Neutral Citation Number: [2024] EWHC 992 (TCC)

Case No: HT-2023-000338

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 29 April 2024

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

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Between :

TCLARKE CONTRACTING LIMITED

Claimant

- and -

BELL BUILD LIMITED

Defendant

- - - - - - - - - - - - - - - - - - - -

Andrew Singer KC (instructed by **Howard Kennedy LLP**) for the **Claimant**
Krista Lee KC (instructed by **Fladgate LLP**) for the **Defendant**

Hearing date: 2 February 2024

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Approved judgment

This judgment was handed down remotely on 29 April 2024
by circulation to the parties and by release to the National Archives.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. After hearing argument in this case, I ruled that the use of the Part 8 procedure was inappropriate and directed that the claim should proceed under Part 7. This judgment sets out my reasons for that ruling.

BACKGROUND

2. TClarke Contracting Ltd seeks declaratory relief against Bell Build Ltd as to the validity of a purported Pay Less notice and as to an adjudicator's decision that it should pay Bell the sum of £2,129,672.69 plus any applicable VAT.

3. The claim arises in respect of works for the construction of a data centre at Greenwich Point in London. TClarke is the main contractor and, by an agreement entered into on 4 November 2021, subcontracted the supply and installation of the new sub and superstructures to Bell for a total contract price of £20,013,088. The subcontract incorporated the 2016 JCT Design & Build Subcontract Conditions. The parties are in dispute as to whether such contract was varied by a subsequent agreement in March 2023.

4. The disputed Pay Less Notice was issued by TClarke on 6 June 2023. By the details of its claim, TClarke seeks a declaration that such notice was valid and that accordingly no sums were due under Bell's payment application 18. Such formulation is flawed since in fact the purported Pay Less notice accepted a liability to pay £710,120.61. That sum has, however, since been paid and TClarke clearly means to assert that no further sum is now due under payment application 18.

5. Secondly, TClarke pleads that the adjudicator was wrong in law to find that, upon the proper construction of the alleged variation, its notice was not a valid Pay Less notice. At paragraph 25 of its claim, TClarke pleads:

> "Irrespective of whether that agreement was reached between the parties ([TClarke] denies that the same was ever reached), in any event, the Adjudicator's Decision is wrong as a matter of law."

6. Further, TClarke argues that the adjudicator wrongly relied on the alleged March agreement as a variation.

7. TClarke therefore seeks a declaration that the adjudicator's decision should be set aside. It pleaded, at paragraph 5 of its details of claim, that there were wider disputes and that it raised the issues in its Part 8 claim without prejudice to its right to rely on further matters by way of defence to any enforcement claim brought by Bell.

8. Bell objected to use of the Part 8 procedure when acknowledging service. Although not required under Part 8, it pleaded a Defence. It pleaded that the issues were to be determined by the court afresh and that the adjudicator's reasoning was not therefore relevant to this claim. Nevertheless, it asserted that the adjudicator had been right to find that the subcontract had varied the procedure for assessment of

interim payments. Accordingly the question of the validity of the Pay Less notice would depend, among other matters, on the court's findings as to whether, and if so how, the payment procedure had been amended and whether TClarke's conduct in relation to payment applications 16 and 17 and its failure to respond to Bell's queries as to the status of the purported notice estopped TClarke from now asserting that it was valid.

ARGUMENT

9. Krista Lee KC, who appears for Bell, argued that this is not a case which is unlikely to involve a substantial dispute of fact. She resisted TClarke's argument that the case could be tried on assumed facts. She argued that the suggested assumed facts are simply not clear. Further, she argued that the assumed-facts approach is predicated on the flawed proposition that the court should review the adjudicator's reasoning.

10. Andrew Singer KC, who appears for TClarke, responded that the claim does not seek to challenge the factual basis on which the adjudicator reached his decision. Rather, it seeks to challenge the proper construction of the Pay Less notice set against the facts asserted by Bell and found by the adjudicator. TClarke simply argues that, on that factual premise, a reasonable and objective interpretation of the notice should have been that it was intended to be a Pay Less notice. He added that the factual background "is agreed as found by the adjudicator" and that, accordingly, the issues of whether there was a contractual variation and the "contents of that agreement" are not challenged in these proceedings.

THE LAW

11. Rule 8.1(2) of the Civil Procedure Rules 1998 provides:

> "A claimant may, unless any enactment, rule or practice direction states otherwise, use the Part 8 procedure where they seek the court's decision on a question which is unlikely to involve a substantial dispute of fact."

12. Paragraph 3.3.2 of the TCC Guide adds:

> "A Part 8 claim form will normally be used where there is no substantial dispute of fact, such as the situation where the dispute turns on the construction of the contract or the interpretation of statute. Claims challenging the jurisdiction of an adjudicator or the validity of his decision are sometimes brought under Part 8, where the relevant primary facts are not in dispute. Part 8 claims will generally be disposed of on written evidence and oral submissions."

13. The court has an express power under r.8.1(4) to order any Part 8 claim to continue as if the claimant had not used such procedure.

14. The principles were usefully summarised by Jefford J in Merit Holdings Ltd v. Michael J. Lonsdale Ltd [2017] EWHC 2450 (TCC), [2018] B.L.R. 14 and by Neil Moody KC, sitting as a Deputy Judge, in Berkeley Homes (South East London) Ltd v. John Sisk & Son Ltd [2023] EWHC 2152 (TCC). In Merit Holdings, Jefford J said at [21]-[22]:

> "21. It is, therefore, an express requirement of the use of the Part 8 procedure that the question for the Court is one that is unlikely to involve a substantial dispute of fact and it is, it seems to me, to be implied in the rules that the question should be framed with some degree of precision and/or be capable of a precise answer.
>
> 22. The experience of this court shows that there is a real risk of the Part 8 procedure being used too liberally and inappropriately with the risks both of prejudice to one or other of the parties in the presentation of their case and of the court being asked to reach ill-formulated and ill-informed decisions."

DISCUSSION

15. The claim is pleaded on the flawed assumption that the court will review or hear an appeal from the adjudicator's decision. That is not the function of the court; rather it must finally determine the parties' rights for itself. Subject to narrowly defined exceptions, the TCC routinely enforces adjudication decisions as temporarily binding upon the parties pending such final determination of their rights. This is not, however, an enforcement claim.

16. The proper construction of a written contract where there is no dispute as to its terms is a paradigm example of a case that might be suitable for the Part 8 procedure. Before the court can construe a contract, it does, however, need to establish that there was a binding agreement and then identify the terms of such contract.

17. In this case, the parties are in dispute as to whether there was any contractual variation at all. Further, the alleged variation is said to have been evidenced by, rather than being contained in, writing. Accordingly, issues as to the existence of and terms of any contractual variation must be determined by witness evidence.

18. While TClarke does not accept that the contract was varied, it seeks a declaration as to the true effect of the alleged variation on the basis of Bell's own case. A declaration contrary to TClarke's pleaded case would not, however, necessarily be the end of the matter since it might thereafter seek to argue that there was no such variation or alternatively that the terms of any such variation were not as alleged by Bell.

19. Furthermore, Bell's estoppel argument will necessarily depend upon evidence both as to the conduct alleged and any detrimental reliance upon such conduct that is said to give rise to the estoppel.

20. In my judgment, the proposed use of the Part 8 procedure in this case is laden with risk that the court might reach ill-formulated and ill-informed decisions that will not finally dispose of the disputes between the parties. Further, I am not satisfied that TClarke has identified one or more precise legal questions that can be properly tried upon clearly identified agreed facts and which will be determinative of the current dispute between the parties.

21. Accordingly, I conclude that the use of the Part 8 procedure was plainly inappropriate and that this case must proceed under Part 7.