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CPL Contracting Ltd v Cadenza Residential Ltd
HIGH COURT OF ENGLAND AND WALES, BIRMINGHAM DISTRICT REGISTRY, TECHNOLOGY AND CONSTRUCTION COURT
Her Honour Judge Kirkham::August 26, 2004
[2005] T.C.L.R. 1

Mr Jones, of Davies and Partners, appeared for the plaintiff.
Mr Yates, of Trowers and Hamlins, appeared for the defendant.

JUDGE KIRKHAM:
1 This is an application by the claimant for summary judgment to enforce the decision of an adjudicator, that decision dated June 21, 2004, by which the adjudicator decided that the defendant to these proceedings should pay the claimant £46,068.71 plus VAT in respect of the claimant's claim for payment of the claimant's application no.13. The claimant pursues only the application for summary judgment and not an application for an interim payment.

2 The background to this case is that the parties had contracted on the JCT standard form 1998 with contractor's design. The claimant made various applications during the contract. On September 11, 2003 the claimant made application no.13 for £86,395.42 plus VAT. The application listed a number of elements with the amount claimed in relation to each and it appears that application no.13 was the last interim application on the contract.

3 The employer's agent was a firm called KHK. They issued a certificate in relation to application no.13 and by that certificate they purported to certify that the sum of £47,736.92 was due to the claimant.

4 On October 13, 2003 the claimant wrote to KHK saying: "Please find enclosed our invoice number 2610 for the agreed valuation number 13". There is a document dated October 13 which at one place in the bundle is referred to as an invoice and at another place in the bundle bears on its face the word "Application". The document called "Invoice" has been exhibited by the defendant, so one assumes that the document that the defendant received was one called "Invoice". It is a document which bears a VAT number. That document is dated October 13. It is called "Invoice 2610" and it says "To valuation number 13 for works to ...; [the name of the property] ...; as agreed", and that claims the sub-total of £47,736.92 plus VAT.

5 On October 15, 2003 the defendant served a notice of withholding in regard to £4,500 or thereabouts in respect of liquidated damages and the defendant paid the net sum of £43,226.71 plus VAT.

6 In his statement, Mr Rex Nevitt of the defendant says that the defendants heard nothing further from the claimant in relation to application no.13 until the claimant served a notice to adjudicate. That notice is dated May 11, 2004, so several months after the documents to which I have referred. There is no evidence from the claimant to challenge that. In submissions Mr Jones has taken me to a letter dated April 20, 2004 from consultants instructed by the claimant. I will come back to that letter shortly. The notice to adjudicate indicated that there was a dispute. It defined the dispute as the sum to be paid to the claimant in respect of interim application no.13, and the redress sought was said to be payment of £43,168.71. That was subsequently defined as the balance of the value of work applied for but not paid, plus the £4,500 liquidated damages which had been deducted.

7 On May 16, 2004 the claimant served its referral to the adjudicator. By that document the claimant set out the basis on which it was primarily putting its claim, that is pursuant to

cl.30.3 of the contract. On May 26, 2004 the defendant served a response, indicating that it was taking part in the adjudication under protest and contending that the adjudicator had no jurisdiction on the grounds that no dispute existed or had crystallised. The adjudicator proceeded to make his decision in June 2004.

8 The primary issue between the parties today is whether or not there was a dispute. The claimant's case is that under 30.3 of the contract the mechanism for applying for payment and payment was set out. The claimant's application was dated or received September 11, 2003. Clause 30.3.5 provided that, if the employer did not give written notice, then the employer was bound to pay the contractor the amount stated in the application for interim payment. The claimant's case is that, because the employer had not given notice pursuant to the contract, the whole of the sum claimed by application no.13 was payable. Mr Jones's submission is that, because the employer (the defendant) did not pay in full the amount sought by the claimant in its application no.13, a dispute arose at that point. Mr Jones relies on the decision in Halki Shipping Corporation v Sopex Oils Ltd [1998] 1 W.L.R. 726 in support of that. Mr Jones's submission is that the dispute crystallised at the point where the employer made only part payment and not full payment of the sum which the claimant had sought. Until the claimant's claim for the balance under application no.13 had been compromised, then there was a dispute which was extant and which the claimant was entitled to refer to adjudication. Mr Jones for the claimant relies on the decision of His Honour Judge Moseley in Watkin Jones & Son Ltd v Lidl GmbH (2000) 86 Con.L.R. 155. Mr Jones submits that the circumstances in this case are very similar to those in Watkin Jones. In that case the contractor made an application, the employer failed to respond within the time-limit, and therefore a dispute arose, as Judge Moseley had concluded in that case. Mr Jones submits that the decision in Watkins Jones was consistent with Halki and that there are strong parallels with this case here. On that basis the claimant was entitled to refer that dispute as to the balance due under application no.13 to adjudication.

9 Mr Ralph Sangster for the claimant has made a statement in which he seeks to explain why the claimant used the words "agreed valuation" in the letter of October 13 to KHK and the words "as agreed" in the invoice dated October 13, 2003, saying that this was the claimant's general practice; it was a matter of routine adopted on this contract and on other contracts. Mr Sangster suggests that the words have no significance.

10 In submissions Mr Jones made reference to a letter of April 20, 2004. The claimant's case is that the dispute crystallised at the point where the employer made only part payment of the sum applied for under application no.13. Mr Jones submits that the letter of April 20, 2004 was an indication to the defendant through KHK (to whom the letter is addressed) that there was a dispute in relation to application no.13.

11 There are a number of difficulties with that. This is the first time that this suggestion has been made. It was not, for example, foreshadowed by the claimant in Mr Jones's skeleton argument. The letter of April 20 is detailed; it runs to four pages. It indicates that the consultants were assisting the claimant with what are described as the claimant's entitlements in relation to the project and it sets out matters which are said not to have been accepted by the employer's agent or the employer. The items referred to are scaffold removal, items excluded from the contract, issues relating to a party wall, issues relating to the provision of a show flat and providing phased completion, and issues concerning exceptionally adverse weather. It is not clear to me from the face of that letter that the matters referred to in that letter are necessarily matters which were covered by application no.13. Mr Jones has referred broadly to the detailed support in that application but it is not clear to me from the documents that I have been taken to how there might be any correlation between those. Mr Yates tells me that there have been other adjudications between the parties in relation to at least some of the matters set out in that letter. Certainly, there is no clear indication in that letter of April 20 that the claimants took issue with any question relating to interim application no.13, whether, as a matter of detail in relation to different elements of the contract or as to the technicality, as Mr Yates has characterised it, that

is the failure by the employer to have responded within five days, as provided by cl.30 of the contract.

12 It is clear from the documents available to me that the only response to KHK's certificate, which set out their view as to what was due on application no.13, was the claimant's letter of October 13 coupled with the invoice of that date. By neither of these documents did the claimants seek to challenge the position. There is no indication in these documents that the claimant disputed the figure which KHK put on the valuation. To the contrary-the wording of the letter and of the invoice indicated that the claimant accepted the position. If the claimant had wanted to make it clear that it reserved its position that would have been an obvious opportunity to have done so, but it did not do so. The employer then made payment of only part of the total which had been applied for. Again, there is no evidence before me that there was any challenge to that or any indication was given by the claimant that they disputed the view which the employer took as to the sums payable pursuant to the application.

13 I have already dealt with the question of the letter of April 20. It does not appear to me that that gave any indication that the contractor took issue with the position regarding application no.13.

14 Mr Jones and Mr Yates have taken me to a number of authorities. So far as I am concerned, the authority which I find most helpful here is that of Halki and the judgment of Forbes J., in Beck Peppiatt Ltd v Norwest Holst Construction Ltd [2003] B.L.R. 316 and, in particular, the passages at [3] to [5] of Forbes J.'s judgment which set out the law relating to this matter. As he says, "It has to be borne in mind that, as observed in Halki, 'dispute' is an ordinary English word which should be given its ordinary English meaning. This means that there will be many types of situation which could be said to amount to a dispute. Each case will have to be determined on its own facts." I approach this issue on that basis.

15 It is clear to me that at no stage prior to the notice to adjudicate did the claimant indicate that they pursued the balance due under application no.13. To the contrary-they made it clear in October 2003 that they were accepting of the position. Looking at the matter objectively, as at October 13 no dispute had arisen between the parties. At no time between that date and the notice to adjudicate in May this year did the claimant put in issue the balance of payment due under application no.13. Quite simply, here, in my judgment, there was no dispute. In the absence of a dispute between the parties the adjudicator did not have jurisdiction.

16 Mr Yates has sought to persuade me that, additionally, the parties had in October 2003 reached a binding agreement whereby the claimant agreed that it would not seek payment as regards any under-valuation in relation to application no.13. He submits that that agreement can be found within the wording of the letter and invoice of October 13, 2003. I reject that submission. It seems to me that an agreement to that effect cannot be found simply by the words set out in that letter or that invoice. There is not evidence of offer, acceptance, consideration and so on, all of the elements that one would expect to find in relation to a binding agreement between the parties as to a matter of that nature.

17 I should add, for the sake of completeness, that it seems to me that the circumstances here are different from those in Watkin Jones and the position can therefore be distinguished. In Watkin Jones there was in effect no communication or exchange between the parties. The position here was quite different. There was an exchange between the parties. The claimant made its claim, if I can put it that way, by the application. It was answered by the employer through the employer's agent and the claimant simply did not dispute the position thereafter.

18 In all the circumstances, it cannot be said that the defendant has no real prospect of successfully defending the claim and it is therefore not appropriate here for an order for summary judgment to be made.