



Neutral Citation Number: [2017] EWHC 2395 (TCC)

Case No: HT-2017-000173

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/09/2017

Before:

MRS JUSTICE O'FARRELL DBE

Between:

JACOBS UK LIMITED
(formerly known as Jacobs Engineering UK Limited)

Claimant

- and -

SKANSKA CONSTRUCTION UK LIMITED

Defendant

Nicholas Dennys QC (instructed by Beale & Co) for the Claimant
Justin Mort QC (instructed by Skanska UK plc) for the Defendant

Hearing date : 28th July 2017

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE O'FARRELL

Mrs Justice O'Farrell:

1. This is an application by the claimant (“Jacobs”) against the defendant (“Skanska”) for an injunction to restrain Skanska from proceeding with an adjudication, following Skanska’s withdrawal from an earlier adjudication in respect of the dispute between the parties.
2. The material question raised by the dispute is whether a party to an adjudication is entitled to withdraw a dispute from adjudication and refer the same, or substantially the same, dispute to a second adjudication.

Background to the dispute

3. From about 2008, Skanska engaged Jacobs to provide design services in respect of a PFI project for the design and replacement of street lighting in Lewisham and Croydon. In about February 2011 Skanska entered into a formal contract with Jacobs for those services (“the Design Agreement”).
4. A dispute has arisen between the parties as to the adequacy of the design services provided by Jacobs. Skanska’s case is that Jacobs provided design and advice on which Skanska relied in submitting its bid for the PFI project. Skanska’s bid was successful. The design prepared by Jacobs following commencement of the PFI contract differed materially from the design and assumptions provided for the purposes of the bid. Skanska claims that as a result of that disparity, together with delays in the production of the design and the poor quality of the design, it has suffered loss and damage.
5. The Design Agreement is a construction contract for the purposes of section 108 of the Housing Grants Construction and Regeneration Act 1996 (“the 1996 Act”) and Clause 21 of the Design Agreement contains an adjudication provision.
6. On 8 February 2017 Skanska gave notice of an intention to refer the dispute to adjudication.
7. There was a concern as to whether the adjudication agreement complied with the 1996 Act and Jacobs raised jurisdictional challenges in respect of the proposed adjudication. Following exchanges of correspondence, the parties reached agreement as to the applicable procedural rules and timetable for the adjudication, as recorded in the exchange of e-mails on 13 February 2017:
 - i) Mr Waterhouse would act as the adjudicator;
 - ii) the statutory scheme for adjudication (“the Scheme”) would apply (subject to the agreed timetable);
 - iii) the referral notice would be served by 17 February 2017;
 - iv) the response would be served by 24 March 2017;
 - v) the reply would be served by 7 April 2017; and

- vi) the time for the adjudicator to reach his decision would be extended and he would be invited to issue his decision within 14 days of the date of service of the last written submission (excluding Easter).
8. Mr Waterhouse was appointed as adjudicator.
9. The referral and response documents were served in accordance with the agreed timetable.
10. Jacobs incurred substantial costs in responding to Skanska's claim in the adjudication.
11. Unfortunately, Skanska's counsel became unavailable and Skanska was unable to serve its reply by 7 April 2017 as agreed.
12. On 5 April 2017 Skanska requested an extension of time from Jacobs but the request was refused.
13. Skanska requested the adjudicator to grant an extension of time but on 6 April 2017 he refused unless both parties agreed.
14. On 7 April 2017 Skanska withdrew its reference to adjudication and invited the adjudicator to resign.
15. On 11 April 2017 the adjudicator resigned.
16. On 21 June 2017 Skanska gave a fresh notice of an intention to refer the dispute to a second adjudication.
17. The second adjudication contains the same claims against Jacobs but the claim in relation to one of the claims (the Croydon Central Network) has been withdrawn, the scope of the dispute has narrowed, and the methodology and quantum of the damages claimed has been revised.

The Claim

18. On 4 July 2017 Jacobs commenced these Part 8 proceedings, seeking the following relief:
 - i) a declaration that in proceeding with Adjudication No.2 Skanska are acting unlawfully;
 - ii) an order restraining Skanska from taking any further steps in furtherance of Adjudication No.2;
 - iii) an order requiring Skanska to withdraw from Adjudication No.2;
 - iv) a declaration that Jacobs are entitled to be paid their costs of Adjudication No.1; and
 - v) further or other relief.

19. Jacobs' case is that the parties agreed that the reference of this dispute should be to an adjudicator appointed under the Scheme and that the adjudication should be conducted in accordance with an agreed timetable. Jacobs had a right to a resolution process which was fair to both parties and did not confer an uncovenanted advantage on the referring party beyond that implicit in the rough and ready adjudication process. Jacobs invites the court to grant relief to protect Jacobs' right to a procedurally fair process of the dispute which is not unreasonable and oppressive.
20. Skanska's case is that there is no concept of abuse of process in adjudication and a referring party is free to obtain whatever tactical advantage it can. A party has the right to start adjudication in relation to a dispute at any time. This gives a party an unrestricted right to start, abandon and pursue serial adjudications in respect of the same dispute.
21. The issues for determination by this court are:
 - i) whether a party to an adjudication is entitled to withdraw unilaterally a dispute referred to adjudication and commence a second adjudication in respect of the same, or substantially the same, dispute;
 - ii) whether, in such circumstances, the court has power to grant an injunction to restrain pursuit of the second adjudication;
 - iii) if so, whether the court should exercise its discretion on the facts of this case; and
 - iv) whether Jacobs is entitled to its wasted costs in respect of the first adjudication.

The 1996 Act and the Scheme

22. Section 108(1) of the 1996 Act provides:

“A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.”

23. Section 108(2) of the 1996 Act provides:

“The contract shall—

- (a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;
- (b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;
- (c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

- (d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;
- (e) impose a duty on the adjudicator to act impartially; and
- (f) enable the adjudicator to take the initiative in ascertaining the facts and the law.”

24. Section 108(3) of the 1996 Act provides:

“The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement. The parties may agree to accept the decision of the adjudicator as finally determining the dispute.”

25. The Scheme contains the following material provisions:

Paragraph 1(1):

“Any party to a construction contract (the “referring party”) may give written notice (the “notice of adjudication”) of his intention to refer any dispute arising under the contract, to adjudication.”

Paragraph 7(1):

“Where an adjudicator has been selected in accordance with paragraphs 2, 5 or 6, the referring party shall, not later than seven days from the date of the notice of adjudication, refer the dispute in writing (the “referral notice”) to the adjudicator.”

Paragraph 9(1):

“An adjudicator may resign at any time on giving notice in writing to the parties to the dispute.”

Paragraph 9(3):

“Where an adjudicator ceases to act under paragraph 9(1) –

- (a) the referring party may serve a fresh notice under paragraph 1 and shall request an adjudicator to act in accordance with paragraphs 2 to 7; and
- (b) if requested by the new adjudicator and insofar as it is reasonably practicable, the parties shall supply him with copies of all documents which they had made available to the previous

adjudicator.”

Paragraph 11(1):

“The parties to a dispute may at any time agree to revoke the appointment of the adjudicator...”

Paragraph 13:

“The adjudicator may take the initiative in ascertaining the facts and the law necessary to determine the dispute, and shall decide on the procedure to be followed in the adjudication ...”

Paragraph 14:

“The parties shall comply with any request or direction of the adjudicator in relation to the adjudication.”

Paragraph 15:

“If, without showing sufficient cause, a party fails to comply with any request, direction or timetable of the adjudicator made in accordance with his powers, fails to produce any document or written statement requested by the adjudicator, or in any other way fails to comply with a requirement under these provisions relating to the adjudication, the adjudicator may –

- (a) continue the adjudication in the absence of that party or of the document or written statement requested,
- (b) draw such inferences from that failure to comply as circumstances may, in the adjudicator’s opinion, be justified, and
- (c) make a decision on the basis of the information before him attaching such weight as he thinks fit to any evidence submitted to him outside any period he may have requested or directed.”

26. The adjudication procedure envisaged by the 1996 Act and the Scheme is a rough and ready process. The referring party has a clear advantage in selecting the timing and scope of the dispute. The timetable is very tight, regardless of the size and complexity of the dispute. Provided that they follow the rules of natural justice, adjudicators have wide powers to determine the procedure and evidence considered to reach their decisions. The inherent unfairness in the adjudication process is justified by the advantage of speed and efficiency in obtaining a decision and balanced by the temporary effect of any decision.

Legal Principles

27. There is no express or implied restriction in the 1996 Act or the Scheme that precludes a party from withdrawing a disputed claim which has been referred to adjudication: *Midland Expressway Ltd v Carillion Construction Ltd* [2006] EWHC 1505 per Jackson J at paras.[100] and [101].
28. The entitlement of a party to withdraw a claim persists even after the referral, regardless of the motive for the withdrawal, and does not necessarily preclude that party from pursuing the claim in a later adjudication: *Lanes Group plc v Galliford Try Infrastructure Ltd* [2012] EWCA Civ 1617 per Jackson LJ at paras.[38] – [40].
29. The principle of abuse of process does not apply to adjudication: *Connex South Eastern Ltd v MJ Building Services Group plc* [2005] EWCA Civ 193 per Dyson LJ at para.[40].
30. However, it does not follow that the courts will never intervene to prevent a party from pursuing a claim in adjudication.
31. Section 37 of the Senior Courts Act 1981 provides:

“The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.”
32. The court's power under section 37 may be exercised (a) where one party can show that the other party has invaded, or threatens to invade, a legal or equitable right of the former for the enforcement of which the latter is amenable to the jurisdiction of the court, or (b) where one party to any action has behaved, or threatens to behave, in a manner which is unconscionable. The court’s jurisdiction extends to a power to grant an injunction restraining a party from commencing or continuing an adjudication that is unreasonable and oppressive, although the fact that a claim is being pursued by way of adjudication rather than litigation may affect the court’s view as to whether or not it amounts to unreasonable and oppressive behaviour: *Mentmore Towers Ltd v Packman Lucas Ltd* [2010] EWHC 457 (TCC) per Edwards-Stuart J at paras. [14] – [23]; *Twintec Ltd v Volkerfitzpatrick Ltd* [2014] EWHC 10 (TCC) per Edwards-Stuart J at paras.[63] – [73].
33. I reject Mr Mort’s submission that it would be open to a party to start and stop serial adjudications in respect of a claim. Subjecting a party to serial adjudications in respect of the same claim and requiring it to incur irrecoverable costs could amount to unreasonable and oppressive behaviour. It is a question of fact in each case as to whether the behaviour of the party to adjudication is found, on an objective basis, to be unreasonable and oppressive.

Discussion

34. In this case, the 1996 Act and the applicable Scheme do not impose any restrictions on the referring party’s entitlement to withdraw unilaterally a claim referred to adjudication or to commence a further adjudication in respect of the same, or substantially the same, dispute. It is envisaged that in circumstances where an

adjudicator resigns, the same dispute may be the subject of a further reference. The adjudicator in the first adjudication did not reach a decision. Therefore the adjudicator in the second adjudication would have jurisdiction to determine the dispute referred.

35. The court has power to grant an injunction to restrain the second adjudication if it is established that it is unreasonable and oppressive. Such power will be exercised where the adjudicator does not have jurisdiction (such as where the dispute has already been decided in an earlier adjudication), where the referring party has failed to comply with the adjudication agreement (such as failures to pay awards or costs from earlier adjudications), or where the further adjudication is vexatious (such as serial adjudications in respect of the same claim).
36. Skanska's withdrawal of the claim was unreasonable. The unavailability of counsel is rarely a good excuse for failing to meet an agreed timetable, especially where the party in default is the referring party who controls the timing and scope of the reference. However, unreasonable behaviour by one party will not automatically deprive it of the right to adjudicate the dispute in question in a subsequent reference. The court will not intervene unless the further reference is both unreasonable *and* oppressive. In this case, the substance of the claims remains the same and therefore, Jacobs will be entitled to rely in large part on its prepared response. Although there is new material, including new quantum expert evidence, it was anticipated that there might be new arguments raised by Skanska following Jacobs' response; hence the indication that Jacobs would seek the right to submit a rejoinder. The inconvenience and additional costs suffered by Jacobs as a result of the second adjudication are not so severe or exceptional so as to warrant intervention by the courts by way of injunctive relief.
37. Jacobs is entitled to any wasted or additional costs caused by Skanska's failure to comply with the agreement of 13 February 2017. It is common ground that, in the absence of agreement giving the adjudicator jurisdiction to award costs, a party's costs of adjudication proceedings are not recoverable. However, in this case, the parties entered into an *ad hoc* agreement under which the procedure and timetable to resolve the referred dispute in the first adjudication were agreed and fixed. That went beyond mere agreement as to the timetable to be directed by the adjudicator in respect of an existing contractual or statutory adjudication and imposed new enforceable obligations on the parties.
38. Skanska's failure to serve its reply or continue with the first adjudication constituted a breach of the *ad hoc* agreement, entitling it to its wasted or additional costs as damages. It does not follow that Jacobs is entitled to all costs incurred in connection with the first adjudication. As indicated above, many of the costs incurred in responding to the claims in the first adjudication would have been incurred in responding to the second adjudication. The costs wasted in respect of abandoned claims will not be recoverable because even if the first adjudication had continued, Skanska would have been at liberty to abandon the CCN claim or concede it in its reply without any costs implications. However, if and to the extent that Jacobs could establish wasted or additional costs caused by Skanska's failure to comply with the agreed procedure and timetable, it would be entitled to recover them as damages.
39. Alternatively, there was an implied term in the *ad hoc* agreement that if one party changed its mind and decided to ignore the agreement, it would pay the wasted costs

of the other party. Such a term was both reasonable and necessary. They were commercial parties with the benefit of legal representation and they were aware of the substantial resources and funds required to participate in an adjudication of this nature. If each party had been asked whether they would expect the other party to pay any wasted costs in such circumstances, they would have replied "of course". Although the *ad hoc* agreement did not prohibit Skanska from withdrawing part or all of its claim, and starting a fresh adjudication in respect of the same or substantially the same claim, it did impose responsibility on Skanska for the costs wasted or incurred by its failure to adhere to the agreed procedure and timetable.

Conclusion

40. For the reasons set out above:

- i) A party to an adjudication is entitled to withdraw unilaterally a dispute referred to adjudication and commence a further adjudication in respect of the same, or substantially the same, dispute.
- ii) In such circumstances, the court has power to grant an injunction to restrain pursuit of the further adjudication if the further adjudication is unreasonable and oppressive.
- iii) On the facts of this case, the second adjudication does not amount to unreasonable and oppressive behaviour, justifying the exercise of the courts' discretion in granting injunctive relief.
- iv) Jacobs is entitled to its wasted and/or additional costs, if any, caused by caused by Skanska's failure to comply with the agreement of 13 February 2017.