IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND & WALES
TECHNOLOGY & CONSTRUCTION COURT (QBD)
[2021] EWHC 1742 (TCC)

No. HT-2020-000465

Rolls Building
Fetter Lane
London
EC4A 1NL

Thursday, 13 May 2021

Before:

MRS JUSTICE JEFFORD

B E T W E E N :

MAYPOLE DOCK LTD — Claimant

- and -

CATALYST HOUSING LTD — Defendant

MS L. KUEHL (Counsel) appeared on behalf of the Claimant.

MR C. WINSER QC (Counsel) appeared on behalf of the Defendant.

J U D G M E N T

(via Microsoft Teams)

MRS JUSTICE JEFFORD:

The claim

1 This is an application for an interim injunction to restrain the pursuit, by the defendant, of an expert determination. The background facts are these. On 4 April 2014, the defendant, Catalyst, purchased land and buildings in Southall from the claimant, Maypole. Upon completion of the sale, the parties entered into an Overage Agreement, which contained obligations on the part of Catalyst to seek planning permission to optimise the Open Market Value ("OMV"), as defined, of the land and to pay Additional Consideration to Maypole on the obtaining of such planning permission.

2 Planning permission for a residential development of affordable homes was granted in August 2017 and the scheme was constructed by Catalyst. The development costs exceeded the projected revenue so that the Open Market Value, for the purposes of the Overage Agreement, was negative and no Additional Consideration was payable or paid to Maypole.

3 Maypole now makes the claim that Catalyst acted in breach of the Overage Agreement so that it failed properly to optimise the Open Market Value. Maypole claims damages in part, at least, calculated by reference to the Additional Consideration which it did not therefore receive. The nature of Maypole's case is that Catalyst undertook a development which was entirely of social housing so that the OMV was negative. Maypole alleges that Catalyst moved residents from another site to that social housing and then redeveloped the other site to their own advantage, but avoiding the Additional Consideration payable under the Overage Agreement.

4 A claim was issued in the Technology and Construction Court on 15 December 2020 and served on 12 March 2021. The Particulars of Claim made extensive allegations of breach,

including allegations that Catalyst had failed to use reasonable endeavours to optimise the Open Market Value; failed to keep Maypole informed (so that Maypole could not prevent Catalyst from proceeding on this basis); failed to seek Maypole's prior approval for the planning application; failed to use reasonable endeavours to ensure that the planning application optimised the Open Market Value; and so forth.

5 Claims were made for damages for breach of contract, expressed as follows. In paragraph 32(1) it was said that:

> "The Claimant has lost the value (to be assessed) of the Additional Consideration which would have been due to the Claimant under clause 9 of the Overage Agreement if the Defendant had sought and obtained planning permission for a profitable development."

In other words, that was a straightforward claim for damages for breach of contract, on the basis that Maypole sought to be placed in the position they would have been in had the contract been properly performed.

6 At paragraph 32(2), it was claimed:

> 'Further, or alternatively, that the Claimant had suffered a loss (to be assessed) measured by reference to the economic value of the contractual right to prevent a planning application being made without the Claimant's consent (also known as "negotiating damages").'

Dispute resolution

7 In respect of dispute resolution, the Overage Agreement contained two clauses material to dispute resolution. Clause 18 provides for expert determination in the following terms:

> "If any dispute arises between the Seller and the Buyer (other than in relation to OMV) relating to or arising out of the calculation of the

> Additional Consideration, the Seller or the Buyer may give to the other written notice requiring the dispute to be determined by an independent surveyor under this clause 18."

The balance of the clause goes on to deal with the appointment of the expert and the procedure for the expert determination.

8 Clause 21 provides, under the heading "Jurisdiction":

> "The courts of England (sic) are to have jurisdiction in relation to any disputes between the parties arising out of or related to this Agreement. This clause operates for the benefit of the Seller who retains the right to sue the Buyer and enforce any judgment against the Buyer in the courts of any competent jurisdiction."

9 On the face of it, therefore, the court has unlimited jurisdiction over all disputes, whereas the expert determination clause is limited in scope. It expressly excludes any dispute in relation to the Open Market Value and it includes "any dispute relating to or arising out of the calculation of the Additional Consideration" only.

The proposed expert determination and the jurisdictional challenge

10 There had been correspondence between the parties about Maypole's claim from at least July 2020. In the course of that correspondence, no suggestion had been made by Catalyst that the court lacked jurisdiction or that the dispute should be referred to expert determination.

11 Following the service of proceedings, however, on 24 March 2021, Catalyst served a notice of expert determination. Under the heading "Dispute", the notice referred to Maypole's claim and the TCC proceedings. Then, at paragraph 4.3, it said:

> "In the premises, a dispute for determination by an expert acting as an independent surveyor under the Overage Agreement has crystallised between the parties. As to whether any sum is due from Catalyst to MDL [a reference to Maypole]:

(i) in respect of Additional Consideration; or
(ii) in respect of loss and damage suffered by MDL, arising from or relating to the calculation of Additional Consideration."

12 The relief claimed was then set out at paragraph 5.1. Leaving aside questions of costs, Catalyst said that they sought the following declarations and relief:

(i) At paragraph 5.1.1:

"A declaration that Catalyst owes MDL £0 in respect of any liability on Catalyst's part to pay to MDL the Additional Consideration under the Overage Agreement."

(ii) Then, at paragraph 5.1.2:

"A declaration that Catalyst owes MDL £0 or such other sum as the expert may determine in respect of any liability on Catalyst's part to pay damages to MDL in breach of contract."

13 On its face, therefore, the notice sought to refer to the expert the same dispute as was the subject matter of the court proceedings, including the claim for damages for breach, although, in correspondence to which Mr Winser QC and indeed Ms Kuehl have referred this morning, Catalyst's position now is that they have indicated that they will be making submissions to the expert to the effect that they do not pursue the claim for a declaration in respect of damages and only the declaration under paragraph 5.1.1.

14 On 25 March 2021, Maypole's solicitors wrote to Catalyst asserting that the court had jurisdiction over the matter and that the notice was void because no dispute had arisen. On 26 March 2021, Catalyst filed its acknowledgment of service, indicating that it intended to contest the court's jurisdiction. On the same day, Catalyst applied to the RICS for the appointment of an expert.

15 On 6 April 2021, Catalyst also applied to the court for a stay of the court proceedings. That application is listed to be heard on 15 July. That is a little over three months from issue.

16 On 6 May 2021, Maypole asked Catalyst to agree to a stay of the expert determination. Although the documents are not in the bundle before me, Ms Kuehl has submitted that prior to that date Maypole had written to the RICS on a number of occasions asking them not to appoint the expert, but those requests were not acceded to, hence the appointment of the expert and the request to Catalyst to agree to a stay of the expert determination.

The application

17 Catalyst refused that request and it is that which has prompted this application. The urgency of the application arises from the provision in clause 18 that the parties' submissions are to be served within ten days of the appointment of the expert and it is common ground that that date is Monday of next week.

18 Put very briefly, Maypole's case is, firstly, that there is no dispute that can be referred to the expert in respect of the calculation of the Additional Consideration, because it agrees that no Additional Consideration was payable under the terms of the Overage Agreement. Secondly, Maypole contends that its claim is one for damages for breach of contract and not for payment of Additional Consideration under the Agreement and that that does not fall within the expert's jurisdiction, nor, as Ms Kuehl has submitted, does the claim for damages that appears at paragraph 32(2) of the Particulars of Claim. I will come to the relevance that has been attached to that case in terms of this application in due course.

The law

19 Turning to the application for the injunction against that background, the application is made and I am asked to apply the principles in *American Cyanamid Co v Ethicon Ltd [1975] AC 396*. There is no issue that those principles apply.

20 There is also no dispute in principle that the court has jurisdiction to restrain the pursuit of the expert determination and I have been referred in written submissions to the decision in *Norwich Union Life Insurance Society v P&O Property Holdings* [1993] 1 EGLR 164.

21 Both parties have also referred me to the authorities decided in this court which deal with the jurisdiction to injunct an adjudication from proceeding. Mr Winser places particular reliance on the summary, which he says is accurate, at paragraph 2C-44.1 in the commentary in the White Book. That passage emphasises that injunctive relief to restrain an adjudication from proceeding will only rarely be granted. The passage starts as follows:

> "Injunctive relief (or declaratory relief with the same effect) will rarely be granted to interfere with an ongoing adjudication, but the court has jurisdiction to grant such relief and will do so in unusual circumstances."

22 A number of decisions are then cited. They include cases in which jurisdiction has been an issue, in particular *Enterprise Managed Services Ltd v Tony McFadden Utilities Ltd* [2009] EWHC 3222 (TCC), in which a declaration was granted that an adjudicator did not have jurisdiction and the adjudication must be aborted. Other circumstances were those where there was an unusual aspect of the adjudication which led the court to conclude that the decision would inevitably be unenforceable.

23 I do not propose to visit any or all of those cases in any degree of detail, save for the decision in *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2020]

UKSC 25, which I will come to in a moment, because the authorities are, in my judgment, of limited value when it comes to this application in relation to an expert determination, rather than an adjudication.

24 Firstly, adjudication is the product of statute, albeit it takes effect by the express provision for a compliant adjudication procedure in the contract or by the implication of such terms. The underlying statutory purpose is to provide a quick form of dispute resolution for all disputes and an adjudication can be commenced at any time. That statutory foundation informs the court's reluctance to interfere with the conduct of an adjudication other than in rare and clear circumstances.

25 In the present case, the expert determination clause, although it has the same characteristic of speed, is limited to a very particular class of dispute and the issue in the present case is whether Maypole's claim in the TCC proceedings falls within that class of dispute, or, looked at another way, whether the matter that Catalyst seeks to refer to the expert determination falls within that class of dispute. Indeed, it is that very dispute which is the subject matter of the application issued by Catalyst after the service of proceedings on it.

26 I mentioned a moment ago the *Bresco* case. In that case, at paragraph 59 of his speech, Lord Briggs said this:

> "The starting point, once it is appreciated that there is jurisdiction under section 108 in such circumstances, is that the insolvent company has both a statutory and a contractual right to pursue adjudication as a means of achieving resolution of any dispute arising under a construction contract to which it is a party, even though that dispute relates to a claim which is affected by insolvency set-off. It follows that it would ordinarily be entirely inappropriate for the court to interfere with the exercise of that statutory and contractual right. Injunctive relief may restrain a threatened breach of contract but not, save very

> exceptionally, an attempt to enforce a contractual right, still less a statutory right."

27 The point that Lord Briggs was making was that once it was recognised that the adjudicator would have jurisdiction, there was a contractual right to pursue adjudication, and the court would then be slow to restrain a party who was seeking to do so. In the particular circumstances of the *Bresco* case, the basis of the argument for such restraint was that it would result in a decision which was, on the face of it, unenforceable because of the effect of insolvency set-off. That was not, in his Lordship's view, sufficient to restrain the pursuit of the adjudication in the first place.

28 Mr Winser QC argues that from that passage it can be seen that the court should only grant such an injunction where, as in this case, the expert's lack of jurisdiction is clear cut. That, to my mind, puts the proposition the other way around. Where there is a dispute as to the adjudicator's jurisdiction and the court concludes that there is a serious issue to be tried about that, then *American Cyanamid* principles offer the answer, in terms of the balance of convenience. It may well be the case that the balance of convenience favours allowing an adjudication to continue, bearing in mind the statutory background and the temporarily binding nature of the decision. That will be a fact-specific issue in each case. However, it does not follow that the same approach should be taken to an expert determination, still less that an injunction should only be granted where the expert's lack of jurisdiction is clear cut.

29 In this case, one party is seeking to enforce what it says is a contractual right to have a dispute determined by the expert, whilst the other party is seeking to enforce what it says is a contractual right to have the dispute determined in court. There are, thus, two competing contractual rights and two competing dispute resolution mechanisms. Moreover, the resolution of that jurisdictional dispute is already a matter pending before this court.

30 For all those reasons, and addressing the *American Cyanamid* principles, I do not approach this application as if I were concerned with an adjudication, or with any form of special pleading relating to adjudication.

Discussion

31 I turn, therefore, to the *American Cyanamid* principles and, firstly, the question of whether there is a serious issue to be tried. In my judgment, there clearly is a serious issue to be tried as to whether Maypole's claim falls within the expert determination provision or not, or, as I have said, put the other way, whether the dispute that Catalyst has sought to refer falls within that provision or not.

32 The dispute which Catalyst sought to refer was the dispute before the court, although it does not now apparently intend to pursue the declaration in respect of the damages claim. As I have said, on Maypole's case there is no dispute that no sum is owed under the contract as Additional Consideration. On the contrary, it has a claim for damages for breach of contract. Mr Winser submits that such a claim falls within clause 18, as it relates to the calculation of the Additional Consideration, because the damages claim is for the equivalent amount. That construction of the clause is disputed and Ms Kuehl submits that it is limited to disputes about calculation.

33 In any event, that submission on Catalyst's behalf seems to me quite inconsistent with the notice and the position now adopted on it. Catalyst cannot on the one hand say that they will not pursue the declaration in respect of damages, but that there is a dispute about the Additional Consideration, because that is how damages are to be calculated. At the very least, for the purposes of this application, there is a serious issue to be tried in this respect.

34 Further, Mr Winser in his written submissions submitted that his proposition could be tested in two ways. Firstly, he said that it cannot be right that by alleging a breach of contract a party can avoid a contractually agreed dispute resolution mechanism. That argument merely seeks to make the proposition good by stating it. The issue is whether there is a contractually agreed mechanism that applies to this dispute. The clause refers to calculation and there is a substantial difference between a dispute as to calculation and a dispute as to breach.

35 Secondly, he submits that if Maypole had sought to refer the matter - which must mean the claim they make in these proceedings - to expert determination, Catalyst could not have thwarted that by running the argument that Maypole is advancing. I would ask "Why not?" because, again, the point turns on the meaning of the clause.

36 It is necessary only to state these arguments. They are not for determination on this occasion, but on 15 July. However, they demonstrate that there is a serious issue to be tried.

37 I would add that the matter became even more open to argument in the course of the hearing as Mr Winser submitted that what his client sought from the expert was a determination of the planning aspects of the case, that is, his client's defence that no better application would have been granted and that the calculation of the Additional Consideration would follow from that. That is, with respect, difficult, if not impossible, to discern from the notice and, in any event, seems to place before the expert a matter relating to planning that is not within the scope of clause 18.

38 In approaching the matter in this way, I do not ignore Ms Kuehl's submissions. She submitted that the court did not have to get to this point because, even if she was wrong

about jurisdiction, it would not follow that the court would stay its own proceedings. That was a matter of convenience and was a matter to be determined by the court following the full hearing in July of this year and, as she put it, the stay of the expert determination was then a subset of that issue. Had I reached a different conclusion on the jurisdictional issue, I would have accepted that submission in the alternative, albeit it was put first in the argument before me.

39 Returning to the *American Cyanamid* principles, Ms Kuehl then submits that damages are not an adequate remedy. If the expert determination proceeds, but the expert lacks jurisdiction as she contends, Maypole will have incurred costs that are wasted and not recoverable. If Maypole does not participate in the expert process, she says with some justification that the expert will inevitably find against Maypole. If the court then finds that the expert did have jurisdiction, Maypole is left with a decision which cannot be challenged. So Maypole may find itself forced to participate in the process with the consequences already identified.

40 I accept Ms Kuehl's submission that this places Maypole in an invidious position and one that cannot be compensated in damages. It is a situation which arises solely because of the insistence of Catalyst in proceeding with the expert determination when the issue of jurisdiction is pending on its own application before the court. There is no issue that the court has jurisdiction to determine whether the expert has jurisdiction (see *Barclays Bank Plc v Nylon Capital LLP* [2011] EWCA Civ 826). Although, in one sense, the issue before the court in July will be the court's jurisdiction, the scope of the expert's jurisdiction is the correlative or, as Ms Kuehl put it, the subset.

41 I would add, given the comparison with injunctions in respect of adjudication that has been drawn, that the situation that Maypole finds itself in would not be replicated in adjudication. If a party declined to participate in an adjudication because they disputed jurisdiction, they might well find themselves on the end of an adverse decision and one, subject to the court's decision on jurisdiction, that would be enforceable, but it would always be open to that party to revisit the dispute in litigation or arbitration as appropriate. That is not the case here, as Maypole would, in such circumstances, be bound by the decision.

42 In my judgment, therefore, the balance of convenience is in favour of granting this injunction. Maypole finds itself in a difficult position. If Catalyst is right and it has the right to pursue this expert determination and the court has no jurisdiction, it will be able to do so in July 2021, or, at the least, shortly following that hearing. In any event, Catalyst makes no monetary claim and there is no risk of Catalyst being kept out of its money or otherwise unable to manage its affairs. The court is simply, as Ms Kuehl put it, being asked to hold the ring until the determination of the jurisdictional dispute in July. It seems to me that the balance of convenience is in favour of the court doing so.

43 Lastly, on the face of the application and in the evidence in support, there is reference, in the alternative or in addition, to seeking an interim or final declaration. I am not at all sure that the court can grant an interim declaration, but I would certainly not proceed to a final declaration at this stage. The outcome of the application in July will decide how to deal with the matter and whether any declarations should, as a result, be made.

LATER

44 I am going to reserve the costs to the judge who hears this on 15 July. I have some sympathy for Ms Kuehl's position that this application could have been avoided, in accordance with the overriding objective, by the simple expedient of agreeing to stay the expert determination.

45 However, if it is, in due course, concluded that Mr Winser's client had in fact a contractual right to pursue that course, it would seem to me to be wrong that they should already have had to pay the costs of this application. I will, therefore, reserve the costs. I think I had seen, as Mr Winser said, that that was already provided for as an alternative in the draft order.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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