TRANSCRIPT OF PROCEEDINGS

[2019] EWHC 711 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

7 Rolls Buildings
Fetter Lane

Before MR JUSTICE FRASER

IN THE MATTER OF

BILLINGFORD HOLDINGS LTD & BFL TRADE LTD

(Claimants)

-v-

(1) SMC BUILDING SOLUTIONS LTD
(2) NIGEL ANTHONY DIGHT

(Defendants)

MR MAYNARD, instructed by Huggins Lewis Foskett LLP, appeared on behalf of the Claimants

MS DRAKE, instructed by Palmers LLP, appeared on behalf of the First Defendant

JUDGMENT
8th MARCH 2019, 11.36-11.49
(AS APPROVED)

MR JUSTICE FRASER:

1. This is an application that is made today for urgent interim relief by the claimants, or applicants; they are Billingford Holdings Limited and BFL Trade Limited. They have today issued proceedings, and seek an order against two defendants. The first is SMC Building Solutions Limited, and the second is Mr Nigel Anthony Dight. Mr Dight is an adjudicator and this application is in respect of an adjudication which is ongoing. This application was issued and served after close of business yesterday evening upon both the defendants. Ms Drake has come to court today, on short notice, but has had no chance to provide any responsive evidence. Today is 8 March 2019 and I am just going to explain the background to the adjudication.

2. SMC Building Solutions, the first defendant, issued a notice of intention to refer a dispute to adjudication on 21 February 2019. It followed that up with a referral on 25 February 2018. Mr Dight was appointed the adjudicator to determine that dispute and in a letter of 25 February 2019 he notified the parties of his appointment. He was nominated for appointment by the President of the RICS - the Royal Institution of Chartered Surveyors - who had nominated him to be the adjudicator under system that is called RICS Dispute Resolution Services. This part of the RICS act for and on behalf of the President of the RICS.

3. In the letter dated 25 February 2019 from Mr Dight to which I have referred, he advised the parties that he accepted the nomination and he was willing to act as the adjudicator in respect of the dispute between the parties, which arose out of a construction contract. He enclosed his terms and conditions for acting as the adjudicator. He also set down a timetable for the adjudication. That letter also identified that the referral notice had to be served not later than Thursday 25 February 2019. As I have identified, it was actually served in accordance with that timetable.

4. What Mr Maynard, for the claimants, seeks from this court today is an injunction by way of an order preventing both the adjudicator (the second defendant) and the other party to the adjudication (the first defendant) from continuing that adjudication. It is clear, therefore, that the claimant seeks the court to interfere in an ongoing adjudication. The short notice which was provided to the defendant, whereby they were provided at 8:40pm last night with the relevant documents, has led to Ms Drake appearing today before me on this application to resist the urgent interim relief which the claimants seek.

5. Although I have found both parties' skeletons very useful (and they have both been prepared in short order, Ms Drake's in particular) and the authorities that have been brought to my attention are of course useful, in my judgment, based on the approach of the Technology and Construction Court to adjudications and previous reported decisions in this field, they rather miss the central point. I am just going to explain what that point is.

It is only in extremely rare cases that the TCC will interfere by way of injunctive relief, or the grant of declarations under CPR Part 8 that are akin to injunctions, in ongoing adjudications. In ***Dorchester Hotel v Vivid Interiors*** [2009] EWHC 70 (TCC) Coulson J, as he then was, said at [15] that the court did have jurisdiction to issue injunctions or declarations akin to injunctions in respect of ongoing adjudications, but that such an injunction would only rarely be granted. He also said at [17]:

'Accordingly, for these reasons I have concluded that the TCC does have the jurisdiction to consider the application for a declaration in this case, but I make it clear, as I hope I made clear in argument, that such a jurisdiction will be exercised very sparingly. It will only be appropriate in rare cases for the TCC to intervene in an ongoing adjudication. It is important that wherever possible, the adjudication process is allowed to operate free from the intervention of the court. Applications of this sort will be very much the exception rather than the rule.'

6. Although it is the case that Edwards-Stuart J in ***Twintec Ltd v Volkerfitzpatrick Ltd*** [2014] EWMC 10 (TCC) the judge said that the court did have jurisdiction to grant an injunction and in that case the injunction was granted, that does not mean that the approach of the court has been diluted. In my judgment, the dicta of Coulson J, as he then was, remains a correct statement of the approach that the court will take in terms of being reluctant to interfere in ongoing adjudications. Indeed I have applied that dicta myself in ***Lonsdale & Bresco*** [2018] EWHC 2043 (TCC). At [16] I said:

'I do not wish parties to adjudications generally to read any element of this judgment and conclude that CPR Part 8 represents a short cut available to them in conventional cases or as any encouragement to seek injunctions to restrain ongoing adjudications. Such proceedings will only be considered suitable or even arguable in very rare cases.'

Here, the claimants seek an injunction so that declarations in terms of the adjudicator's jurisdiction, already considered by the adjudicator, can be resolved by the court under CPR Part 8.

7. Mr Maynard seeks to persuade me that in this case an injunction would be justified because, as he has put it, the issues are so very clear it would be wrong for the court to allow the adjudication to run if there was no prospect of it reaching a binding decision. But I am afraid I do not consider that is the correct approach, nor is it the correct test. This is not an unusual case. The claimant challenges the jurisdiction of the adjudicator on grounds which are, if I may say so, entirely run of the mill. There is nothing in this dispute about the jurisdiction of the adjudicator and whether the correct nominating body was the body that appointed the adjudicator to take this out of the conventional case.

8. I would also draw the parties' attention to the fact that it is exactly the sort of argument which took place in a very recent case called ***Skymist Holdings Ltd v Grandlane Developments Ltd*** [2018] EWHC 3504 (TCC). This is a decision of Waksman J who, after a decision had been issued by an adjudicator, considered exactly this question of the correct nominating body. In that case I had declined to grant an interim injunction to restrain an ongoing adjudication, for precisely the same reason that I have declined to do that today, which is that this is not a rare case.

9. Adjudication has to be allowed to continue, so far as possible, free from the interference of the court, and quibbles or challenges to an adjudicator's jurisdiction should, in a conventional case, be taken upon enforcement. As an example of that, I refer to another decision, this one of Stuart-Smith J in ***Hitachi Zosen v John Sisk*** [2019] EWHC 495 (TCC), that was handed down this morning. The central issue for determination in that case was whether the adjudicator - in what was the eighth adjudication - had jurisdiction to decide the sums that were properly payable. There was a jurisdictional challenge; the adjudication had been fought by both parties and that challenge was considered at the enforcement stage.

10. There are other powerful policy reasons why adjudications that are underway should, for the most part, be allowed to continue through to a decision, with challenges going to jurisdiction being taken on enforcement. Adjudication is designed to be quick and inexpensive, and adjudicators are expected to reach a decision within 28 days, or 42 days if extended. There is simply no time within that duration to factor in applications to the court, with contested points on jurisdiction, without causing serious disruption and delay to the timetable set down by Parliament for an adjudicator to reach a decision. Further, the practice in the TCC of considering contested enforcement proceedings which has been in place since the decision of Dyson J (as he then was) in ***Macob Civil Engineering Ltd v Morrison Construction Ltd*** [1999] EWHC 254 (TCC), which is to enforce if appropriate by means of summary judgment under CPR Part 24 (see [31] to [37]) enables an unsuccessful party to contest enforcement on jurisdictional grounds. Sometimes those grounds are challenged by the successful party on the basis that the other party has conducted itself in such a way as to have submitted to the adjudicator's jurisdiction. That is, in the normal case, the appropriate way for such points to be taken.

11. In this case the adjudicator was asked - or rather his attention was drawn by the solicitors representing the claimants - to consider what they said was a compelling argument that he had no jurisdiction. In an email which was sent to him on 5 March 2019 he was told, in respect of various observations about the contract, the following:

'We mean no disrespect, but in the circumstances it appears to us you do not have jurisdiction to make any decision on the substantive complains of the referring party against our client. In order to avoid any unnecessary waste of your time or the parties' resources, we invite you to make a preliminary determination today that you do not have jurisdiction and that the referring party, which has submitted itself to your jurisdiction, should pay our client's costs of and in connection with the referral. In the event that you decide you do have jurisdiction, we respectfully request a short extension of time until 4 o'clock on Friday 8 March for service of our client's response to the substantive referral notice. On behalf of our client we reserve its right to make a claim in the meantime, if advised, for an injunction to restrain proceedings on the adjudication.'

(emphasis added)

12. The adjudicator considered that representation from the claimants and in a letter of 5 March 2019 he dealt with each ground of challenge, as he referred to them, and identified that as far as he was concerned, his nomination was effective and he did have jurisdiction. His first ground was the one dealing with nomination by the RICS, and one of his conclusions was, and I quote:

'In my view, by electing to remain silent on this point and allowing the referring party to secure the nomination of an adjudicator by the RICS, the respondent has foregone the opportunity of objecting to the validity of that nomination on that ground.'

13. In respect of ground number 2 he went on to say, in respect of the email which I have identified, 'It seems to me the respondent, by virtue of the email timed at 5.07pm on 28 February, in which I was requested to exercise my discretion as adjudicator, which request I declined, by extending the deadline for service of the response without any form of reservation as to my power to do so, has submitted to my jurisdiction as adjudicator.'

14. Whether those observations are correct or incorrect in law, is a matter which can and will be decided at the enforcement stage if that is challenged, and if the claimants in these proceedings are unsuccessful in the adjudication. I repeat there is nothing in this case, or in the arguments deployed, that put it in the rare or exceptional circumstances category.

15. I will deal with one subsidiary point. Because of the very short notice that was given to the first defendant to deal with the material today, Mr Maynard sensibly accepted that the substantive hearing of the claimants' application for interim relief could not be heard today, and would have to be heard next week. That then led to some consideration about what the appropriate order would be in the meantime, were I minded to order a return date.

16. The timetable set down by the adjudicator is notable in this respect. The response to the referral notice, on the adjudicator's timetable, has to be served today. Mr Maynard sought to persuade me that I should order the adjudication to be suspended pending the hearing of the substantive application on the return date. By making any order at all between today and the notional return date next week, all I would be doing would be interfering with the adjudicator's control of his own procedure and timetable. I would effectively be granting the claimants an extension of time to lodge their response to the referral notice. That is something which, it seems to me, would be wrong in principle and I am not prepared to make such an order. The adjudicator is in charge of the timetable of the adjudication, and the court is not. Therefore, in those circumstances, I am not proposing to make, and I am not prepared to make, any order on the application today by the claimants.

17. Mr Maynard made a rather bold submission that in the absence of Ms Drake the court would not hesitate to make the sort of order that, as he put it, 'would hold the ring.' While that might be the correct approach, or a general approach, on some applications for urgent interim relief on other facts, in my judgment it is not the correct approach when there is an ongoing adjudication and the effect of such an order is to grant one party an extension of time and interfere with an adjudicator's directions.

18. What I will now do is explore with counsel the way in which any relevant order could or should be made, so far as hearing these issues on enforcement is concerned, and I should also say Ms Drake has asked for her costs. I will hear from Mr Maynard about that first.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge