Neutral Citation No: [2017] EWHC 2061 (TCC)
Case No: HT-2017-000164

IN THE HIGH COURT OF JUSTICE
IN THE TECHNOLOGY & CONSTRUCTION COURT

7 The Rolls Buildings
Fetter Lane
London EC4A 1NL

Wednesday, 5 July 2017

BEFORE:

MRS JUSTICE O'FARRELL DBE

BETWEEN:

TRANT ENGINEERING LIMITED

Claimant

- and -

MOTT MacDONALD LTD

Defendant

MR A HICKEY, QC appeared on behalf of the Claimant
MR J MORT, QC appeared on behalf of the Defendant

JUDGMENT
(As Approved)

Digital Transcript of WordWave International Ltd trading as DTI
8th Floor, 165 Fleet Street, London, EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Web: www.dtiglobal.com Email: courttranscripts@dtiglobal.eu
(Official Shorthand Writers to the Court)

MRS JUSTICE FARRELL:

1. This is the claimant's application on notice to the defendant for an interim injunction until trial or further order that the defendant should provide access to design data that it has prepared in connection with the Mid-Atlantic Power Project currently stored on a licensed software program, known as ProjectWise. Further, that the defendant should enable the claimant to use all of that design data either by itself or by other third parties in connection with the Project.

2. The claim arises out of a £55 million Mid-Atlantic Power Project to construct a power station at Mount Pleasant Complex in the Falkland Islands in respect of which the claimant, TEL, is employed by the Ministry of Defence. The Mount Pleasant Complex is the main UK military base supporting the operation for British Forces South Atlantic Islands. It comprises a military airport facility, including runway and associated support facilities, as well as technical and domestic accommodation facilities, and was constructed after the 1982 Falkland Islands conflict.

3. The project is to provide a new power generation facility, modification and automation of the existing standby power generation facility, the replacement of the existing boiler plant and main MTHW distribution system. The claimant's contract with the Ministry of Defence is on the terms of the Work Contractors Conditions of Contract, FCOM 200, Edition 2, 2005.

4. During the tender period for that contract, the claimant engaged the defendant, MML, to provide design consultancy services in respect of which it received modest payment with a view to MML carrying out full design consultancy services in the event that the bid was successful. The services included preliminary design, detailed design, design co-ordination, preparation and implementation of BIM and procurement support, principal designer responsibilities and development of the DREAM assessment (an environment assessment throughout the design stage).

5. The BIM system is building information modelling. It comprises a software system which is intended to assist the design, preparation and integration of differing designs and different disciplines for the purposes of adequate and efficient planning and management of the design and construction process. MML intended to implement the use of engineering project software called ProjectWise so as to enable the design teams to manage, share and distribute design data on a single platform.

6. The claimant's bid to the MoD was successful. In about May 2016, the claimant notified MML that they had the green light to go ahead with the project following which MML started to carry out its design services in respect of the project. On 12 July 2016, MML sent two emails to Brendan McFarlane of the claimant, TEL, enclosing proposed schedules and a contract. In the first email, it stated:

> "Please see attached our proposed schedules to attach to the contract, we need to sign between Mark MacDonald and Trant. I've also attached the proposed contract and this is identical to that

> which you've already seen but with details filled in for your confirmation."

7. The draft consultancy agreement had been sent by MML to Trant as part of the tender documentation but without any details completed.

8. The documents that were attached comprised:

   (i) Schedule 2, a "Scope of Services" relatively high level document summarising the work and services that would be supplied by MML;

   (ii) Schedule 3, "Details of Client Supplies to the Consultant" which stated that all documents dated ... are considered necessary to develop the detailed design, i.e. would be provided by Trant;

   (iii) Schedule 4, "Terms of Payment" which identified that there was a lump sum fee in respect of MML's services in the sum of £780,000 and contained provision for monthly payments in accordance with a schedule for payments to be made from June 2016 through to September 2018. It also contained rates in respect of any additional work. The "assumption" stated that the design phase would be complete by March 2017.

9. The attached contract, which was, in fact, sent by the second email, was a consultancy agreement made on MML's standard terms and conditions. It included at clause 1.4, a limitation of liability provision including the limitation of MML's liability in the event of a breach of contract of £1 million. It also contained provisions for payment at clause 1.8 which, effectively, followed the Housing Grant Act provisions for interim payments and it contained a provision that the contractor, in this case the consultant, could suspend works in the event of any failure on the part of the client, i.e. Trant, to make payment. Clause 1.10 contained a disputes resolution provision, for mediation, adjudication or arbitration. At clause 1.11.7, there was a provision in relation to intellectual property which stated:

> "Upon full payment of the fees due under the consultancy agreement the consultant shall grant to the client an irrevocable royalty-free non-exclusive licence to use all rights, titles and interest in any such intellectual property in connection with the construction, completion, maintenance, re-instatement, repair, promotion and/or advertisement whether by the client or by a third party authorised by the client of the project."

10. It is common ground that the claimant received the proposed contract documents but did not respond to them and did not, at any stage, prior to the current dispute, sign or return the contract documents. At around, or shortly after, that date, the parties entered into a dispute as to the scope of works for which MML was required to provide its consultancy services and its entitlement to payment in respect of what MML considered to be a wider scope of services than that contemplated at the time of the tenure bid.

11. MML did not invoice in respect of interim payments as set out in schedule 4 of the draft contract that had been sent to Trant. However, two payments, each of £250,000 plus VAT were made following invoices sent in the early part of 2017. It is common ground that those invoice sums were in respect of work carried out by MML but were simply payments made on account by Trant in respect of those works.

12. On 7 April 2016, MML issued an invoice claiming the sum of £475,000 plus VAT. That sum was not paid by Trant and contrary to the provisions in the obviously disputed contract, Trant did not issue a pay less notice indicating that it would be paying less than the sum claimed. On 26 May 2017, MML issued a further invoice in the sum of £1.626 million plus VAT. That sum was not paid by Trant but Trant issued a pay less notice in respect of that sum. On 30 May 2017, MML issued a notice stating that it would suspend performance within seven days unless payment of the sum of £475,000 plus VAT was made by 2 June 2017. In fact, on about 2 June 2017, MML denied access to the servers hosting the design data in ProjectWise by revoking the passwords that had been issued in about March 2017 to Trant.

13. By letter dated 9 June 2017, MML claimed that there was no contract between the parties and that because the outstanding invoices remained unpaid, it was suspending all and any work with immediate effect pending payment and invoking its copyright and intellectual property rights in respect of the design data provided up to that point.

14. On 23 June 2017, Trant's solicitors wrote a letter before action seeking undertakings that it would have access to the design data that had been supplied to Trant and the design materials that were currently stored on the database. It also sought an undertaking that MML would resume continued performance of its services and that MML would not seek to demand payment, save in compliance with the terms of the contract. MML refused to give those undertakings. Therefore, on 28 June 2017, the claimant issued a notice terminating MML's services under the contract on the grounds that it considered that MML had repudiated the contract. On 29 June, the claimant issued these proceedings seeking a declaration as to the contract and also the injunction which is the matter before the court today.

15. The application is for an interim injunction. Section 37 of the Senior Courts Act empowers the court, by order, whether interlocutory or final, to grant an injunction in all cases in which it appears to the court to be just and convenient to do so. The power to make an order is very wide but the applicable test is set out in the well-known decision of *American Cyanamid Co (No 1) v Ethicon Ltd & Ethicon* [1975] UKHL, AC 396, namely, firstly, whether there is a serious question to be tried; secondly, if there is, whether damages would be an adequate remedy for a party injured by the false grant of or its failure to grant an injunction; thirdly, if damages are not an adequate remedy, whether the balance of convenience lies in granting or refusing the injunction.

16. In this case the application is for a mandatory injunction. The relevant guidance can be found in the decision of Chadwick J in *Nottingham Building Society v Eurodynamics Systems plc* [1993] FSR 468, in which the learned judge stated:

> "In my view, the principles to be applied are these: first this being an interlocutory matter, the overriding consideration is which course is likely to involve the least risk of injustice if it turns out to be wrong. Secondly, when considering whether to grant a mandatory injunction, the court must keep in mind that an order which requires a party to take some positive step at an interlocutory stage may well carry a greater risk of injustice if it turns out to have been wrongly made than an order which merely prohibits action, thereby preserving the status quo. Thirdly, it is legitimate, where a mandatory injunction is sought, to consider whether the court does have a high degree of assurance that the claimant will be able to establish this right at a trial. That is because the greater the degree of assurance the claimant will ultimately establish is right, the less will be the risk of injustice if the injunction is granted. Fourthly, but even where the court is unable to feel a high degree of assurance that the claimant will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage. Those circumstances will exist whether risk of injustice if the injunction is refused sufficiently outweigh the risk of injustice if it is granted."

17. That test was approved by the Court of Appeal in the case of *Zockoll Group Ltd v Mercury Communications Ltd* [1998] FSR 354. The court stated that Chadwick J's concise summary was all the citation that should, in future, be necessary to guide the court on the question of the balance of convenience in cases where an interim mandatory injunction is sought. That summary is set out at page 2970 in volume II of the White Book.

18. Having set out the test as to which there is no real dispute to the parties, I now turn to apply that test on the facts of this case. The starting point is whether there is a serious question to be tried. The claimant's case is that there was a concluded contract on the terms of the schedules and MML conditions that were sent under cover of the emails dated 12 July 2016. The contract provided for a lump sum fee of £780,000 of which £500,000 has already been paid. Under the terms of that contract, MML's scope of services, first of all, were sufficiently defined so as to enable them to carry out those works between May 2016 and May 2017. Secondly, the scope of services identified by MML include the BIM preparation and implementation, and also included design detail, and design co-ordination services that the defendant then went on to carry out.

19. On the basis of those terms and conditions, it is submitted by the claimant that it is entitled to the design data for which it has paid and in respect of which MML provided the work. It is accepted that the claimant did not sign or return the contract documents during 2016. The belated service of a signed contract, at the end of June 2017, was clearly too late. However, it is said that the claimant accepted those contract terms and conditions by performance in making payments to MML and it was also evidenced by the fact that MML continued to carry out its services in accordance with the schedules.

20. The defendant's case is that there was no contract concluded between the parties. The first point that it makes is that there was no express acceptance. That is common

ground. Secondly, it is said that far from acting in accordance with the contract documents that were produced in July 2016, MML made itself clear that it was not bound by any such contract terms because, in August 2016, it raised issues as to the fees that were payable, the terms under which it was providing the services and also made reference to the fact that the scope of its services had not been finalised and/or agreed.

21. It is clear from the documents that are before the court today that there were, indeed, continuing discussions between the parties subsequent to 12 July 2016 in which those matters were discussed. However, what is not so clear from the documents before the court is whether the issues were raised in the context of there being no existing contract, a simple contract without detailed terms and conditions, or a contract in the terms submitted by MML in July 2016 that MML wished to renegotiate (because the basis on which the fee had been agreed had subsequently changed).

22. Thirdly, it is submitted by the defendant that the payments that have been made do not support the existence of a contract. As at December 2016, the defendant made it clear that it considered that there was no contract between the parties. Throughout 2016, MML did not invoice any payments, either in accordance with the draft schedule or at all. Although two payments were made in 2017, they were round figure sums that on any view were sums paid on account without any specific reference to particular areas of work or, indeed, without reference to any specific terms and conditions.

23. Fourthly, it is said by the defendant that there is no evidence before the court that Trant had any entitlement to the design data. If, as is contended by the defendants, there was no concluded contract, its position is that there is no right, whether contractual or otherwise, to the design data that has not already been supplied in pdf form to the claimant. It makes a final point that, in any event, its fees have not been paid and, therefore, even under clause 1.11 of the terms and conditions produced by it, the claimant would not be entitled to a licence to continue using that design data.

24. It is clear to the court that there is a dispute as between the parties as to what services have been provided by MML, the value of those services and what sums of money MML is entitled to, taking into account the on account payment £500,000. There is also a dispute between the parties as to whether, if there was a contract between them, either the claimant or the defendant was in repudiatory breach of contract and, if so, what the implications might be on any entitlement to retain access to and/or use of any design data prepared by the defendant.

25. I am satisfied in this case that there is a serious issue to be tried. Both parties have identified points that may turn out to be valid. It is quite feasible on the documents that I have seen that there was a concluded contract based on the contract documents sent by MML to Trant in mid-July 2016 followed by performance of the parties. The fact that the parties continued to discuss commercial terms and/or any revisions to the scope of works and the payment does not necessarily mean that there was no concluded contract in place.

26. Likewise, the material put forward by the defendant does show that although it sent contract documents in mid-July there was no apparent response from Trant, even to say that it agreed with the terms, albeit that it had not formally signed off on them. In those circumstances, where at a very early stage, i.e. in August 2016, there were disputes over scope and price, it may well have a case that on the facts of this case, despite the fact that performance and payment continued, that there was, on a proper legal analysis, no binding contract.

27. It is something that the court cannot resolve on the documents put before it today. I am satisfied that for the purpose of the first limb of *American Cyanamid* there is a serious question to be tried.

28. I then turn to the second limb which is the adequacy of damages. It is submitted by the defendant that damages would be an adequate remedy for the claimant in that, if there is delay to the project as a result of the claimant's inability to use the design data that is currently held in ProjectWise, nonetheless that could be compensated by way of damages. It is also suggested by the defendant that the claimant has exaggerated the nature of the problem in relation to the design data because the design documents have, in fact, already been supplied, albeit in pdf form, and there is no real evidence that the claimant would have to start again.

29. The claimant's points are, firstly, that it would be difficult for it to recover any real losses if no injunction were granted and it was subsequently proved that it was entitled to the design data. The contract contains a limitation of liability clause of £1 million and it is likely that any losses resulting from the delay to a £55 million project, in terms of a year's delay, are likely to far exceed that. In persuading the court that it should take account of the fact that any damages would not be fully recoverable from the defendant, Mr Hickey relies upon the Court of Appeal decision in *AB v CD* [2014] EWCA, Civ 229 in which Underhill LJ referred to an early authority of Bath v Mowlem:

> "The primary obligation of a party is to perform a contract. The requirement to pay damages in the event of a breach is a secondary obligation and an agreement to restrict the recoverability of damages in the event of a breach cannot be treated as an agreement to excuse performance of that primary obligation ...
>
> The rule, if rule is the right word, that an injunction should not be granted when damages would be an adequate remedy should be applied in a way which reflects the substantial justice of the situation: that is, after all, the basis of the jurisdiction under section 37."

30. Ryder LJ agreed and summarised the applicable test as being, "Is it just in all the circumstances that a claimant be confined to his remedy in damages". Laws LJ, stated at paragraph 33:

> "Where a party to a contract stipulates that if he breaches obligations his liability will be limited or the damages he must pay will be capped, that is a circumstance which, in justice, tends to favour the grant of an injunction to prohibit the breach in the first place."

31. Applying that authority to this case, it seems to me that the claimant satisfies this court that damages would not be an adequate remedy. The losses would not be simply pecuniary losses given that this is part of a wider project to benefit the Falkland Islands. It would have an effect which, presumably, would be very difficult to establish at any trial. Damages would not be an adequate remedy because the likely losses on a project of this nature will far exceed the £1 million limit on damages recoverable from MML under this form of contract, assuming that is established by the claimant at trial.

32. So, I then turn to consider whether damages would be an adequate remedy for the defendant. On one view, it is clear that damages would be an adequate remedy for the defendant because the defendant's real complaint in this case is that the fee that was put forward at this stage did not reflect the vast scope of work that it was subsequently expected to perform. If and to the extent that it is established that MML had an entitlement to additional fees, whether under a contract or by way of *quantum meruit*, then that is something that could stand in damages. Based on the initial size of the contract and, indeed, based on the current estimate by MML as to its fees, something in excess of £3 million, and based on the Trant accounts that have been exhibited to the witness statement of Simon Trant in this matter, it is clear that there could be an award of damages that would compensate MML for those lost fees.

33. However, I accept that there is some force in the submission by Mr Mort that the defendant would suffer a loss of bargaining position. If the defendant were to establish that there was no contract, that would enable it to ask for a premium in respect of the price for any design data. I do not go so far as to accept Mr Mort's more outrageous submission, that effectively they would be entitled to hold the claimant to ransom and charge what might, no doubt, be a very substantial sum of money in respect of the design data. If this were a no contract situation, it is likely that the defendant might be entitled to more by way of restitution than if it were providing the services under the contract, with or without additional fee entitlement based on the change in scope. I accept that would be something that would be difficult to identify and to value.

34. To that extent, I consider that the defendant does have an argument that damages would not necessarily be an adequate remedy.

35. I, therefore, turn to the question of the balance of convenience as to which the overriding test is which course of action is likely to carry the risk of the least injustice if it turns out to be wrong. The claimant's position is that without restoring access to the relevant database on the ProjectWise platform, the project cannot be progressed. The claimant would be forced to start the project from square one, having lost a year of progress. In those circumstances, it would be appropriate for the court to permit the status quo by allowing the claimant access to the design data that had already been completed by MML at the time that the suspension/termination occurred, so as to allow

the claimant to progress the project. It is said, with some force by the claimant, that there is very little by way of harm to the defendant if it is required to provide access to the design data that it has already provided, particularly in circumstances where the claimant has undertaken or is offering to undertake to pay any compensation, whether by way of outstanding fees or damages that might subsequently be ordered.

36. I am not satisfied that there is a high degree of assurance that the claimant will be able to establish at trial a contract based on the documents sent by MML to Trant in July 2016. However, there is a high degree of assurance that the claimant is entitled to the design data that has already been carried out by MML and that is currently sitting in the public database area of ProjectWise on the basis that it has either been done under the contract produced by MML or a simple contract. Even if there was no contract, MML has already accepted payment on account in respect of the work that it has carried out. It may be that turns out to be too low but, in those circumstances, it is unlikely that the court will reach a conclusion that the claimant was not entitled to the design data.

37. For those reasons, in my judgment, the balance of convenience firmly lies in granting the injunction that has been sought by the claimant today. Mr Trant, in his witness statement, indicated that he would be prepared to give the usual undertakings in respect of any damages.

38. He also indicated that the claimant would be prepared to make a payment into court of £475,000 plus VAT, pending resolution of the dispute. I consider that should be done. I note that even on the claimant's case, if the MML terms and conditions were applicable, it should have issued a pay less notice in respect of that invoice. It failed to do so and, therefore, if it went to adjudication on those terms and conditions, it is likely that it would be ordered to pay that sum. I accept that, of course, the court has not yet determined whether those terms and conditions apply and, therefore, the court is not in a position to decide, summarily, that that sum must be paid today to the defendant. It does seem to me that it is only fair and reasonable that in circumstances where the court is ordering MML to make available the design data that has been produced to date, it should also make the claimant effectively put up the money in respect of a sum that was invoiced and in respect of which it failed to issue a payment notice.

39. Also, as indicated earlier in exchanges with Mr Hickey for the claimant, the court requires the undertaking to extend to Trant Holding Ltd, Trant's parent company. The accounts that have been exhibited make it clear that the turnover, the profits are based on the parent company. Without going into further detail, it seems to me that there is clearly something to be said for any undertaking being made by the holding company as well as by Trant Engineering.

40. In terms of the order, as drafted, I think it is accepted by Mr Hickey that it is too wide. It should be limited to the public folders which were intended for use by Trant and these clients.

WordWave International Ltd trading as DTI hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

165 Fleet Street, London EC4A 2DY

Tel No: 020 7404 1400

Email: courttranscripts@DTIGlobal.eu

This transcript has been approved by the Judge