HT-2021-BHM-000004

Case No: HT-2021-BHM-000004

Neutral Citation Number: [2021] EWHC 1034 (TCC)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Birmingham Civil and Family Justice Centre
Priory Courts

Birmingham
B4 6DS

Date: 30/04/2021

Before : **HER HONOUR JUDGE SARAH WATSON**

Between :

DELTA FABRICATION & GLAZING LIMITED - V- WATKIN JONES & SON LIMITED

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Mr Nicholas D K Jackson (instructed by **MD Law**) for the **Claimant**
Ms Camille Slow (instructed by **Kerrigans Construction Lawyers**) for the **Defendant**

Hearing date: 7 April 2021
Handing down date: 30 April 2021

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JUDGMENT

Her Honour Judge Sarah Watson:

Introduction

1. In these proceedings, the Claimant applies for summary judgment to enforce the award of an adjudicator under the Housing Grants Construction and Regeneration Act 1996 ("the Act"). The Defendant resists the application on the basis that the adjudicator did not have jurisdiction because the Claimant referred disputes under two separate contracts to the adjudicator in the same adjudication.

2. The Defendant raised its jurisdictional objection to the adjudication at the outset. It did not agree that the adjudicator could decide the question of his own jurisdiction but put forward its arguments and invited the adjudicator to resign. The adjudicator reached the non-binding decision that he had jurisdiction.

3. The parties agree that, if the referral did concern disputes under two separate contracts, the adjudicator did not have jurisdiction and the award should not be enforced. They also agree that they did enter into two separate contracts. The Defendant was the main contractor under a contract for the construction of student accommodation in Walthamstow. The Defendant's contract with its employer is identified by reference number 3197. The Defendant sub-contracted brick slip cladding work to the Claimant by a sub-contract order numbered 3197/S7200 dated 5 August 2019. The Defendant sub-contracted roofing works to the Claimant by a subcontract order numbered 3197/S7218 dated 19 September 2019. Each of the subcontract orders ("the contracts") contained substantial documentation setting out the detailed terms of the sub-contracts.

4. The Claimant argues that the adjudicator had jurisdiction and the award is valid because:

    a. the parties later agreed, by their conduct, to vary the contracts so that they were amalgamated and so that there was only one contract with effect from 21 February 2020;

    b. even if the parties' conduct did not amount to a variation so that there was only one contract for all purposes, it had the effect of amalgamating the contracts into one contract for the purposes of the Act; alternatively

    c. the Defendant is estopped from denying that there is a single contract within the meaning of the Act.

The law

5. In very brief summary, on an application for summary judgment by a Claimant, the test is whether the Defendant has a real prospect of success at trial. Its prospect must be real, as opposed to fanciful. The defence must carry some degree of conviction. The court must not conduct a mini-trial. It can take into account the evidence before it and also take into account evidence that can reasonably be expected to be available at a trial even if it is not available at the summary judgment hearing. The court should hesitate to make a final decision without a trial but, if the court has what it needs to decide that a defence has no real prospect of success, it should grasp the nettle and give summary judgment.

6. In a summary judgment application to enforce an adjudicator's award under the Act, there are very limited grounds available to the Defendant to resist judgment. They include the ground that the adjudicator did not have jurisdiction.

The Claimant's primary argument: agreement to vary the contracts so as to amalgamate them into one contract

7. The Claimant's primary argument is that, by agreement, the contracts had been amalgamated into one contract, so the Claimant did not refer disputes arising under more than one contract to the adjudicator. The Defendant denies this.

8. The parties are agreed that they did not enter into any express discussions under which they agreed to vary the contracts, so they be amalgamated. It is clear from the evidence of both parties that the issue of variation or amalgamation of the contracts was never discussed between the parties or expressly raised in correspondence. The Claimant argues that the parties reached agreement by their conduct, in the way they dealt with payment applications. Specifically, the Claimant alleges that the Defendant made an offer to amalgamate the contracts into one by the Defendant's Assistant Quantity Surveyor issuing the Defendant's payment notice of 12 February 2020, which related to both contracts. The Claimant alleges that it accepted the Defendant's offer to amalgamate the contracts by issuing its request for payment of 21 February 2020 as one payment application relating to both the contracts.

The law

9. The parties are agreed that, in order to find for the Claimant, I must be satisfied that the parties' conduct is unequivocal and consistent only with the parties having agreed to vary the contracts so that a single contract came into existence.

10. The Claimant relies on the decision of Coulson J (as he then was) in the case of *RCS Contractors Ltd v Conway* [2017] EWHC 715 in support of its case. In particular, it relies on the following passage from the judgment:

> *"It does not follow that, because there might have been different documentation pertaining to the different sites, there were three separate contracts."*

11. That case concerned an oral contract relating to three separate sites, in respect of which there was separate documentation. It is clear from his judgment that Coulson J accepted the testimony of a witness that the parties had orally agreed that there be one contract covering all three sites. On the facts of that case, he considered that the Defendant's case amounted to no more than an assertion that, because there were three separate sites, three separate bills of quantity and other valuation documents, there must have been three separate contracts. That is unlike this case, where the contracts were originally made as separate written contracts. I accept that the existence of documents relating to the separate works packages does not in itself mean that the contracts must be separate. However, in a case where the contracts were originally separate written documents, I would need to be satisfied that, despite the existence of the separate written contracts, the parties had agreed that the contracts be amalgamated.

The facts and analysis

12. The Claimant's own witnesses did not give evidence that they believed that the parties had agreed that the contracts be amalgamated into one contract. The Claimant's Managing Director, Mr Durband gave evidence on this point. His witness statement reads as follows:

> *"After the 12 February 2020 payment notice, we assumed that the Defendant wanted our payment applications to be combined so that is what we did for each payment application from February 2020 (pages 27 to 30) onwards. Each and every payment notice that the Defendant issued thereafter was a combined document."*

His evidence was that he understood the Claimant wanted payment applications to be combined, not that he understood that the Claimant wanted the contracts themselves to be combined.

13. The payment notice on which the Claimant relies as constituting the offer to amalgamate the contracts was not, in my judgment, un unequivocal offer to do so. The notice consists of a single page and supporting documents. The single page is a letter from the Defendant to the Claimant dated 12 February 2020, headed "*Payer Notice*" "*Re contract: 3197 Forest Road Walthamstow*". Contract number 3197 is the number applicable to the main contract between the Claimant and its employer. It is not the purchase order number applicable to either of the contracts. The payment notice, or "payer's notice" contains an amalgamated figure for the payment due under both contracts. It contains the following statement: *"the basis upon which the total of*

the above payment is calculated is all as the attached itemised, calculated and valued schedule of works." The next page is headed with the same contract number, 3197, and headed with the project name. There is a table beneath that heading, which sets out figures for the Claimant's application, the Defendant's certified totals, the previous payments and the amount to be paid, under the following headings: "*Brickslip Cladding – S7200*"; and "*Roofing – S7218*". Those headings are the descriptions and order numbers of the contracts. The following pages contain separate, detailed breakdowns of the figures summarised in the table. Therefore, although the payment notice was for one figure for both contracts, the supporting documentation did not confuse or amalgamate the contracts but dealt with the calculations separately. It does not follow that including the total of the sums due under both contracts in one payment notice amounts to an offer to amalgamate the contracts so that they cease to exist as separate contracts and become one contract. As I have already observed, it appears that the Claimant's own Manging Director understood from the Defendant's conduct that the Defendant wanted the payment applications combined. That is not the same as combining the contracts into one.

14. The Claimant's payment application of 21 February 2020, which the Claimant alleges amounted to acceptance of the Defendant's offer, also breaks down the payment application by reference to the cladding works and the roof works, with separate figures for the value of the separate works packages that were awarded under the contracts. The payment application was sent by email dated 21 February 2020, which identifies a number of separate pdf attachments, which include one entitled "*D1390- Walthamstow BOQ CLADD Feb 2020.pdf*", one entitled "*D1390- Walthamstow BOQ ROOF Feb 2020.pdf*"; and one entitled *"D1390- Walthamstow FEB 2020Appliciation.pdf"*. From this, and from the documents exhibited, it appears that the Claimant's payment application included separately prepared, detailed calculations of the sums due under the two contracts, albeit that the resultant totals were added together, and a single combined total figure claimed in the payment application.

15. When the parties agreed variations to the contracts, they numbered them consecutively under each of the separate contracts or works packages. Variations for the cladding work were prefaced "VO" and those for the roofing work were prefaced "RVO". In each case, the variations were consecutively numbered. That is indicative of the fact that the parties viewed the contracts as distinct.

16. There are numerous examples of the Claimant referring to both contracts in the documentation after the alleged amalgamation. Whilst some of the correspondence is inconsistent, in that the Claimant referred to "*contract*" in the singular and "*contracts*" in the plural even within the same letters, the following are examples of the Claimant's correspondence referring to more than one contract.

a. A letter of 15 December 2020 refers in the body of the letter to "*the contract*" and to "*said contract*" but is headed "*Re: Subcontracts 3197/S7200 Brick Slip Cladding & 3197/S7218 Roof Covering*".

b. A letter dated 21 December 2020 is headed:

> *"Sub-Contract Order number 3197/S2700 for brick slip cladding dated 5 August 2019*
> *Sub-Contract Order Number 3197/S7218 for roof covering dated 19 September 2019*
>
> *(each a "sub-Contract" and together "Sub-Contracts")*
>
> *Each between Delta Fabrication & glazing Limited (Delta") and Watkin Jones & Son Limited ("Watkin Jones")".*

It reads as follows:

> *"….we reaffirm our termination of the above contracts due to a Repudiatory breach of the Sub-Contracts by Watkin Jones, your claim that there has been no repudiation of either sub-contract by Watkin Jones is not accepted."*

c. In an email dated 2 November 2020, the Claimant stated: "*Final accounts need to be agreed*".

d. The Claimant's adjudication notice, headed "*statement of case*", reads as follows:

> *"In May 2019 the referring party received a Sub-Contract numbered 3197/2700 for value of £2,050,214.91 by the Respondent to design, procure and install Brick Slip Cladding at 4 Forest Road Walthamstow London E17 6JJ*
>
> *In July 2019 the referring Party received a Sub-Contract Numbered 3197/S7218 for the value of £193,995.37 by the Respondent to design, procure and install Roof Covering at 4 Forest Road Walthamstow London E17 6JJ……."*

It makes no reference to the amalgamation of the sub-contracts as now alleged.

17. The Claimant's referral asserted: *"The cladding and roofing works on this project had been issued under two separate order documents, however, these agreements were part of the one contract and were administered in regard to a single contract".* That submission makes no reference to the alleged variation to amalgamate the contracts on which the Claimant now relies, but gives the impression that the Claimant's position is that the "*agreements*" were always "*part of the one contract*". If the parties had agreed to amalgamate them by the process of offer and acceptance as now alleged, it is surprising that it is not mentioned in the Claimant's referral.

18. The referral states that all payment notices have been issued under one payment notice, and that the final account had been agreed as a single agreement *"making it difficult to differentiate between the "sub" contract agreements and the figures in relation to each element and as such, we consider the monies deducted in relation to all elements and agreed under the 1 nr agreement, can be administered under the 1 nr adjudication procedure as it is our consideration that it was WJSL intention of all elements to be treated and administered as one nr contract."* Again, this submission does not include any statement that the parties agreed by their conduct to vary the contracts so as to amalgamate them; rather that the Claimant considers, as a result of the way the final account statement was prepared, that the Defendant intended them to be "*treated and administered*" as one contract.

19. In response to the Defendant's jurisdictional challenge, in its submission to the adjudicator, the Clamant alleged that, whilst it accepted that there two separate subcontract elements issued by the Defendant for each of the works packages initially *"upon commencement of the works, the separation of the contracts ended there and there was consideration made by WJSL, in regard the culmination of the packages into 1 nr contract with the conduct of WJSL demonstrating that without doubt*". That is inconsistent with the Claimant's position now. It suggests that the separation of the contracts ended on commencement of the works and not as a result of the offer said to be contained in the Defendant's first payment notice of 12 February 2020 and the acceptance said to be contained in the Claimant's payment request of 21 February 2020.

20. The Claimant, both in its submissions to the adjudicator and in its evidence and argument in this application, places importance on the final account documentation. Indeed, it appears that this was the principal reason for the adjudicator's decision that he did have jurisdiction. The final account documentation consists of a letter from the Defendant to the Claimant dated 5 November 2020 which included wording to be accepted and signed by the Claimant. It was drafted by the Defendant. It is headed: "*Contract: Student Accommodation – 3197 Forest Road, Walthamstow*". It reads as follows: "*We set out below a statement of Final Account of the above contract".* There is a further heading "*Final Account for: Brick Slip Cladding, Roof Coverings and associated works*". It also states: *"We hereby confirm that following our negotiations we accept the sum of £3,140,000 in full and final settlement of all our entitlement under the above contract and of all claims against Watkin Jones Limited of whatsoever nature in relation thereto….*".

21. The Claimant argues that this is indicative of the parties' agreement to amalgamate the contracts into one, as it refers to "*the above contract*" in the singular. The adjudicator decided that this document recorded negotiations entered into by the parties after the issue of the contracts which led to an agreement that works were to be considered as executed under one contract. The adjudicator appears to have concluded from the wording of the final account that the parties' agreement that all

the works were to be considered as executed under a single contract was the result of negotiations between the parties. I respectfully disagree with the adjudicator's conclusion for the following reasons:

a. It is not consistent with the Claimant's case. The Claimant alleges that the agreement was the result of the parties' conduct in dealing with the payment notices in February 2020. It has never alleged the agreement was the result of any negotiations. Nor has either party given any evidence of any negotiations.

b. I do not read the wording of the final letter as indicating there had been negotiations to vary the contracts, but as indicating negotiations for the agreement of the total amount to be paid in full and final settlement of the Claimant's claims.

c. I do not read the words "*the above contract*" as a reference to the contracts so as to indicate that the contracts must have been amalgamated into one contract. The "*above contract*" appears to be a reference to the heading, which is "*Contract: Student Accommodation – 3197 Forest Road, Walthamstow*". I consider the wording is consistent with the reference being to the main contract and the project, under which the parties had entered into two sub-contracts numbered 3197-S2700 and 3197-S2718.

22. If the parties had intended that the contracts be amalgamated or understood that they had been, it is surprising that there is not a single document expressly referring to the fact that the contracts had been amalgamated or giving the new contract a new purchase order number or reference number.

23. The Defendant's evidence is that the parties had an extensive course of dealing relating to various different projects, and that they had entered into separate subcontracts for the different works packages on various project, rather than varying the contracts for the first works package to include further works packages, as they could have done had they wished to deal with the Claimant under one contract rather than several. The Defendant's evidence is that they also adopted the practice of having one payment notice for all the Claimant's sub-contracts under each project without amalgamating the sub-contracts into one. Against that background, it does not appear likely that the parties intended, or that the Claimant reasonably understood, that the simple act of including the valuations under both contracts in one payment notice was intended to amount to an offer to combine the contracts into one.

24. Some of the correspondence and documentation on which the Defendant relies predates the alleged agreement to amalgamate the contracts into one (which the Clamant alleges occurred by its acceptance of the Defendant's offer on 21 February 2020). However, it is relevant to the context surrounding the parties' conduct and the question of whether the parties' conduct is unequivocally indicative of an agreement to amalgamate the sub-contracts. In January 2020, the parties executed separate Deeds of Warranty between the main contractor, the Claimant and the Defendant for

the separate contracts. Those deeds are dated 13 January 2020, which is about a month before the Claimant alleges the Defendant offered that the contracts be amalgamated. The preparation and execution of separate deeds of warranty suggests that the Defendant intended the contracts to remain separate. No explanation has been offered as to why that would have changed a month later.

25. In summary, the documents relied on by the Claimant as constituting the agreement to vary are not unequivocal. In addition, far from satisfying me that the conduct of the parties unequivocally indicates that the parties agreed for the contracts to be amalgamated into one contract, the conduct of the parties, both before and after the alleged agreement to amalgamate, indicates that the parties did not intend that the contracts would be amalgamated or that only one contract existed.

The Claimant's second argument: one contract for the purposes of the Act or an election to treat the two purchase orders as one contract for the purposes of the Act

26. Mr Jackson argued that, even if I was not satisfied that the parties had agreed for all purposes that the contracts be amalgamated, I should be satisfied that they were amalgamated for the purposes of the Act, and that it was possible for the contracts to have become one contract for the purposes of the Act but not for all purposes. I hope I do not do a disservice to him in my summary of his argument, which I did find hard to follow.

27. He argued that the words "*a construction contract*" in s108 of the Act bear the same meaning as they do in relation to the other provisions of the Act, including under s109, s110A, s110B and s111 (3). I do not believe that proposition is contentious.

28. He also argued that, for the purposes of the Act, the focus of which was on the payment mechanisms and dispute resolution processes, if a contract was one contract for the purposes of the payment mechanisms, it was also one contract for the purposes of the adjudication provisions in the Act. He argued that, by treating the contract as one contract for the payment processes, the Claimants had elected to treat it as one contract for the purposes of the adjudication provisions of the Act.

29. He put his argument this way in his skeleton argument:

> *"Where the parties have unequivocally operated and administered two purchase orders as one, they will very readily qualify as a single contract for the particular purposes of the Construction Act.*
>
> *That is not to say that the expression should be interpreted at all differently to the common law. Merely, it is to say that, for the purposes of the Construction Act, one need only look to the manner in which the parties have operated the machinery of the Act in relation to the state of affairs. Put the other way, it is*

submitted that under this alternative limb there is no requirement to establish a formal contractual agreement to amalgamate if the parties have elected to treat one or more contracts as one."

30. As I understand his argument, it is that something less than the offer, acceptance and consideration required for a formal variation of a contract at common law is required for the parties to have agreed that the contracts be amalgamated for the purposes of the Act.

31. That would mean it would be possible for the contracts to remain separate contracts at common law, but to be "*a construction contract*" under the Act. Mr Jackson was unable to refer me to any authority in support of this proposition.

32. Miss Slow referred me to *RCS Contractors Ltd v Conway*, on this point. The fact that the parties had issued only one payment notice and one pay less notice covering all three sites was a factor that reinforced Coulson J's finding that there was one contract in that case. However, as Miss Slow submitted, it does not appear that Coulson J considered that point alone to be decisive, so that it was not possible under the Act for one payment notice or one pay less notice to relate to more than one contract.

33. S104 (1) of the Act defines a "*construction contract*" as *"an agreement with a person for any of the following*" and it then lists the types of services that meet the definition. There is nothing in the Act that suggest that the words "*contract*" or "*agreement*" bear anything other than their normal and natural meaning. I am not persuaded that it is possible for two contracts that have not been amalgamated into one at common law could nonetheless be within the definition of "*a construction contract*" in the Act.

34. In any event, even if I am wrong on that point, for the reasons explained above in relation to the Claimant's primary argument, it is far from clear that, by adding together the two individually calculated amounts claimed in respect of the contracts and claiming the total in a single payment application supported by detailed breakdowns by reference to the separate contracts or work packages, the parties have "*unequivocally operated and administered two purchase orders as one*" so that they should "*qualify as a single contract for the purposes of the Construction Act*".

35. For these reasons, I am not persuaded that the parties' conduct gave rise to a single contract for the purposes of the Act, but not for other purposes.

The Claimant's third argument: estoppel

36. The Claimant also argues that the Defendant's conduct gives rise to an estoppel. It argues the elements of estoppel in this case are as follows:

a. the Defendant's representation, by its payment notice of 12 February 2020 (and presumably later payment notices), amounted to a representation that the contracts were to be treated as one contract;

b. the Claimant relied on the representation;

c. the Claimant has suffered detriment.

37. The Claimant has not adduced witness evidence to support its claim in estoppel. Whilst it may be that the Claimant considered that the question of whether the Defendant had made a representation was one of interpretation of documents that are before the court, it is not clear why the Claimant has not adduced evidence as to its reliance on the representation or the detriment it claims to have suffered. There is no evidence before me on either of these essential elements of estoppel.

38. As far as the representation is concerned, for the reasons I have already given in relation to the question of whether the contracts were varied, which I shall not repeat, I am not persuaded that the Defendant's payment notice or notices amounted to a representation that the Defendant was treating the contract as one contract. The payment notices themselves are not clearly indicative that the Defendant considered the contracts to be amalgamated. They are equally consistent with the Defendant simply wishing to administer the payments on both contracts together.

39. As far as reliance is concerned, there is no evidence as to the reliance the Claimant actually placed on the alleged representation. Further, for the reasons I have already given, the remaining conduct of the parties, including correspondence referring to more than one contract, is inconsistent with the Claimant's reliance on the alleged representation.

40. Mr Jackson valiantly attempted to persuade me as to detriment. He suggested that the Claimant may have incurred additional costs in dealing with the applications as though there were one contract. That argument was not supported by evidence and was also inconsistent with the Claimant's argument that the consideration for the agreement to amalgamate the contracts would be the cost saving to the Defendant of dealing with the payments the contracts together. It is hard to see how the Claimant would have incurred higher costs as a result of treating the contracts as one. If anything, it would be more likely that there would have been a small saving. Mr Jackson also suggested that the detriment was the referral to the adjudicator of the disputes as one dispute under one contract. However, the adjudication notice makes clear that there were two contracts, and the referral, though it does state that the "*agreements were part of the one contract and were administered in regard to a single contract*", does not make any reference to the claim in estoppel.

41. It is far from clear, therefore, that the Claimant did rely on the alleged representation to its detriment. In any event, in the absence of evidence from the Claimant on the

issue of reliance and detriment, I cannot conclude that the Defendant has no real prospect of defending the claim because it is estopped from denying that the contracts were to be treated as one contract.

Conclusion

42. In my judgment, the Defendant has not only a real, but a strong, prospect of successfully defending the claim on the ground that the adjudicator lacked jurisdiction, because the Claimant referred disputes under two separate contracts to the adjudicator in one referral.

43. The application for summary judgment is dismissed.

44. The Claimant has asked that I should require the Defendant to make a payment into court of the adjudication award as a condition of defending the claim. Its basis for that request is that, if the adjudicator is right, the Defendant is in breach of its lawful obligation to pay the amount awarded, because the adjudicator's decision is *"right until it is proved otherwise*" and the only challenge is jurisdiction.

45. On the evidence before me at this stage, I consider the Defendant's prospects of defending the claim on the ground of jurisdiction to be strong. Whilst jurisdiction was the only issue before me, that is because the Defendant rightly acknowledges the very limited grounds for opposing summary judgment following an adjudication award. The Defendant also disputes the adjudicator's substantive decision as to repudiatory breach and the financial awards that followed. I am not persuaded that it is appropriate for me to make leave to defend conditional on a payment into court in the circumstances of this case.