then brings me on to the second substantive issue which is that, notwithstanding that the claimant has a valid adjudication decision which it is entitled to enforce, matters have moved on as a result of the decision on the 5th October 2017 by Mr Bunton in adjudication number two.

34. It is common ground that the effect of that decision determining, at least on an interim basis, the final value of the works, has the result that the claimant is entitled to just over £60,000 in relation to the principle sum, although, I think it is accepted that the claimant would still be entitled to that interest and the adjudicator's fees on top of that.

35. The relevant principle where the court is faced with such a dilemma, has been very helpfully summarised by Akenhead J in the case of HS Works Limited -v- Enterprise Manage Services Limited [2009] EWHC 729:

> "38. The first area of contention is how, if at all, the court deals simultaneously with two adjudication enforcement which decide different things, which might or do impact on each other…
>
> 39. The more difficult case arises where there are two enforceable decisions which might or do impact on each other. In YCMS -v- Grabiner [2009] EWHC 127, the court addressed this issue drawing on the earlier decision of Jackson J (as he then was) in Interserve:
>
> > "51. So far as the possibility of setting off one adjudicator's decision against the other, it was considered by Jackson J in Interserve Industrial Services Limited -v- Cleveland Bridge UK Limited [2006] EWHC 741. Having reviewed the authorities he said at paragraph 43,
> >
> > > "where the parties to a construction contract engage in successive adjudications, each focused upon the parties' current rights and remedies, in my view the correct approach is as follows. At the end of each adjudication, absent special circumstances, the losing party must comply with the adjudicator's decision. He cannot withhold payment on the ground of his anticipated recovery in a future adjudication based upon different issues. I reach this conclusion both from the express terms of the Act and also from the line of authority referred to earlier in this judgment."
>
> 63. Finally, I turn to the Third Decision. These Courts have from 1998 onwards taken the view that Adjudicators' Decisions are to be enforced summarily and expeditiously unless there is a valid jurisdictional or natural justice ground which renders enforcement inappropriate. There is, perhaps unfortunately, nothing in the HGCRA which legislates for setting off one adjudicator's decision against another. It is in those circumstances that the dictum of Jackson J in the Interserve case is so apposite. It is not accepted by YCMS that the Third Decision is enforceable. Because the decision has only relatively recently been issued, YCMS reserve their position so far as enforceability is concerned. It took a jurisdictional objection during the Third Adjudication and it may seek to rely on that in any enforcement proceedings in relation to the Third Decision.
>
> 64. It follows from my views above that YCMS have established that the First Decision should be enforced. I see no good reason to depart from the approach adumbrated by Jackson J in the Interserve case. I do not consider that the fact that a Third Decision has been reached which

> on its face allows to the Defendants a net recovery is a special circumstance which justifies departing from the general rule that valid adjudicators' decisions should be enforced promptly. Things might be different if there were effectively simultaneous adjudications and decisions. There is no suggestion that YCMS or the Defendants are in financial difficulties and will not be able to pay the sums said to be due on the First Decision or said to be due the other way on the Third Decision. There is no prejudice to the Defendants in having to honour the First Decision, which should have been honoured some 14 months ago, albeit I accept it was not the Defendants' fault as such that proceedings for enforcement were delayed against them."

36. Having referred to those two decisions Akenhead J then stated at paragraph 40,

> "In my view these steps need to be considered before one can consider whether in effect or in actually to permit a set off of one decision against another:
>
> > a) First, it is necessary to determine at the time when court is considering the issue whether both decisions are valid. If not or if it cannot be determined whether each is valid it is unnecessary to consider the next steps.
> >
> > b) If both are valid it is then necessary to consider if both are capable of being enforced or given effect to. If one or other is not so capable the question of set off does not arise.
> >
> > c) If it is clear that both are so capable, the court should enforce or give effect to them both provided that separate proceedings have been brought by each party to enforce each decision. The court has no reason to favour one side or the other if each has a valid and enforceable decision in its favour.
> >
> > d) How each decision is enforced is a matter for the court. It may be wholly inappropriate to permit a set off for the second financial decision as such in circumstances where the first decision was predicated upon a basis that there could be no set off."

37. With that guidance in mind, I turn to consider the current circumstances. There is, as I have already found, a valid adjudication decision in adjudication one. There is a more recent adjudication decision in adjudication two which, if valid and enforceable, would effectively reduce significantly the sums that were found to be due in adjudication number one.

38. The issue of the enforcement of adjudication two has been raised in the amended defence and in the evidence served very recently by the defendant. It is also raised by way of Part 8 proceedings although, as I have already indicated, the declaratory relief sought goes somewhat further than simply an enforcement of the adjudicator decision and would need to be amended. But nonetheless, the issue has been raised. I make no criticism of the fact that the issue has been raised two days ago given the recent second decision. However, undoubtedly that has had a very significant impact on the claimant in responding to it and certainly in terms of producing the evidence that it would normally have had an opportunity to produce had the second adjudication decision simply been enforced in the normal way.

39. The arguments that are raised by Mr Townend on behalf of the claimant are twofold. It is said that in this case there is a question mark over the validity of the second adjudication decision for two reasons. The first is that it is said that the second adjudication decision was issued late. It is common ground that the 28-day period ran out on 3rd October 2017 and the decision was issued on the 5th October 2017. The claimant's position is that the decision was therefore issued out of time. It is trite law that if an adjudication decision is issued late, it is invalid.

40. The evidence that is relied on by the claimant is that there was no agreement to extend the time for the adjudicator to issue this decision or there is confusion as to whether anything and if so, what, was agreed.

41. In response, the defendant asserts that there was a clear agreement between the parties as to an extension of the time for the second decision to the 5th October.

42. I should start by going to the terms of paragraph 19 of the Scheme. Paragraph 19.1 states,

> "The adjudicator shall reach its decision not later than:
>
> a) 28 days after receipt of the referral notice
>
> b) 42 days after receipt of the referral notice if the referring party so consents or

> c) such period exceeding 28 days after receipt of the referral notice as the parties to the dispute may, after the beginning of that notice, agree".

43. It is common ground that the 28 day period expired on 3rd October. The defendant's case is set out in the witness statement of Mr David McCune dated the 11th October, i.e. yesterday. He states at paragraph 12, that at a meeting held between the parties, he informed Mr Bunton, the adjudicator, and Mr Robinson for the claimant, that he would agree to an extension for the adjudicator's decision of one day to the 5th October 2017. That was agreed and understood by everyone in the meeting room.

44. It was confirmed by Mr Bunton's email dated 26th September 2017 in which he indicated that his decision would be issued on the 5th October to which no dispute was raised by the claimant. Therefore, the defendant's case is that at the meeting on the 26th September 2017, both parties agreed to extend the time for the adjudication decision to be issued to the 5th October 2017.

45. The claimant's response is that there was no such agreement at the meeting. The evidence as to that is set out in the second witness statement of Laura Beth Jordan Kayo dated 11th October 2017. She states at paragraph 16, that although she did not attend the meeting, Mr David Robinson attended on behalf of the claimant and:

> "…he advised us that the adjudicator did not explain the timetable or the original deadline for the decision at the meeting and Mr Robinson did not understand from the meeting that there was a request from Mr Bunton for an extension of time of the date for the decision or that an extension of time of the date for the decision was agreed with the defendant".

46. Reliance is placed on an exchange of emails between the adjudicator and both parties. First of all, an email was sent by Mr Kearney of Elemental Consultants dated the 2nd October timed at 1736, i.e. the evening before the original deadline, in which he states, "Frankly, I am flabbergasted that the referring party…", i.e. the defendant, "…have notified you that it will present the evidence of its case only hours before your decision is due".

47. Then there was a response from Mr Bunton on the same date at 1747 copied to all parties, in which he said, "I will consider the allocation of my fees and expenses in due course. The above will not delay my decision which I intend to issue late tomorrow…", that is 3rd October "…or on Wednesday morning…", 4th October, "…subject to the contra-charge issue".

48. Considering the evidence that has been put in by both parties, it seems to me that there is a dispute that would require evidence in order to dispose of it. There is, at least, potential confusion between Mr McCune's assertion that a one-day extension of time was granted to the adjudicator at the meeting on the 26th September as against his assertion that the extension of time was to the 5th October. A one-day extension of time would only have taken the parties to the 4th October and not the 5th, the day on which the decision was in fact issued.

49. Although I am less impressed by the second-hand evidence of Mr Robinson as to whether or not he understood what was going on in the meeting of the 26th September, nonetheless, it is quite clear from the exchange of e mails on 2nd October, that at least at that date the claimant appeared to be under the impression that the decision remained due on 3rd October. The adjudicator, when responding, did not make any reference to the deadline of the 5th October. This court cannot say that there is no dispute regarding whether or not any extension of time was granted to the adjudicator so as to render the decision valid. In reaching that view I am very conscious of the fact that both parties have had a very short period of time to marshal the evidence that they would wish to run in respect of that issue. It is a relatively short issue. It is unlikely that very much evidence by way of witness evidence and/or documentary evidence would be required. Nonetheless, it is a dispute that this court is not in a position to determine today.

50. Mr Townend also relies upon a second challenge to the validity of adjudication number two in that it is submitted that there was no crystallised dispute in respect of the final account. The claimant's position is that although adjudication number two was issued on the 31st August 2017, at that stage the defendant had not produced a proper breakdown or explanation for the sum that it contended amounted to the final value of the final account in respect of the project. Therefore, the claimant had not had

sufficient opportunity to consider and respond to it and there was no crystallised dispute giving the adjudicator jurisdiction to determine it.

51. It is said on behalf of the defendant by Mr Crowley, that the parties quite clearly were in dispute as to the sum due in respect of the works, as evidenced by the payment application made by the claimant in March 2017 which was the subject of the first adjudication, albeit that the first adjudication was determined based on the absence of any valid payment or pay less notice.

52. It is said that, relying on the well-known authorities *AMEC -v- Collins* that in circumstances where there is a clear rejection or a failure to respond to a claim, that it can properly be said to be in dispute.

53. In my judgment, the challenge to the validity of adjudication two on the basis of a lack of a crystallised dispute is not particularly strong. It is always a steep hurdle for any responding party to clear in order to invalidate an adjudication decision. Where the parties clearly were in dispute as to the sums due, the claimant would have a particularly high hurdle to clear in order to challenge the decision on that basis. However, I bear in mind, that the claimant has only had two days to consider the adjudication decision and to raise its challenges. Because I have formed the view that there is a dispute that cannot be determined in relation to the extension of time issue, I do not need to decide whether the argument is so thin that I can dismiss it today.

54. That brings me to the appropriate way of disposing of the applications in this case. The decision in adjudication one is a valid decision on which the claimant is entitled to summary judgment. Therefore, I propose to give judgment for the full sum claimed in the sum of £756,754.79, the principle sum including VAT, interest up to the 11th August 2017 in the sum of £17,182.50, late payment compensation in the sum of £100, and adjudicator fees and expenses including VAT in the sum of £7,536.96, a total of £781,574.25. In addition, I will award interest but at the rate of 1% above base rate which I would invite the parties to calculate and agree.

55. However, I am going to order that the sum of £104,537.24 is payable within seven days, that is by the 19th October 2017. The balance will become payable on 21st

November 2017, the day after determination of the Part 8 proceedings. I will give directions in respect of the defendant's Part 8 proceedings which will need to be amended to reflect the fact that the relief sought is a declaration that the decision in adjudication number two is valid and binding on an interim basis pending final determination by litigation, arbitration or agreement and that effect should be given to the interim binding effect of adjudication number two by repayment by the claimant to the defendant of the balance due.

Directions

Subject to any further submission on timetable, it is ordered that the claimant should file and serve any evidence in response to the Part 8 proceedings by the 26th October 2017. The defendant should file and serve any evidence in reply by the 2nd November 2017. A bundle of all relevant documents shall be exchanged and filed with the court on the 6th November 2017. Skeleton arguments shall be exchanged and filed with the court by the 14th November 2017 and this matter will be determined on the 20th November 2017 with an estimate of one day.