

Neutral Citation Number: [2005] EWHC 1268 (TCC)

Case No: HT-05-130

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2005

Before :

His Honour Judge Richard Havery Q.C.

Between :

Mr. Tracy Bennett
- and -
FMK Construction Limited

Claimant

Defendant

Mr. Justin Mort (instructed by **Fenwick Elliott LLP**) for the **Claimant**
Miss Jessica Stephens (instructed by **Brian Harris & Co**) for the **Defendant**

Hearing date: 17th June 2005

Judgment

1. This is an application under Part 8 of the Civil Procedure Rules for declarations as to the construction and effect of terms of a contract. The contract in question was a contract whereby the claimant engaged the defendant to carry out building and refurbishment works at the claimant's property. The contract was in the form of the JCT Standard Form of Building Contract 1998 Edition Private without Quantities. The defendant carried out the works, and after they were completed a final certificate was issued on 11th March 2005. The defendant disputes the validity and the correctness of the final certificate. As to the correctness of the certificate, the defendant disputes that the certificate properly represents the defendant's entitlement on the grounds that on the true construction of the contract the defendant was entitled to be paid on a cost-plus basis and that the certificate wrongly shows an entitlement on the part of the claimant to deduct or levy liquidated damages against the defendant. The claimant seeks these declarations in order to establish the proposition that the final certificate is conclusive evidence of the matters stated in it.
2. On 6th April 2005 the defendant's solicitors served on the claimant's solicitors a notice of their intention to refer the dispute to adjudication. On 13th April 2005 they applied to the contractual nominating body, the Royal Institute of British Architects, for the nomination of an adjudicator. That body nominated Mr. J.R.Smalley, FRICS, FCIArb, as adjudicator on 14th April 2005. The referral notice was communicated to the adjudicator by fax on 18th April 2005. The supporting documents were sent to him on the following day.
3. Clause 30.9.1 of the contract provides, so far as material, that except as provided in clauses 30.9.2 and 30.9.3 (and save in respect of fraud), the Final Certificate shall have effect in any proceedings under or arising out of or in connection with the contract as conclusive evidence of the matters set out in clauses 30.9.1.1 to 30.9.1.4. The rest of clause 30.9 provides as follows:
 - .2 If any adjudication, arbitration or other proceedings have been commenced by either party before the Final Certificate has been issued the Final Certificate shall have effect as conclusive evidence as provided in clause 30.9.1 after either
 - .2 .1 such proceedings have been concluded, whereupon the Final Certificate shall be subject to the terms of any decision, award or judgment in or settlement of such proceedings, or
 - .2 .2 a period of 12 months after the issue of the Final Certificate during which neither Party has taken any further step in such proceedings, whereupon the Final Certificate shall be subject to any terms agreed in partial settlement,whichever shall be the earlier.
 - .3 If any adjudication, arbitration or other proceedings have been commenced by either Party within 28 days after the Final Certificate has been issued, the Final Certificate shall have effect as conclusive evidence as provided in clause 30.9.1 save only in respect of all matters to which those proceedings relate.
 - .4 Where.....either Party wishes to have a dispute or difference on which an Adjudicator has given his decision on a date which is after the date of issue of the Final Certificate finally determined by arbitration or legal proceedings, either Party may commence arbitration or legal proceedings within 28 days of the date on which the Adjudicator gave his decision.
4. Clause 41A provides, so far as material, as follows:
 - .2 .2 where either Party has given notice of his intention to refer a dispute or difference to adjudication then.....any application to the nominator must be made with the object of

securing the appointment of, and the referral of the dispute or difference to, the Adjudicator within 7 days of the date of the notice of intention to refer.

- .3 If the Adjudicator dies or becomes ill or is unavailable for some other cause and is thus unable to adjudicate on a dispute or difference referred to him, then either the Parties may agree upon an individual to replace the Adjudicator or either Party may apply to the nominator for the nomination of an adjudicator to adjudicate that dispute or difference;.....
- .4 .1 When.....a Party requires a dispute or difference to be referred to adjudication then that Party shall give notice to the other Party of his intention to refer the dispute or difference, briefly identified in the notice, to adjudication. If an Adjudicator is agreed or appointed within 7 days of the notice then the Party giving the notice shall refer the dispute or difference to the Adjudicator ('the referral') within 7 days of the notice. If an adjudicator is not agreed or appointed within 7 days of the notice the referral shall be made immediately on such agreement or appointment. The said Party shall include with that referral particulars of the dispute or difference together with a summary of the contentions on which he relies, a statement of the relief or remedy which is sought and any material he wishes the Adjudicator to consider....
- .5 .6 Any failure by either Party.....to comply.....with any provision in or requirement under clause 41A shall not invalidate the decision of the Adjudicator.

5. Mr. Mort drew my attention to section 108(2) of the Housing Grants, Construction and Regeneration Act 1996 ("the Act"). That subsection 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.

He submitted that clause 41A.2.2 of the contract was designed to give effect to section 108(2)(b) of the Act. I do not doubt that it was. But the clause does not provide a timetable for securing the appointment of the adjudicator. Nor, indeed, does the Scheme for Construction Contracts contained in Part 1 of the schedule to 1998 S.I. No. 649.

6. Mr. Mort's first point was that clause 41A.2.2 of the contract had not been complied with. The application to the nominator was not made until the afternoon of the seventh day after the service of the notice of intention to refer the dispute to adjudication. It was highly improbable that that would have led to a nomination the same day, as the solicitor making the application must have known. Thus the application could not have been made with the object of securing the appointment of the adjudicator within 7 days of the date of the notice of intention to refer. It was not relevant, Mr. Mort submitted, that the delay had been occasioned by reason of a family bereavement of the fee earner with conduct of the matter.
7. Mr. Mort's first point was raised before the adjudicator. The adjudicator considered that he would be acting improperly in placing the respondent before him (the claimant before me) in the position of defending an adjudication that was probably fatally flawed. In consequence, he resigned as adjudicator on 21st April 2005.
8. The following day, 22nd April, the defendant re-served the notice of intention to refer, and applied for the appointment of an adjudicator. The same adjudicator, Mr. Smalley, was re-appointed on 26th April. The adjudicator deemed the original referral notice to have been re-served on 28th April. The claimant took the second point raised before me by Mr. Mort, namely that the notice of intention to

refer having been served more than 28 days after the date of the final certificate (11th March 2005), the certificate was conclusive evidence of its contents in accordance with clause 30.9.1 of the contract, the exception contained in clause 30.9.3 no longer applying. Accordingly, the adjudication proceedings were stayed pending determination of the question whether the final certificate was conclusive evidence of its contents.

9. As to Mr. Mort's first point, it has not been argued, nor in my judgment could it sensibly be argued, that the state of mind of the person applying for the nomination has to be determined in order to decide whether clause 41A.2.2 has been complied with. Mr. Mort's submission was that no-one applying on the last day, or at any rate the afternoon of the last day, could possibly have the necessary objective. Mr. Mort's submission implies that there must be a time limit of about 6 days, or 6½ days at the most. I do not read clause 41A.2.2 as imposing a particular time limit of less than 7 days for making the application.
10. Miss Stephens submitted that the provision in clause 41A.2.2 was merely directory. It could not have been intended to be mandatory given the impossibility of determining the object in the mind of the person applying to the nominator. Moreover, any adjudication which proceeded to a decision was validated by clause 41A.5.6 notwithstanding any failure to comply with any provision or requirement under clause 41A. Thus clause 41A.2.2 must be directory in all cases. I accept that submission. Accordingly, I reject Mr. Mort's first point.
11. Mr. Mort's second point was that the final certificate was conclusive evidence of its contents in all respects set out in clause 30.9.1 of the contract because the current, stayed, adjudication proceedings were not commenced within 28 days of the issue of the certificate. The certificate was issued on 11th March and the adjudication proceedings, he submitted, were not commenced within 28 days of that date.
12. The first question that I must consider in this connection is whether the issue on 6th April 2005 of the first notice of intention to refer the matter to adjudication was sufficient to comply with clause 30.9.3 of the contract so as to prevent the final certificate from being conclusive evidence of the matters to which the earlier (and indeed the later) adjudication proceedings relate.
13. Mr. Mort submitted that the first notice of intention was of no effect for the purposes of clause 30.9.3 since the adjudication proceedings that flowed from it had been abandoned without a decision. Whilst clause 30.9 did not expressly contemplate such a situation, it envisaged that the proceedings would be pursued to a decision, which would then take effect in lieu of the final certificate, unless the parties compromised their dispute. (If the parties compromised their dispute, the provisions of clause 30.9, and the terms and effect of the final certificate, would become irrelevant). The provisions of clause 30.9.4 were relevant: where adjudication proceedings were commenced within time, then in effect the 28 day timetable was put back to the date of the adjudicator's decision in those proceedings. Moreover, the "matters to which those proceedings relate" in clause 30.9.3 could not be determined by reference only to a notice of intention to refer a dispute to adjudication, since the scope of the dispute must be determined also by reference to the referral notice. He relied on paragraph 34 of the judgment of His Honour Judge Anthony Thornton, Q.C. in *Fastrack Contractors v. Morrison* [2000] B.L.R. 168, 179.
14. It must follow from the defendant's case, submitted Mr. Mort, that a party seeking to take issue with a final certificate need do no more than serve, within 28 days, a notice of intention to refer a disputed matter to adjudication. The party would need to do nothing further: it would be at liberty to bring subsequent proceedings at such time as it considered convenient. Moreover, such a conclusion would render clause 30.9.4 pointless.
15. I accept Mr. Mort's argument to this extent: that if the referring party abandons adjudication proceedings by simply not pursuing them, then the salvo in clause 30.9.3 ceases to apply. However, that is not this case.

16. I have heard argument on the effect of clause 41A.3 of the contract. The question was whether, by resigning, Mr. Smalley was "unavailable from some other cause". Miss Stephens submitted that he was; Mr. Mort submitted that he was not unavailable: he was appointed again as adjudicator five days after his resignation from the first adjudication. In my judgment, it is unnecessary to answer that question. But my answer would be that Mr. Smalley was unavailable by reason of his resignation and was thus unable to adjudicate on the dispute or difference referred to him unless and until he were re-appointed. Such conditional unavailability and inability are, in my opinion, circumstances falling within clause 41A.3.
17. Apart from the issue of a new notice of intention to refer the matter to adjudication, which is not required by clause 41A.3 where that clause applies, the procedure envisaged in that clause was in fact adopted. The new notice of intention was in the same terms as the old; and it was the same dispute or difference that was referred to the adjudicator. In my judgment, it is clear that where the clause 41A.3 procedure does apply and has been adopted, the salvo in clause 30.9.3 continues to apply. The words "those proceedings" in clause 30.9.3 must in my judgment be interpreted accordingly. That is the obvious intendment of the language, taken as a whole. I can see no reason why the position should be different where, as here, the adjudicator's unavailability and his inability to adjudicate on the dispute or difference can be cured by a further referral to the same adjudicator. There can be no reason why the re-appointment of the same adjudicator should negative the application of the salvo to clause 30.9.3 whereas the appointment of a new adjudicator when the previous adjudicator is ill should not. I conclude that the word "those proceedings" in relation to adjudication in the salvo to clause 30.9.3 is wide enough to include, and does include, new adjudication proceedings brought by a referring party in relation to the same dispute or difference as was the subject of earlier adjudication proceedings brought by the same party which have been rendered abortive through no action or omission of the referring party. And if the issue of the new notice of intention was not necessary, the new notice can be treated as surplusage.
18. Mr. Mort further submitted that it was the referral notice that completed the commencement of proceedings. If that were right, then clause 30.9.3 would not be applicable to the first reference, let alone the existing reference. Mr. Mort referred me to a passage in Keating on Building Contracts, seventh edition, paragraph 18-430 at page 791 to the effect that proceedings are commenced in adjudication by a written notice to refer to adjudication. He submitted that that passage was wrong. I reject that submission. For the purposes of clause 30.9.3, which provides a short time period with a strict time limit, failure to comply with which leads to serious consequences analogous to the consequences of limitation provisions, "commencement" must, in my judgment, refer to service of the notice of intention. Delay in the appointment of an adjudicator could lead to failure on the part of an applicant to serve a referral notice within 28 days after the issue of the final certificate through no fault on his part. It would take clear words to that effect to lead to such a conclusion. Clause 30.9.3 refers also to the commencement of arbitration proceedings. For the purposes of limitation, arbitration proceedings before a sole arbitrator are commenced by the giving of a notice to concur in the appointment of an arbitrator: see Mustill and Boyd, *The Law and Practice of Commercial Arbitration in England*, second edition, p.169. In my judgment, it is clearly contemplated by clause 30.9.3 that an arbitration can be commenced before the appointment of the arbitrator; and the same, mutatis mutandis, applies in relation to the appointment of an adjudicator.
19. The claimant claims a declaration that

Notwithstanding the issue of adjudication proceedings by the defendant by notices dated 6th April 2005 and 22nd April 2005, the final certificate dated 11th March 2005 (subject to any argument as to its validity) is conclusive evidence of all those matters listed in clause 30.9.1 of the contract conditions, without the qualification or saving contained in clause 30.9.3 of the contract conditions.

I refuse to make that declaration.
20. The defendant claims the following two declarations:

1. That notwithstanding the date of the defendant's application to the RIBA, the adjudicator was validly appointed in the first adjudication;
2. That the final certificate issued by the architect on 11th March 2005 is not conclusive evidence of the matters listed at clause 30.9.1 of the contract.

I make the first of those two declarations. I refuse to make the second. Instead, I declare as follows:

That the final certificate issued on 11th March 2005 is, subject to the question of its validity, conclusive evidence as provided in clause 30.9.1 of the contract save only in respect of all matters to which the first adjudication proceedings relate.