IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
TECHNOLOGY & CONSTRUCTION COURT (KBD)

No. HT-2023-000197

NCN: [2023] EWHC 1682 (TCC)

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 9 June 2023

Before:

MRS JUSTICE JOANNA SMITH DBE

B E T W E E N :

MONTY & PAYTER LLP — Claimant

- and -

MWA PROJECTS LIMITED — Defendant

MR T JACKSON (LLP Designated Member of Monty & Payter LLP) appeared on behalf of the Claimant.

MR T OWEN (instructed by Freeths LLP) appeared on behalf of the Defendant.

J U D G M E N T

MRS JUSTICE JOANNA SMITH:

1 This is an application for an interim injunction made by the employer under a building contract, Monty & Payter LLP ("**M&P**"), against its principal contractor and principal designer, MWA Projects Limited ("**MWA**"). Building works are currently being undertaken by MWA pursuant to this building contract at 20 Westbourne Park Villas, London W2 5EA ("**the Site**").

2 M&P has been represented today, with the permission of the court, by Mr Tim Jackson, a member of M&P and the named Contract Administrator in the building contract. He has confirmed that M&P has had considerable legal input into the evidence and written submissions that it has made in support of its application. Notwithstanding this, M&P has no legal representation today. No proceedings have been commenced against MWA by M&P and no draft proceedings have been put before the court. Mr Jackson has made coherent and focused submissions on behalf of M&P, for which I am grateful.

3 Notice of the application was provided to MWA, which has had the opportunity to file evidence in opposition to the proposed injunction. MWA is represented today by Mr Owen, who has provided a detailed skeleton argument (for which I am also most grateful) and has made submissions during the course of the hearing.

4 I have had the opportunity to read the lengthy witness statements provided by both sides and I was taken to various parts of those statements during the hearing. Very shortly before the hearing, Mr Jackson provided a further witness statement responding to allegations he considered had been made against him personally. I should make clear that I have focused, for the purpose of this judgment, only on the evidence that is directly material to the question of whether an injunction should be granted. It is very clear from the statements before the court that there is, to put it mildly, a considerable amount of tension between the parties to this application. However, I cannot resolve that tension at this hearing and I emphasise that the purpose of this hearing is not to make a determination as to the rights and wrongs of allegations that are of no relevance to the specific issue before the court; namely whether to grant the injunctive relief sought.

5 M&P seek what is effectively a mandatory injunction in the following terms:

> "That the Defendant be forbidden, whether by its servants, agents, officers or otherwise, to make any changes to the arrangements and practices in place on 1 May 2023 for health and safety or site access as they affect the Contract Administrator or the Claimant's design team or workers on site, other than pursuant to an emergency, without first (a) providing the Claimant with (i) details of the proposed changes, their objectives and why they are considered necessary and (ii) a brief analysis of why the existing arrangements or less onerous changes would be insufficient to achieve the required objectives and (b) allowing the Claimant 5 working days to make representations as to the proposed changes, and (c) providing a reasoned written response to any representations received."

6 It is clear from the evidence that the real purpose of this proposed relief (which seeks to preclude the making of changes to arrangements that are said to have been in place on 1 May 2023) is to require MWA to provide site access to Mr Jackson personally in his role as

Contract Administrator at times which fall outside normal working hours and in the absence of a representative from MWA.

7 During his oral submissions, Mr Jackson suggested that this was not, in fact, the case and that all he requires is that MWA should explain changes they have recently made to existing arrangements. However, in my judgment, the subtext is plainly that Mr Jackson is of the view that the status quo at the Site is that unrestricted access is being provided to him as Contract Administrator and his concern is to ensure that this access is not in any way restricted by MWA (as he believes it has been in recent weeks). It was clear from his submissions that Mr Jackson was concerned about what he described as "his exclusion from the Site".

8 Pausing there, I note that the terms of the proposed injunction, as it stands, are, in my judgment, unclear and uncertain. Indeed, this appeared to me to be acknowledged by Mr Jackson very fairly in his oral reply submissions when he confirmed that the five-day notice period envisaged may be "unworkable".

9 The reason that Mr Jackson says he requires unrestricted access to the Site is that he has other professional roles, often cannot attend the Site during normal working hours and needs to bring third parties onto the Site from time to time in order to enable them to provide quotations or other information. It was suggested by Mr Jackson in his skeleton argument that this is necessary in circumstances where he considers that MWA has attempted to overcharge M&P for some items of work.

10 It appears to be common ground that until around 16 May 2023, MWA's construction manager had effectively been granting relatively unrestricted access to Mr Jackson, owing apparently to his understanding from Mr Jackson that, as Contract Administrator, he was entitled to such access. There is some dispute as to who knew about this state of affairs; MWA says that its directors were wholly unaware of it and would not have sanctioned it. However, what is clear is that on or around 16 May 2023, the directors of MWA obtained legal advice as to their responsibilities on Site, including, in particular, their responsibilities under the CDM Regulations 2015 and the Health and Safety at Work Act 1974, and that they then made clear to Mr Jackson that access to the Site could only be provided to him during normal working hours when MWA had a presence on the Site. Alternatively, that out of hours access could be accommodated as long as MWA was present.

11 Mr Jackson objects to this state of affairs, contending that it is in breach of the building contract, disproportionate and unnecessary and that it may have the effect of impeding his role as Contract Administrator and the progress of M&P's own works on the Site.

The Law

12 CPR 25.2(1) permits the court to make an order for an interim remedy before the commencement of proceedings only if the matter is urgent or it is otherwise desirable to make the order in the interests of justice.

13 It is common ground that in considering whether it is appropriate to grant an injunction, I must apply the principles laid down in the case of *American Cyanamid v Ethicon Limited* [1975] AC 396. In short, I must consider (i) whether there is a serious issue to be tried; (ii) if so, whether damages would be an adequate remedy for the claimant, and (iii) if damages would not be an adequate remedy for the claimant, where the balance of convenience lies.

14 In circumstances where what is sought here appears to be a mandatory injunction, Mr Owen drew my attention to the **White Book** in his skeleton argument at Volume 2, paras.15-24. I need not set them out here. Suffice to say that the basic principle is that the court should take whatever course seems likely to cause the least irremediable prejudice to one party or the other. The overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong.

15 I was addressed in the skeleton arguments by both parties as to the terms of the building contract and the law on health and safety, which I need not refer to in detail now.

16 Relevant terms of the building contract are to be found in clause 2.4 (possession of the Site by the Contractor), clause 3.1 (the entitlement of the Contract Administrator and any person authorised by him to have "at all reasonable times access to the works"), clause 3.2 (the requirement for the Contractor to ensure that at all reasonable times he has on Site a competent person in charge), clause 3.14 (the entitlement of the Contract Administrator to issue instructions to open up the works for inspection) and clause 3.18 (the obligations of the parties in respect of the CDM Regulations). I pause to observe that, of course, Mr Jackson is not personally a party to the contract.

17 As for the law in relation to health and safety, it is clear that MWA has strict obligations to ensure, so far as is reasonably practicable, that persons not in its employment who may be affected thereby are not exposed to risks to their health and safety: see s.3 of the Health and Safety at Work Act 1974 and Regulation 13 of the CDM Regulations. It is a criminal offence to fail to discharge a duty under s.3 of the Health and Safety at Work Act 1974.

The Application

18 Turning to the substance of the application, I do not consider that it would be appropriate to grant the injunction sought. My reasons are as follows.

19 **Serious issue to be tried**. I do not consider there to be a serious issue to be tried. There is no right under the building contract for the Contract Administrator to attend the Site at any time he pleases or which may be convenient to him. MWA has an obligation to grant access to the Contract Administrator at all reasonable times but otherwise enjoys exclusive possession. On my reading of the evidence, MWA has provided the necessary access in accordance with the terms of the contract. I do not consider that the fact that Mr Jackson has until recently been granted greater leeway than is strictly available under the terms of the contract means that M&P now has an arguable case for breach of that contract. Mr Jackson submitted that there is a need for protection from arbitrary changes to the contract but that does not give rise to a serious issue to be tried where there has been no breach. MWA's offer to accommodate out of hours access as long as it has a presence on the Site seems to me to exceed its contractual duty.

20 Mr Jackson's submissions in his skeleton to the effect that MWA's conduct is disproportionate and unnecessary do not give rise to a serious issue to be tried and there is no evidence that Mr Jackson's work as Contract Administrator has, in fact, been impeded or that MWA's works on Site have been affected.

21 In his skeleton argument, Mr Jackson submits that MWA has obligations to work collaboratively to prevent delay, to provide information necessary to enable the Contract Administrator to determine extensions of time or rewards of loss and expense. However, there is no evidence that Mr Jackson has been unable to carry out his role as Contract

Administrator or that MWA has acted in breach of the contractual obligations on which Mr Jackson relies. Indeed, Mr Jackson puts his case in his skeleton no higher than that the evidence in his witness statement *suggests* that there is at least an arguable case that MWA has acted in breach, or may do so. In oral submissions, Mr Jackson referred in general terms to breaches which *could* give rise to a loss but did not identify what they were.

22 **Are damages an adequate remedy?** I consider that even if M&P has an arguable cause of action for breach of the building contract, it is clear that damages would, in any event, be an adequate remedy. There is no real suggestion by M&P of any loss other than financial. Mr Jackson alluded during the course of his oral submissions to this case being analogous to a case involving the destruction of evidence, but with respect to Mr Jackson, that is not an appropriate analogy. There is no evidence to indicate that matters have been hidden from Mr Jackson in the context of his work as Contract Administrator, or that he has been prevented from carrying out that role in accordance with the terms of the contract.

23 There is no suggestion whatever that MWA would be unable to pay any damages that might be awarded; it is a well-established contractor of over twenty years' standing. Furthermore, this is not a case, in my judgment, of genuine urgency, where but for injunctive relief, M&P would be irremediably prejudiced. Indeed, I accept Mr Owen's submission in his skeleton argument that there is no real urgency involved in this application.

24 **Balance of convenience.** Further and in any event, it seems to me that the balance of convenience is in favour of rejecting the application for an injunction. As I have already said, there is no urgency or real necessity for the relief sought by M&P. It is clear that Mr Jackson may attend the Site in his capacity as Contract Administrator at any reasonable time during working hours and that he may also attend outside working hours if appropriate arrangements are made. This has been made abundantly clear to him in correspondence by MWA which, in my judgment, has made every effort to be reasonable and to accommodate the constraints on Mr Jackson's availability. I cannot see any basis for the complaints that Mr Jackson makes.

25 Mr Jackson has the express contractual right, by reason of clause 3.14 of the building contract, to instruct opening up for inspection of the works or to arrange for, or carry out, tests of any materials or goods. I cannot see any genuine basis for the complaint that he may not be in a position properly to carry out his role as Contract Administrator. Indeed, in his oral submissions this was put no higher than that there was a significant risk of harm in the future. Where it is clear that Mr Jackson's role as Contract Administrator has not been impeded to date and that M&P has suffered no prejudice, I can see no proper basis to think that there is a significant risk of such harm occurring in the future.

26 Both parties have provided contractual undertakings to comply with the requirements of the CDM Regulations and I accept that the health and safety risks of permitting unrestricted access to Site of the type for which Mr Jackson contends significantly outweigh the risk of preserving the status quo of permitting him access only at reasonable times and by arrangement (which, after all, is entirely in accordance with the terms of the contract). I do not consider Mr Jackson's submissions today as to the question of good faith to take matters any further on this point. Indeed, open correspondence that I have seen over the course of the last few weeks suggests that MWA has, in fact, been acting in good faith in trying to resolve the issues raised by M&P and in making various suggestions to Mr Jackson as to how a satisfactory resolution might be achieved.

27 In my judgment, the course which carries the lower risk of injustice is accordingly to refuse the injunction.

28 Finally, I note that, notwithstanding the legal advice that has plainly been available to M&P, no undertaking in damages has been offered by M&P in connection with this application. In a case such as this, that would ordinarily be a serious impediment to the grant of an injunction. MWA has filed evidence which casts very serious doubt over M&P's ability to compensate MWA in the event that an injunction were to be wrongly granted. On this ground alone, I would also have rejected the application.

29 For all these reasons, I dismiss the application for an injunction. Returning to CPR 25.2(1), this application is, in my judgment, neither urgent and nor is it desirable in the interests of justice to grant injunctive relief.

LATER

30 I am now called upon to deal with the costs of this application. MWA, which has succeeded in opposing the grant of the injunction that was sought by M&P, seeks its costs of the application on an indemnity basis. I have seen a statement of costs for summary assessment and I am invited to make a summary assessment of the costs in the order of £57,000.

31 Dealing first with the principle of costs, Mr Jackson very realistically did not oppose an order for costs in favour of MWA in light of their success in defending the application. However, he sought to suggest that an order for indemnity costs would not be appropriate and he also made various observations about the level of MWA's costs.

32 In my judgment, this is a case in which the application falls outside the norm (the test to be applied in considering an application for indemnity costs). It is clear that Mr Jackson wishes to obtain unrestricted access to the Site (which was not provided for in the building contract) and that he continues to seek unrestricted access in the face of MWA's attempts to advance perfectly reasonable proposals, not only for reasonable access but also for access outside normal hours. I reject Mr Jackson's suggestion that MWA rebuffed his attempts to identify the necessity for arrangements in relation to health and safety.

33 In my judgment, it is regrettable that Mr Jackson, for whatever reason, did not want to accept the perfectly reasonable and contract compliant proposals made by MWA to resolve this dispute. Instead, on behalf of M&P, he obtained legal assistance from counsel and then pursued this application to the bitter end, albeit ultimately without legal representation and without the draft proceedings that would ordinarily be required or, indeed, any form of undertaking.

34 I accept Mr Owen's submission that Mr Jackson made a very creditable attempt to advance the application in court. His oral submissions were, as I said in my main judgment, coherent and clear and his written skeleton appears to have had substantial legal input. Accordingly, he does not appear to me to have been disadvantaged by the lack of legal representation. Unfortunately however, as Mr Owen submitted, this application was doomed from the start and should never have been made.

35 Of course that is not to say that MWA did not need to take it seriously. The threat of an imminent application to the High Court to obtain injunctive relief is always likely to be taken extremely seriously by a putative defendant and it is unsurprising that MWA instructed experienced solicitors and counsel to deal with it and considered it necessary to

serve detailed evidence in response. It was inevitable, in the circumstances, that MWA would incur substantial legal costs. Mr Jackson had every opportunity to stop these legal costs from racking up, but he persisted in making his application nonetheless.

36 Therefore I am going to make an order for indemnity costs. Looking at the statement of costs, Mr Jackson has raised some questions around the conduct of MWA but I think that, in the remarks that I have already made, I have addressed those. I reject his submissions that MWA has not acted in good faith. I do not consider that the evidence that I have seen is supportive of the proposition that MWA has not properly engaged with this dispute and, in my judgment, M&P is going to have to pay the costs of this application in the full sum claimed of £57,518. Those costs are to be paid within fourteen days.

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

This transcript has been approved by the Judge.