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

No. HT-2019-000221

[2019] EWHC 2360 (TCC)

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 8 August 2019

Before:

MRS JUSTICE JEFFORD

B E T W E E N :

UNIVERSAL SEALANTS (UK) LIMITED
(t/a USL BRIDGECARE) — Claimant

- and -

SANDERS PLANT AND WASTE MANAGEMENT LTD — Defendant

MISS S. WILLIAMS (instructed by DAC Beechcroft LLP) appeared on behalf of the Claimant.

MR A. EDWARDS (instructed by O'Neill Richmonds, North Shields) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE JEFFORD:

1 This is an application for summary judgment to enforce the decision of the Adjudicator, Mr Bergin, made on 13 May 2019.

2 In October 2016 the claimants were engaged by A One+ Integrated Highways Services to carry out works on the A1 at Bladon Haugh Viaduct in Gateshead. The works involved the removal of existing bridge expansion joints and the installation of replacement joints. In March 2017 the defendants, Sanders, supplied concrete as part of those works.

3 It is, in short, the claimant, USL's case, that Sanders ought to have supplied a grade or type of concrete designated M50, but, in fact, and in breach of contract, supplied concrete of the type ST5, which was both not what was contracted for and unfit for purpose. The concrete had to be broken out and replaced. The dispute between the parties was as to whether Sanders was in breach of contract and, in any event, as to the quantification of damages.

4 The dispute was referred to adjudication in April of this year, and led to the decision of the Adjudicator, which was that Sanders was in breach and liable to pay damages to USL of £52,259.

5 Sanders participated in the adjudication, having reserved its right to contest the Adjudicator's jurisdiction. No point is taken that that was not an effective reservation. There had been a previous attempt to refer the dispute to adjudication, the same jurisdictional objections had been taken, and the Adjudicator had declined to act. The present Adjudicator took a different view and proceeded to make a decision.

6 The jurisdictional objections are maintained on this application for enforcement, and Mr Edwards, on behalf of Sanders, submits that they are, at the very least, sufficiently arguable that there is a realistic prospect of success in defending this claim.

7 The points are twofold. The first is that the adjudication was commenced under the wrong contract. Both parties agree that there was a contract, but not one which contained an express provision for adjudication. Accordingly, if the Adjudicator had jurisdiction, it would have to flow from the terms implied by the Housing Grants Construction and Regeneration Act 1996 (as amended).

8 The second point taken, which is free-standing and arises whatever the contract between the parties was, is that the Act does not apply because the delivery of concrete falls within the exception in s.105(2)(d) of the Act.

9 I will deal with the contractual issue first. It is common ground between the parties that the issue of whether the contract pursuant to which the adjudication was commenced was the proper contract, is a valid jurisdictional objection. I observe that it might have been open to argument whether, once it was accepted that there was a contract, the precise manner in which the contract was formed, and its precise terms, were a matter within the jurisdiction of the Adjudicator, but that is not the way the matter has been argued before me, nor the contention of either party. I make that observation simply so that it is apparent that it is not a point that I have had argued before me or have decided.

10 USL's case is as follows and I take this very largely from the helpful skeleton of Miss Williams, on behalf of USL. The starting point was a conversation by telephone on 21

February 2017 between Mr Harle of USL and Miss Mozdzen of Sanders. Mr Harle's evidence was that on that occasion he said that USL required delivery and installation of concrete of the M50 type to the site, and that Anna (Miss Mozdzen) confirmed that Sanders was able to source, mix and install the form of concrete that was required. He recalled that he had emphasised the importance of the correct specification of concrete and that Miss Mozdzen had confirmed that Sanders could provide and install that type of concrete. It seems to have been common ground between them, at the least, that she also required an email setting out that position.

11 Miss Mozdzen's evidence about the phone call, however, is that she simply received a phone call inquiring about concrete, and asked Mr Harle to send his inquiry by email. She did not say that she would submit it for approval or that Sanders could provide M50 concrete. In any event, the phone call was followed by an email on 22 February 2017 from Mr Harle to Miss Mozdzen, which referred to the telephone call, and confirmed that USL required M50 grade concrete to be supplied.

12 Miss Mozdzen's evidence, in her first statement in the adjudication, was that after receiving Mr Harle's email inquiry and considering it, she telephoned him and explained to him that the strongest concrete Sanders could supply was ST5, which was a mix they had provided to A One+ and others for crash barrier repairs on the A1. Her evidence was that she asked Mr Harle whether this would be acceptable. He explained it should be fine, but he would phone back. She said that they then spoke again, and he informed her that ST5 concrete would be fine and instructed its delivery. She went on to say the concrete delivery was agreed and arranged for 7 March 2017.

13 Irrespective of that evidence, and whether it might be accepted or not, on 23 February, USL sent to the defendant, Sanders, its subcontract order. That was sent by email which was addressed to Miss Mozdzen and her email address as the previous email had been. The subcontract order clearly referred to the provision of grade designation M50 concrete. I note that the purchase order simply refers to package details and the specification of the concrete, and concludes: "To be supplied at the rate of £100 per m^3 plus a £450 delivery charge". The subcontract order refers to USL's terms and conditions, which can be found via a link on the internet and the terms that can be found on the internet are then set out in a document headed "Standard Subcontract Purchase Order."

14 It is, in simple terms, USL's case that that was their offer to purchase the M50 grade designation concrete, and that it was an offer accepted by conduct, by Sanders, by the delivery to site of concrete - albeit as it turns out not M50 grade concrete - on 7 March 2017, at the date which Miss Mozdzen accepted had been agreed with her.

15 Miss Williams' skeleton argument further summarises the evidence as to what happened in the intervening period between 23 February and 7 March. Mr Harle's evidence in that respect is that during this period he had a couple of telephone calls with Miss Mozdzen about the concrete ordered, and particularly the specification, agreeing what the exact water content would be, and that at no point in those conversations was he told that Sanders had any issue with the subcontract order, or was unable to source, mix, supply and install what had been ordered. Miss Mozdzen's evidence in response, in a second statement in the adjudication, simply denied that Mr Harle had discussed the water content of the concrete with her.

16 In his submissions Mr Edwards sought to argue that Miss Mozdzen had said in the telephone calls that only ST5 concrete was available. As Miss Williams pointed out, that appears to be

her evidence about what happened following the email of 22 February, and before, or despite, the terms of the email of 23 February 2017, including or sending the subcontract order. It certainly does not appear to be Miss Mozdzen's evidence – there is no evidence to the effect that, following receipt of that subcontract order, she made it clear that it was not being accepted because Sanders could not supply the grade of concrete which had been ordered.

17 There was an issue in the adjudication as to whether Miss Mozdzen had seen the subcontract order. She initially denied that she had but the Adjudicator records, in his decision, that she accepted at a hearing held in the adjudication that she had, in fact, seen the subcontract order. It would, in my view, be surprising if that were not the case because the subcontract order was the precursor to the delivery of the product, the concrete, to the site on 7 March 2017.

18 On USL's case, therefore, the initial phone call was an invitation to treat. It was followed by some discussion, and I accept Miss Williams' submission that it is unnecessary for me to decide on this application precisely what was discussed and what may have been said about M50 or ST5 concrete. The short point, and how USL puts its case, is that the subcontract order was an offer to purchase M50 concrete, which offer was accepted at latest by the delivery of concrete to the site.

19 Sanders argues that there was no such concluded contract; that silence in response to the subcontract order is not acceptance; and that, therefore, there was no concluded contract because the terms of the subcontract order were not accepted. What, therefore, happened on Sanders' case was that the delivery of the concrete, together with the delivery note was an offer, or counteroffer, to supply concrete - that being ST5 grade concrete - which was accepted by USL on the terms of the Sanders' delivery note signed by Mr Harle.

20 In my judgment the defendant's case stands no real prospect of success. Whatever the factual disputes as to what was said in the phone calls and, indeed, what appeared to be the factual dispute as to whether Miss Mozdzen had seen the subcontract order, it seems to me entirely clear that the order was accepted by the delivery of the concrete to the site. There was then a concluded contract on the terms of that order. The production of the delivery note on different contract terms was too late to be a counteroffer. On the facts, Mr Harle's evidence was that it was presented to him after the discharge of the concrete had started. There is no evidence to contradict that and there should have been such evidence adduced on this application if that argument on Sanders' part was to stand any real prospect of success.

21 Accordingly, in my judgment, the contract was formed as USL contends it was, and, were that the only issue on this summary judgment application, I would find in the claimant's favour. However, as I have said the second issue arises in any event.

22 The adjudication provisions of the Housing Grants Construction and Regeneration Act apply only to construction contracts as defined by the Act. S.104(1) provides that: ". . . a 'construction contract' means an agreement with a person for any of the following . . ." and subparagraph (a) is "the carrying out of construction operations". "Construction operations" is a defined term, and it is defined by s.105(1). There are a number of descriptions of "construction operations" which mean

> ". . . subject as follows, operations of any of the following descriptions:

(a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land . . .
(b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including . . ."

various matters which are then specified and which include roadworks. Then:

"(e) operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations . . ."

and so forth.

23 It is evident, therefore, that the placing of concrete could fall within the definition of 'construction operations'. However, there is further an exclusion from the meaning of construction operations in s.105(2). The following operations are specifically provided not to be construction operations within the meaning of this Part. Sub-paragraph (d) excludes, therefore, from the meaning of construction operations:

"manufacture or delivery to site of—

(i) building or engineering components or equipment,
(ii) materials, plant or machinery, . . .
except under a contract which also provides for their installation."

24 On its face, the order and the contract was for the supply of concrete. It is common ground that that fell within the exclusion in sub-paragraph (d). It was implicit that the concrete would be delivered, and it appears to be common ground between the parties that it was agreed that it would be delivered to a particular place on a particular day. There was no express reference to installing the concrete in the subcontract order and, as Mr Edwards pointed out in his skeleton argument, no rate or price for doing so. I do not consider that, in order to fall within the exception to the exclusion it would be necessary for the contract specifically to contain reference to, or to use the word, "installation", but the absence of any reference is indicative of the nature of the contract between these two parties. Mr Edwards therefore argues that this is a contract for the supply of materials, falling within the exclusion in s.105(2)(d) and is not one that also provides for their installation so as to fall within the exception to the exclusion.

25 The evidence about what Sanders actually did pursuant to this contract is not entirely satisfactory. It appears that some kind of concrete wagon delivered the concrete to the site. It is not clear whether that concrete was pre-mixed or to be mixed on arrival at the site. Mr Edwards contends that the nature of the wagon is one in which the concrete would be mixed on site. Miss Williams says simply that there is no evidence to that effect.

26 It appears that the concrete was then discharged or poured directly into a channel which formed the basis of, or part of, the expansion joints that were being installed. It is unclear whether that was an operation that was directed by USL, although as I observed in the course of the argument there must have been some instruction from USL to Sanders to pour the concrete into the channel.

27 In the Adjudication, there appears to have been evidence from Mr Harle, not in a written witness statement but again at a hearing, that the vehicle was repositioned a couple of times in order to do so. Mr Edwards submits that once the concrete had been poured into the channels, it must have been the case that it was further worked on by USL's operatives. There is no substantive evidence to that effect and Miss Williams urges me not to take account of that submission.

28 There is, however, some support for it at least in pages of material submitted in the adjudication in support of the quantification of the claim for damages. One item is a programme which shows a specific activity for placing of concrete, from which Mr Edwards suggests that I can infer that there was some activity to be carried out by USL after the delivery of the concrete to the site. Secondly, there is a claim in respect of the time of a foreman and two labourers in relation to the remedial works that were carried out. The inference which I am invited to draw is that, if a USL foreman and labourer were required to carry out work in the context of the remedial works for placing of concrete, then the same must have been the case on the original delivery and pouring of the concrete. I approach this matter with some caution because, as I have said, there is no substantive evidence as to what was done to the concrete after it had been poured into the channel, but these references do provide some support for the defendant's contention as to what must have happened.

29 Some of the written argument before me focused on whether the delivery of the concrete, and/or the operations that I have just described, fall within s.105(1). It seems to me, and it was the focus of the oral argument that the relevant consideration is the express exclusion in s.105(2) and the exception to that exclusion. The supply of concrete to a site, which is what Sanders say they did, is patently within the exclusion unless the exception applies, because it is quite simply the delivery of materials.

30 Mr Edwards placed some reliance on the fact that one would not naturally talk about installing concrete. He is right about the use of the verb, but I do not think that the word 'installation' can be given such a narrow construction, for example one does not install bricks, but the delivery of bricks to a site would obviously fall within the exclusion in s.105(2)(d) unless the supplier also did something else, for example, laying the bricks. What the word 'installation' (or its equivalent verb) must connote in s.105(2)(d) is some work done to the materials after delivery. That, it seems to me, is supported by the express wording of the subsection which frames the exception to the exclusion as one under a contract: "which also provides for their installation", i.e. the installation of the materials, and the very use of the word "also", to my mind, suggests that something other than delivery is what is in contemplation in that exception.

31 That brings me to a point that is relied upon by both Mr Edwards and Miss Williams in contrary ways. Concrete is an unusual material in this respect because, once it is mixed, wet concrete starts to set. It would be highly unusual for it to be delivered to some sort of holding facility before it was poured where it was required, and the act of delivery and pouring are, therefore, commonly the same thing, if, as in this scenario, the concrete is being supplied from off-site rather than manufactured on site as might also, and in other circumstances, be the case.

32 Miss Williams submits that that is the position and that it supports her case that what was done here amounted to installation under a contract which provided for that installation because it necessarily provided for delivery. In other words, as she put it, delivery and installation are indivisible, and the fact that the concrete was delivered by being poured necessarily means that there was also an element of installation. She prays in aid the fact,

as the Adjudicator said, that there appears to have been some participation by both USL and Sanders in the laying or pouring of the concrete with, it might be inferred, some direction being given by USL as to where the concrete was to be poured, but the act, or the 'function' (as the Adjudicator put it) of the pouring being undertaken by Sanders' operative, i.e. the driver of the wagon.

33 Persuasively though that point is put, I am unable to accept that submission and, in my view, this particular characteristic of concrete points the other way. Section 105(2)(d) draws a clear distinction between delivery of materials and the contract 'also' – and I emphasise that word again – providing for installation. In this case, the act of delivery and pouring amount to the same thing. That, in my view, means that the pouring is, in these circumstances, part of the delivery and not an additional act of installation involving some work on, or related to, the materials. There is nothing in this contract which also provides for installation. It is simply the case that in order for the materials to be delivered to site in the normal way the concrete will be poured where it is required, rather than, as would be unusual, placed into some sort of storage facility until it could be poured by someone else. That view is supported, although I place minimal reliance on this, by the fact that there is some evidence from which it can be inferred that USL's operatives must have worked on the concrete after it had been poured into the channel by Sanders.

34 For those reasons it seems to me that, at the very least, there is a real prospect of success on the defendant's argument as to the jurisdiction of the Adjudicator on this second issue. Accordingly, in this case, I decline to grant summary judgment.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

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