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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION COURT (QBD)

No. HT-2019-000089/HT-2019-000095

Rolls Building
Fetter Lane
London, EC4A 1NL

[2019] EWHC 1612 (TCC)

Monday, 13 May 2019

Before:

MR JUSTICE WAKSMAN

B E T W E E N :

MTD CONTRACTORS LIMITED — Claimant

- and -

(1) WILLOW CORP SARL
(2) BDB PITMANS LLP — Defendants

MR A. JINADU appeared on behalf of the Claimant.

MR P. COWAN (instructed by Bryan Cave Leighton Paisner) appeared on behalf of the Defendants.

J U D G M E N T

MR JUSTICE WAKSMAN:

1. This is an application to enforce by way of summary judgment a decision of the Adjudicator dated 11 March 2019. By that decision the Adjudicator, Mr Malloy, awarded to the claimant contractor, MTD Contractors Limited ("MTD"), £699,695.42 being the release of the second half of retention monies which were being held by the defendant employer, Willow Corporation SARL ("Willow"). The underlying building contract dated 22 September 2019 concerned the construction by MTD for Willow of a 150-room hotel in Shoreditch. The Adjudicator also awarded interest to MTD and that Willow should be primarily liable for his costs as between it and MTD.

2. Willow has not paid any of the sums awarded. It has, however, issued a Part 8 claim challenging this decision which will be heard in due course. All I need to say about the procedural history of this Part 7 and this Part 8 is that at a hearing on 3 March Fraser J split the two claims so that the Part 7 claim should be heard on 13 May, which was a date at one point agreed by the parties, and the Part 8 proceedings would be adjourned and will not be heard on that date but will be relisted after the judgment of Pepperall J to which I shall refer below has been made available. In his ruling on that point, Fraser J rejected the idea that both applications should go off to a further date and he considered that it was desirable that the Part 7 application should itself be heard.

3. Sometimes, perhaps often, Part 7 and Part 8 claims are heard together but when they are not heard together and where a decision has been made by this court that they should not be heard together, there is obviously the possibility that if there is no real basis for challenging the Part 7 application on well-known principles, there will be an enforceable payment order as a result of that application; that order may in the fullness of time be subject to challenge or reversal on a Part 8 application which, like a trial, will be a final determination of the merits but, in the meantime, the decision of the Adjudicator, if enforced by the court, is final and is binding.

4. I remind myself at this stage of two matters. The first is that to succeed on an application for summary judgment it is for the claimant to show that the defendant has no real prospect of a successful defence and no other compelling reason for a trial. Secondly, one has to view applications for summary judgment to enforce decisions of an adjudicator through the particular prism of the rules concerning the enforcement and ability of parties to obtain an adjudicator's award and the philosophy behind it. This means that, for example, it is a cardinal rule that it is not permitted to challenge the enforcement of an adjudicator's decision at the summary judgment stage on the basis that it is not substantively correct. The circumstances in which a challenge to a judgment itself may succeed are very circumscribed. They are usually limited to things like a lack of jurisdiction or a breach of natural justice.

5. In this particular case, a key argument and, indeed, really the only argument against judgment or enforcement today is this: that there was an earlier decision of Mr Malloy made on an earlier adjudication. I will refer to his earlier decision as the "Previous Decision" and the earlier adjudication as the "Second Adjudication" because, in fact, there was one yet prior to that. The Previous Decision was made on 19 December 2018. It is the subject of a conjoined Part 8 and Part 7 challenge, the Part 8 partly because of a challenge to the approach of the Adjudicator as to how one construes the date for practical completion, and also, a number of natural justice arguments which could affect the particular figures awarded by the adjudicator. That challenge was heard first in February but then it had to go off as it was not finished and was heard again on 25 March, after which, as I understand it, there were some further materials put before the judge. The present position is that the judgment of Pepperall J is awaited.

6. The argument raised by Mr Cowan in his extremely helpful and comprehensive submissions and as developed today is really this; there is an important connection between the reasoning in the Decision and the Previous Decision such that if the Previous Decision is found to be unenforceable and a nullity by the awaited judgment, the inevitable consequence would be that the Decision now at issue would itself be unenforceable. Although the outcome of the second adjudication challenge is not yet known, the way that Mr Cowan puts it is to say that this constitutes at the very least a real prospect of a successful defence because it may turn out on reasonable grounds that the Previous Decision is now not to be enforced; or in the alternative, this is a case where if the court sees no obstacle to the granting of judgment, there should be something which seems to be akin to a stay, although Mr Cowan does not put it on that basis, by refusing be a judgment but on the basis there is a suitable payment into court. MTD resists both of those claims.

7. I need to read something from the Adjudicator's Decision to give a flavour of what it was about and what the Previous Decision was about. The core point before the adjudicator in the Decision was to work out when the rectification period had come to an end. The reason for that was that following the expiry of the rectification period, on one interpretation (itself now the subject of the forthcoming Part 8 claim) a notice of completion of the making good of defects should have been presented by the employer, although it has not been. If such a notice should have been served, then it follows that , I think two weeks later, there should have been repayment of the remaining half of the retention monies.

8. In the Previous Decision, there was a debate as to when practical completion had taken place. Willow contended that it did not take place until about 13 October 2017, whereas MTD had said it had taken place on 28 July. Since the rectification period was for a month, it would mean that it would have expired either (on MTD's case) on 28 July 2018 or (on Willow's case) on 13 October 2018. As the Adjudicator correctly found, the result of that debate, which itself is under challenge in the Part 8 claim for the Previous Decision, does not matter for the purposes of the Decision. That is because, on any view, by the time Mr Malloy had to decide the third adjudication, the rectification period and the fourteen-day period which comes afterwards would have expired. Therefore, on any view, the time for service of the notice and the repayment of an appropriate amount of the retention monies would have arisen. To that extent, the underlying challenge to the Previous Decision makes no difference whichever way it is found.

9. As it happens and for the purpose of the Third Decision, the Adjudicator, giving, as it were, the benefit of the doubt to MTD, held that the relevant period had expired by 13 October 2018 and, allowing the fourteen-day period which follows it, he found that by 27 October 2018 the relevant notice should have been served and the monies in the retention should have been repaid. So far, nothing turns on the Previous Decision. However, the Adjudicator also had to deal with what the appropriate deduction was and in the Second Decision he made findings about that. The findings were to the effect that, first of all, while there was a claim for liquidated damages, that all turned on when completion was and because of his decision on completion, the substantive matter, the result was that there were no liquidated damages paid. That has got to be taken out of account. However, of the £2.7 million of deductions which Willow says it was entitled to hang onto, the adjudicator said in the Second Decision that it was only entitled to hang on to £840,000 of those deductions. The rest were not valid deductions.

10. On that basis, it follows, as a matter of maths, that there would be no reason for any part of the remaining half of the retention monies which themselves are calculated strictly as 2.5% of the relevant contract sums to be kept back. This is because the amount of the deductions to which Willow were entitled were sufficiently modest so that, on any view, it would not need

to have recourse to the separately held retention monies. At para.17 in the Third Adjudication, the Decision, Mr Malloy said this:

> "In such circumstances, MTD say that Willow Corp is entitled to make an appropriate deduction and that I determined the appropriate deduction in adjudication no.2. As such, subject to the longstop period, MTD says that Willow Corp was obliged to issue a notice of making good defects."

11. At para.26 - I do not need to read it in detail - the Adjudicator deals with the possibly different dates for practical completion and the implications thereof. That is the part of his decision where, rightly, he says it does not make any difference on the debate which was before him in the Second Adjudication. Then he recites the fact that adjudication no.2 contained a pay less notice which became about £3 million. He then said:

> "To that extent, it is clear that the decision in adjudication no.2 addressed and determined the amount of an appropriate deduction in relation to those defects."

12. He then went on to say that if there had been, in payless notice no.3, a higher sum because yet further deductions were now being claimed in the passage of time that had elapsed, he would have to deal with that because those deductions would not have been covered in the Second Adjudication. However, the third payless notice was the same amount as the second payless notice, so he said this:

> "That is the same sum which was adjudicated upon in adjudication no.2. It is therefore apparent that the decision in adjudication 2 regarding the extent of MTD's liabilities for defects encompassed both the defects included in the lists as at practical completion and the defects which were identified during the rectification period but which Willow had elected to engage others to attend to. I am satisfied that at the date of this decision an appropriate deduction has been made."

13. In my judgment, and I think that Mr Jinadu accepted this in the end, what he was therefore relying upon was the calculation which he had made in the Previous Decision because nothing had changed since. Also, as I think Mr Jinadu now accepts, it is possible to construct a scenario whereby if everything went wrong with the Second Adjudication as decided, and the true picture was that it was unenforceable and a nullity, then you would be left with both parties claiming the maximum sums against each other and, depending what happened at the end of the day, it might be that Willow would be entitled to much more by way of deduction than £831,000; if that is the case, it might be that it would have to have recourse to the £699,000 it would otherwise have to pay back; in which case, the figures could change. The only way that they could change if the Second Adjudication Decision is found to be unenforceable would either be to have another adjudication on the same point, which would be permissible, or for that as a matter of substance to be decided hereafter. At the moment, whether there is going to be any effective change to the Second Adjudication Decision is completely unknown because we do not have the judgment relating to the challenges concerning that decision.

14. The forthcoming Part 8 challenge to the Third Decision deals with other matters which include, for example, whether, when one looks at the contract it is possible to say the time for service of the notice of the making good of defects where the employer has not required the contractor to make good those defects but has in fact made deductions for others to do so, is when it has elected to make those deductions or whether it should be at some later point, for example when the defects are actually done. In that context, this adjudicator found it was the former. That, of course, is a purely substantive matter and cannot affect arguments about enforceability here, although there were times in Mr Cowan's submissions when, in my view, he came close to saying that.

15. The starting point in terms of analysis is that the present decision is currently valid and it is currently enforceable. It is also the case that it is possible that a successful challenge to the

Second Adjudication decision will have a knock-on effect. The notion that there could be in the future a knock-on effect is not an unusual one. It lies behind the fact that any adjudication decision, even if enforced by the court, is only temporarily binding, albeit that while it is binding it can be enforced as a judgment in the usual way. But it may be, as it were, unwound if there is a trial of the substantive dispute between the parties which results in conclusions inconsistent with the earlier enforcement decision; or if there is a later Part 8 hearing which, because of successful arguments of construction, effectively knocks out or undermines the basis of the prior decision of the Adjudicator. But just because a Part 8 decision may be coming up in the future, that is not a reason not to enforce or give judgment in respect of the Adjudicator's decision in the meantime. The sort of approach which the courts take to those matters is reflected by way of example in what Stuart-Smith J said in *Energo AS v Bester Generacion UK Ltd* [2018] EWHC 1127:

> "It is well-known and established beyond argument that the scheme for adjudications and their enforcement is intended to provide a rapid solution by way of enforcement of valid decisions by adjudicators. The starting point and usually the end point is the court will enforce the decision of an adjudicator, whether right or wrong, unless he did not have jurisdiction to reach his decision or there has been a material breach of rules of natural justice. Adjudication is all about interim cash flow. It is routine to enforce decisions that require substantial allocations of cash to one party in the knowledge it may prove to be an interim measure. The fact that the basis of the adjudicator's decision is to be challenged in other proceedings is of itself seldom if ever a ground for non-enforcement."

16. He goes on to say that he noted the difference between enforcing a valid adjudication decision and where a court may order a stay of execution and that:

> "The mere fact that the adjudicator's decision might later be held to be wrong will not of itself generally amount to a special circumstance rendering it inexpedient to enforce the judgment or order."

17. It follows that any argument put before me to the effect that it is possible, either as a result of the existing challenge to the Previous Decision or the putative challenge to the present Decision, that the present Decision is wrong in some way is of no moment so far as this application is concerned. In order to suggest or submit that this is something different, Mr Cowan's arguments really run thus: if for whatever reason the Previous Decision is found to be unenforceable, then it is a nullity. If it is a nullity, it means that no decision was made on what the appropriate deduction was. However, the argument goes, that must have an impact on jurisdiction under this Decision because, in this Decision, the Adjudicator relied upon the reasoning of the Previous Decision. So if that goes, this adjudicator has not in fact decided a material point. That is one way in which it is suggested that the ultimate outcome, if everything goes Willow's way could be a decision which shows that, in fact, this decision now was in fact taken without jurisdiction.

18. Another way in which he puts the case is to say that the natural justice arguments put in the existing challenge to the Previous Decision could well have the effect of rendering unsafe the calculation of appropriate deduction which was used in the Decision. But if that is right, then what is really happening here is reliance upon a breach of natural justice which occurred not in this Decision but in the Previous Decision and, in that sense, it could be said that the present Decision is vulnerable either on the basis of a lack of jurisdiction or on a basis of breach of natural justice depending on what happens with the judgment on the previous challenge.

19. That is, in a nutshell, what Mr Cowan's arguments boil down to, allied to the notion that while it is true we do not yet know the outcome of the previous challenges (and for all we know may be rejected *in limine*)unless it is going to be said that the entirety of those challenges were themselves frivolous, which is not a matter that I can decide at the moment, it must follow that there is a real prospect of a successful defence. This is because there is a real prospect

that the Previous Decision will be held not enforceable in such a way that it has a knock-on effect on the existing Decision - not simply in terms of substantive merits but possibly in terms of jurisdiction or natural justice as well. That, says Mr Cowan, gives a different flavour to the present Part 7 challenge.

20. The problem about all of this is that, usually, in a Part 7 enforcement application for summary judgment, if there is a challenge to jurisdiction or breach of natural justice, it is done there and then because it can conveniently be dealt with then, usually because the materials are within a relatively narrow compass. One does not usually have a trial of an application for summary judgment of a decision to enforce - precisely because it is only temporarily binding.

21. What Mr Cowan's point boils down to is that where it is possible that the present adjudicator might not have had jurisdiction but one simply does not know, or where it is possible that there is some indirect reliance on a breach of natural justice elsewhere, that should constitute a real prospect of success for the summary judgment application.

22. As against that, Mr Jinadu really makes two submissions. First, he accepts that depending on what the findings under the previous challenge were, they may, like any challenge which is ultimately decided as a matter of substance, have to be taken into account on the continued validity and enforceability of the present Decision. He accepts that this might be the effect if the Previous Decision has been nullified. But that being so there no reason why I should decline to give judgment to enforce it now. Despite the references to jurisdiction and natural justice, it is no different from the fact that there is a prospective Part 8 claim or a trial which may turn out to have different conclusions from the Decision which has been enforced in the meantime and which, as we know, the prospect of which does not affect the enforceability of that Decision in the meantime.

23. The second answer which Mr Jinadu gives, which I think is the correct one, is to say that, effectively, that is all very interesting but the fact of the matter is that this Decision is presently valid and enforceable because there is no challenge to its actual validity or enforceability in the usual way which can now be determined. And while it is valid, it should be enforced. I agree with that submission. I consider that, just as substantive challenges to decisions do not give rise to reasons for not giving summary judgment, so what I regard as speculative (in the sense that the result is not known) reliance upon earlier challenges which may have a later effect on the enforceability of this decision, and even if there is some jurisdictional or natural justice thread to them, cannot be basis for a real prospect of a successful defence. In my judgment, that simply goes entirely against the underlying rationale behind the present scheme for the enforcement of an adjudicator's decision and is entirely in keeping with the way in which Stuart-Smith J put the point. It is also consistent, I might add, with the fact that this court has already decided that these two applications should be split with the obvious possibility that pending the Part 8 claim the Part 7 claim will be heard separately. I can quite see that if the judgment of Pepperall J had been available now, then Willow may have been in a better (but possibly worse) position in terms of what it could do on this hearing. I also accept that it is obviously not the fault of either party that the judgment is still awaited. But it does mean that this case is in a different situation and the natural way in which to characterise it in my judgment is as if it is a case where there is a prospective Part 8 application (or trial) which has not yet been heard.

24. At one point Mr Cowan suggested that a later Part 8 application might itself have the prospect of rendering a nullity the previous Part 7 application but if so, mere fact that if the Part 8 application has not yet been heard does not mean that the underlying decision cannot be enforced by way of summary judgment in the meantime. Therefore, the course urged upon

me by Mr Cowan, while I understand the way in which he has constructed the argument, is completely contrary to the notion of interim cash flow in the meantime.

25. Mr Cowan's alternative argument was one whereby he said that judgment should not be given but there should be a condition of money paid into court. He said that was not the same as an application for a stay of execution and, technically speaking, that is right. That is because there would be no judgment whose execution is to be stayed and he recognised that he would not be in stay of execution territory. However, the course which he has suggested as an alternative, even with the attraction of money going into court, still does not provide for immediate payment of the contractor in circumstances where, in my judgment, the contractor should otherwise have it. And would go against the spirit of the what would have been required to obtain a stay of execution because, in real terms, that is what it is. If it could not have fulfilled the stay of execution conditions, the fact that it is presented in a different way and with a conditional payment into court cannot improve the position of Willow.

26. For all of those reasons, I am quite satisfied that despite the attractive way in which the matter has been presented by Mr Cowan, there should be judgment as claimed by MTD against Willow in the terms of the amounts ordered in the Decision. Nor should there be any form of stay of execution or a judgment not to be enforced pending a payment into court. I will now hear counsel on consequential matters.