Neutral Citation Number: [2009] EWHC 2664 (TCC)

Case No: HT-09-389

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30th October 2009

Before :

THE HONOURABLE MR JUSTICE AKENHEAD

Between :

ROK BUILDING LIMITED	**Claimant**
- and -	
CELTIC COMPOSTING SYSTEMS LIMITED	**Defendant**

Patrick Clarke (instructed by **Ashfords LLP**) for the **Claimant**
Michael Murray, company secretary in person for the **Defendant**

Hearing date: 22 October 2009

JUDGMENT

Mr Justice Akenhead:

Introduction

1. This is an application to enforce an adjudicator's decision and involves an issue as to whether the decision required the defendant to pay or was simply declaratory. There is no issue that the adjudicator's decision is anything other than valid.

The contract

2. Celtic Composting Systems Ltd ("Celtic") was a main contractor employed by Devon County Council to carry out civil engineering works at Deep Moor, Great Torrington, Devon. Celtic employed Rok Building Ltd ("Rok") as a subcontractor to provide and in-vessel composting facility. This sub-contract (the "Sub-Contract") came into effect in about March 2008, albeit that the formal contract was not entered into until later that year. The sub contract incorporated the NEC3 form of engineering and construction contract (Option B June 2005 with amendments June 2006 but as amended by the parties).

3. The language of the NEC3 form is mostly framed in the present tense so that superficially at least there is little patently mandatory language. The relevant payment clauses are as follows:

> "50.1 The Project Manager assesses the amount due at the assessment date…
>
> 50.2 The amount due is
>
> - the Price for Work done to Date
> - plus other amounts to be paid to the Contractor
> - less amounts to be paid by or retained from the Contractor…
>
> 50.4 In assessing the amount due, the Project Manager considers any application for payment the Contractor has submitted on or before the assessment date. The Project Manager gives the Contractor details of how the amount due has been assessed.
>
> 50.5 The Project Manager corrects any wrongly assessed amount due in a later payment certificate.
>
> 51.1 The Project Manager certifies a payment on or before the date on which a payment becomes due.
>
> 51.2 Each certified payment is made on or before the final date for payment. If a certified payment is late, or if the payment is late because the Project Manager does not issue a certificate which he should issue, interest is paid on the late payment. Interest is assessed from the date by which the late payment should have been made until the date when the late payment is made, and is included in the first assessment after the late payment is made.
>
> 51.3 If an amount due is corrected in a later certificate either

- by the Project Manager in relation to a mistake or a compensation event or

- following a decision of the Adjudicator or the tribunal

interest on the correcting amount is paid. Interest is assessed from the date when the incorrect amount was certified until the date when the correcting amount is certified and is included in the assessment which includes the correcting amount.

51.4 Interest is calculated on a daily basis at the interest rate and is commenced annually."

4. Clause 56 provided that the date on which payment became due was 21 days after the date on which the Contractor's statement was received and the final date for payment was 7 days after the date on which the payment became due. If the Employer intended to withhold payment after the final date of payment of the sum due, it had to notify the Contractor not later than one day before the final date for payment. As the Clause itself makes clear, these requirements were there to satisfy Sections 109 and 110 of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA"). There is nothing in the contractual documentation as provided to the Court by either party which suggests that Rok's entitlement to payment was dependent upon what Celtic was entitled to from Devon County Council.

5. Provision was also made elsewhere for what are called "Compensation Events" which, subject to various notice requirements, entitled the contractor to extension of time and financial compensation when certain such events occurred.

6. Option W2 to this form of contract provided for disputes arising under or in connection with the contract to be referred to adjudication. The procedures were set up to enable adjudication to take place in accordance with the HGCRA. Clause W2 .4 (11) provides:

> "The Adjudicator's decision is binding on the Parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. The adjudicator's decision is final and binding if neither Party has notified the other within the time is required by this contract that he is dissatisfied with a matter decided by the Adjudicator and intends to refer the matter to the tribunal."

Reference to the "tribunal" is to the tribunal for final dispute resolution, arbitration in this case. The adjudication was to be in accordance with the CIC Model Adjudication Procedure 4th Edition which provided by Clauses 4 and 5 as follows:

> "4. The Adjudicator's decision shall be binding until the dispute is finally determined by … arbitration… or by agreement.
>
> 5. The Parties shall implement the Adjudicator's decision without delay whether or not the dispute is to be referred to… arbitration"

The facts

7. The Sub-Contract Completion Date, subject to any entitlement to extension of time, was 1 December 2008. There were delays, the responsibility for which remains in issue between the parties. There remains an issue between the parties as to whether Rok has actually completed the works; it follows from this that Celtic is of the view that Rok is liable to it for liquidated damages for delay for most of the delay period. One of the events in which was said by Rok to have delayed progress was flooding which occurred in July and August 2008; Rok claimed that this was a Compensation Event and that, it having been delayed by 19 weeks in consequence, it was entitled to an extension of time. This was disputed by Celtic.

8. In December 2008, Rok submitted a claim for time and money in relation to this flooding incident: 19 weeks extension of time and financial entitlement of £877,339.52. In its application for payment No 13 dated 27 April 2009, Rok claimed £782,875.92 for this Compensation Event. If payment was due, it was due by 25 May 2009 which would have been the final date of payment. Certificate No 13 issued by the Project Manager on 8 May 2009 allowed nothing for this claim and no extension of time was recognised. Although that Certificate identified a negative balance of some £70,000 (that is, no net sum due), nothing seems to turn on that. On 18 June 2009, Certificate No 14 was issued which showed a balance due to the Claimant, after allowing for retention, and amounts previously certified £72,420.38.

9. On 26 June 2009, Rok served a Notice of Adjudication in relation to the dispute about the flooding incident, followed by its Referral to Adjudication on 3 July 2009. Mr Liam Holder was appointed as adjudicator. It was accepted that he had full jurisdiction to deal with the flooding dispute. Written evidence and argument was exchanged between early July and 31 August 2009.

10. The Adjudicator issued his decision, within an agreed extended time, on 7 September 2009. In essence, he decided that the flooding was a Compensation Event but that only 29 working days (5.8 calendar weeks) delay had occurred. He decided that the Completion Date, which had already been extended beforehand to 26 January 2009, should be extended to 6 March 2009. In his Decision at Paragraph 12, he decided as follows:

> "12.3 That Rok shall be paid in the additional sum of £204,465.14 plus VAT in relation to interim payment application 13 in respect of the compensation event arising from the flooding on the site…
>
> 12.5 That Celtic shall pay interest on the sum awarded in the sum of £1470.47 and which continues to accrue at a daily rate of £14.00 from and including 8 September 2009, until judgement or sooner payment."
>
> 12.6 That Rok shall pay 25% of my costs and expenses in the sum of £5371.88 plus VAT; that Celtic shall pay 75% of my costs and expenses in the sum of £16,115.63 plus VAT…"

11. Celtic did not pay to Rok either of these sums, taking the point that the decision was not, in a directive sense, requiring payment specifically to be made within a set time or at all. I will return later in this judgement to what the decision does require.

12. Before the Adjudicator's decision was issued Certificate No 15 was issued on 21 August 2009; it showed, after allowing for retention, delay damages and amounts previously certified, a negative balance in the sum of £66,160.43. No sum was due on that certificate and indeed that Celtic would argue that Rok should have paid the negative balance back to Celtic.

13. To reflect the Adjudicator's decision, Celtic issued on 17 September 2009 a pro-forma document entitled Compensation Event No. 72 which related to the flooding and provided for an adjustment to the Contract Sum of £204,465.14, being the sum allowed by the Adjudicator.

14. Following the issue of these proceedings on 25 September 2009, on 7 October 2009, Rok submitted to Celtic its Valuation No 16. On 15 October 2009, Celtic issued its Certificate No 16, which showed a net sum due to Rok of £121,830.68. However, this was reached after deducting retention (£75,348.30) and "Delay Damages" (£133,000) and allowing for the previously certified sum under Certificate No 15. However, Celtic has only paid £64,020.79 because, it argues, that, allowing for VAT, it is entitled to a credit for the negative balance owing to it from Rok on Certificate No 15. It is clear that the main reason why the gross sum certified on Certificate No 16 (£2,511,610.11) exceeded the gross sum certified on Certificate No 15 (£2,330,856.84) was the inclusion in Certificate No 16 of the sum allowed by the adjudicator to Rok for the flooding compensation event (£204,465.14).

These Proceedings

15. These proceedings for the enforcement of the Adjudicator's decision were issued in late September and directions given by Mr Justice Ramsey on 28 September 2009 so that the hearing on 22 October 2009 could take place. Whilst Rok was represented by solicitors and Counsel, Celtic appeared by its company secretary, Mr Murray, who submitted coherent witness statements and argument and who appeared at the hearing for his company.

16. The essential dispute between the parties on these enforcement proceedings is whether or not the Adjudicator's decision was directive in the sense of requiring Celtic to pay forthwith or within a reasonable time as opposed to being declaratory in the sense that the extension and sum allowed to Rok were simply to be accounted for in future certification and payment procedures. Mr Murray articulately and courteously put his arguments on what the Adjudicator's decision meant; he forcefully made the point that it cannot have been intended that Celtic should find itself in a position in which it should have to pay the sum allowed by the Adjudicator other than through the future certification procedures; Celtic, he argued, found itself in the position, if Rok is right, of having to pay out in circumstances in which it would be difficult if not impossible for it to recover "up the line" from Devon County Council. He openly and expressly accepted that Celtic did not challenge the validity of the Adjudicator's decision.

The Law

17. It is now well established law and practice in the context of construction adjudications that valid adjudicators' decisions are to be enforced in effect without set off or cross claims. So far as set offs or cross claims are concerned, the logic is that these are to be

raised in the adjudication and the adjudicator either allows or disallows them; it is not then appropriate that the losing party raises on enforcement proceedings either the same set offs or cross claims (which have already been adjudicated upon) or new ones which could have been but were not raised. The policy of the HGCRA is that decisions are binding. This is wholly and clearly reflected in the contract terms set out about. Mr Justice Ramsey reviewed a number of authorities in this area in **William Verry Ltd v London Borough of Camden** [2006] EWHC 761 (TCC), and said at Paragraph 43:

> "In such circumstances, should the sums found due in adjudication decision number 3 give way to the disputed valuation in the final certificate? In my judgment, they should not for the following reasons: First, for the reasons set out above, I consider that the binding nature of the adjudicator's decision and the agreement of the parties to comply with that decision means that, prima facie, the adjudicator's decision should be enforced.
>
> Secondly, if payment of an adjudication decision on the sum due on an interim certificate had to be subject to the view of the Contract Administrator/Quantity Surveyor in a subsequent certificate, then the intention of parliament and the purpose of adjudication would be defeated. Each successive certificate would defeat the decision by an adjudicator on the previous certificate."

The logic of the second point in the dictum set out above is that the adjudicator's decision, if it requires payment, should be enforced and it is not subject to the diktat, approval or further certification under the construction contract.

18. Reference has been made to the decision by HHJ Humphrey Lloyd QC in the TCC in **David McLean Housing Contractors Ltd v Swansea Housing Association Ltd** (27 July 2001). That case involved a JCT 1981 contract in which the contractor secured an adjudicator's decision and the issue arose as to whether there should be summary judgement for the contractor in circumstances in which the employer believed it was entitled to be paid an equivalent amount of liquidated damages for delay on the part of the contractor. A payment application had been made in which the contractor claimed for direct loss and expense, money in respect of the value of variations and in respect of measured works together with certain adjustments in relation to provisional sums; there was also argument about whether or not the contractor was entitled to extension of time. The notice of adjudication set out in the judgement identified the disputed matters as relating to the contractors "entitlement" to direct loss and expense and extensions of time, a proper valuation of variations and of measured work and expenditure on provisional sums.. The judge found that the notice did not "say clearly that the contractor was claiming what ought to have been paid" and that "the adjudicator's decision, however, was also not expressed in quite those terms." He went on in Paragraph 13 to set out what he considered the decision meant:

> "Giving it a sensible interpretation, and trying to give effect to its purpose and to the aims of adjudication, in my judgement the adjudicator in arriving at his conclusions on the various elements were saying, in effect: "That is what you should have been paid in response to application 19". Indeed, that is precisely how the defendant apparently read the decision, since within a few days after the issue of the decision... certificate 20 was issued… which met the requirements of

the decision in relation to payment, i.e. the claimant contractor got the certificate to which it was entitled, in the opinion of the adjudicator. Thus I do not consider that any point arises about the validity of the decision in terms of the dispute or in terms of what it seeking payment…The claimant has to accept the consequences of its own reference on this point."

19. There then follows in the judgement a discussion about the legal nature of an adjudicator's decision which is that it does not generally as such "create or modify a right or liability" (Paragraph 15) and that "an action to enforce an adjudicator's decision is an action to enforce the right or liability which has been held by the decision". It can be seen that the learned judge was deciding that case by way of interpretation of the particular adjudicator's decision. At Paragraph 10, he addressed some of the principles involved in interpreting a notice of adjudication:

> "A notice of adjudication has to be put in its context. I have done so briefly. I agree with what was said in **FastTrack Contractors Ltd v Morrison Construction Ltd** [2000] BLR 168. His Honour Judge Thornton QC said:
>
> > "During the course of a construction contract, many heads of claims, issues, contentions, and causes of action will arise. Many of these will be collectively, or individually disputed. When a dispute arises, it may cover one, several or many of one, some or all of these matters. At any particular moment in time, it will be a question of fact what is in dispute. Thus, the "dispute" which may be referred to adjudication is all or part of whatever is in dispute at the moment the referring party first intimates an adjudication reference. In other words, the "dispute" is whatever claims, heads of claims, issues or contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference. A vital and necessary question to be answered, when a jurisdictional challenge is mounted, is: what was actually referred? That requires a careful characterisation of the dispute referred to be made. This exercise will not necessarily be determined solely by the wording of the notice of adjudication since this document, like any commercial document having contractual force, must be construed against the background from which it springs and which will be known to both parties."
>
> When the context is examined, it is plain, in my judgement, that the real dispute was about what payment ought to have been made as a result of application No. 19. That contained various elements-valuations of measured work, valuation and variations, provisional sums, direct loss and expense, etc. Those elements were therefore reflected in the notice of adjudication. The notice was therefore valid in referring the dispute about the payment to be made which could not be decided without considering each such element."

20. One can draw from the **David McLean** decision the propositions that the Court must interpret adjudicators' decisions not only from the words used by the adjudicator but also in the context of the dispute which was referred to adjudication. There may be disputes between the parties as to whether money should be paid or should have been paid but there may also be disputes, as in the **David McLean** case, as to the true value of elements in a previous valuation. Put another way, the crystallised dispute may involve or require a declaration as to what the true value is or a directive decision that

money be paid. This issue in any given case will depend on the facts of the case and the wording used in any given adjudicator's decision.

The Adjudicator's decision

21. The context of the dispute between the parties which was ultimately referred to adjudication was that in December 2008 Rok had submitted a detailed claim in respect of the flooding incident which was based on it being a Compensation Event which had delayed the works by some 19 weeks and which had led to over £700,000's worth of loss. That claim, somewhat arithmetically adjusted, was then submitted as part of Rok's claim for payment in its application No 13; thus it was that Rok was saying in late April 2009 that it was entitled to have certified in Certificate No 13 and paid sums in respect of that Compensation Event.

22. The parties have chosen not to put the actual Notice of Adjudication or the Referral Notice before the Court because, I assume, they are satisfied that the Adjudicator adequately set out the nature of the dispute referred to adjudication. At Paragraph 9.2 of the Adjudicator's decision, he sets out the nature of the dispute or issue as follows:

> "The dispute the Referring Party intends to be referred to adjudication is in relation to Celtic's failure to assess any change to the Completion Date as a result of flooding of the site and in relation to Celtic's inadequate assessment of Rok's financial claim in respect of flooding of the site as manifested in Celtic's valuation of Rok's interim payment application number 13."

In the following paragraph, the adjudicator sets out what the "Reddress Sought" was in the Notice of Adjudication:

> "Rok seeks the following decisions:
>
> 11.1 A decision that Rok is entitled to a compensation event in respect of flooding on the site.
>
> 11.2 A decision that Rok shall be paid the additional sum of £759,389.64 plus VAT or such other sum as the Adjudicator considers appropriate in relation to interim payment application 13 in respect of the compensation event arising from the flooding on the site.
>
> 11.3 A decision that the current Completion Date of 26 January 2009 is extended by 19 weeks or by such other period and to such date as the Adjudicator considers appropriate.
>
> 11.4 A decision that Celtic shall pay interest on the sum awarded at the contract rate of 2% above the average base rate of [various clearing banks] or interest at such other rate as the Adjudicator considers appropriate together with a decision that Celtic pay Rok continuing interest at the appropriate daily rate until judgement or sooner payment.
>
> 11.5 A decision that Celtic pay the Adjudicators costs and expenses on this decision and the nomination fee."

23. Whilst I have set out at Paragraph 10 above the key parts of Paragraph 12 of the Adjudicator's decision of 7 September 2009, I should refer to some elements of his findings in the body of the decision. At Paragraphs 11.15 to 11.84, he addressed the issue of flooding and why as a matter of fact and contractually he decided that it was a Compensation Event under the Sub-contract. Between Paragraphs 11.85 to 11.138, he considered the extent to which there was a delay occasioned by the Compensation Event flooding and decided that there was 29 working days or 5.8 weeks delay caused by the flooding which entitled Rok to an extension of time. Then, in great detail between Paragraphs 11.139 and 11.225, he considered and analysed each of the eleven heads of quantum in the claim presented in Rok's Application No 13. On 8 of the 11 heads, he found that nothing was due. On the other three heads he found that a gross sum of £210,788.80 was due from which at Paragraph 11.225 he deducted 3% retention to leave a balance of £204,465.14. The analysis of all 11 heads of claim was done by reference to that which was the subject matter of Application No 13.

24. The Adjudicator dealt with interest between Paragraphs 11.226 and 11.231. He said as follows:

> "11.228 I agree Rok is entitled to interest on the outstanding balance from the date it fell due to the date of this decision and which shall continue to accrue at the daily rate thereafter.
>
> 11.229 The final date for payment of the relevant certificate was 25th May 2009 (paragraph 25 of the Referral).
>
> 11.230 Rok is therefore entitled to interest on the balance due of £204,465.14 from the date that balance should have been paid (25th May 2009) to the date of this decision (7th September 2009), a period of 105 days, at a rate of 0.5% plus 2%.
>
> 11.231 Therefore, Rok is entitled to a sum in respect of interest to the date of this decision of £1470.47 and which continues to accrue at the daily rate of £14.00 from and including 8 September 2009, until payment is received."

Discussion

25. It is therefore necessary to interpret what the Adjudicator meant in Paragraph 12 of his decision. I have no doubt that in context he was clearly and obviously calling for payment by Celtic and directing that the sums in question be paid by Celtic. He was not simply declaring what the value of Rok's claims for compensation and interest were with a view to them being the subject matter of later adjustment in certificates. My reasons are as follows:

> (a) The whole issue between the parties arose as a result Celtic's refusal (albeit it believed its stance was justified) to include anything in Certificate No 13 by way of compensation for the flooding event. If and to the extent that Celtic had included in Certificate No 13 compensation for this event, that money would have been paid, subject to retention.
>
> (b) The whole tenor of Rok's Notice of Adjudication was to the effect that substantial amounts should have been but were not included in Certificate No 13.

Interest was claimed the certificate on the basis that monies should have been certified and paid.

(c) The “Redress Sought” was that Rok "shall be paid the additional sum". The Reddress was not framed in declaratory terms but in terms of asking for payment.

(d) It is of particular interest that Rok’s claim in the adjudication was for a gross sum less retention and plus VAT. This is material because it demonstrates that it was asserting that it should be paid the sum net of the 3% retention which would have been deducted from Certificate No 13 and that VAT was payable on the balance. That is exactly reflected in what the Adjudicator actually did: having found a gross sum due, he deducted 3% retention and required that Rok should be paid the net some plus VAT.

(e) Paragraph 12 of the decision is framed in directive language: it says that Rok “shall be paid”; that “is in relation to interim payment application 13”. He is effectively saying that the net sum of £204,465.14, which was part of what was claimed for in that application, should be paid.

(f) His decision on interest is confirmation that he has decided that the next time should have been paid on or by 25 May 2009; this underlines his intent that the net sum (and interest) was to be paid.

26. Mr Murray argued with some force that the fact that the Adjudicator had not directed payment within a particular period was a clear indication that he had not intended that payment was to be made promptly or at all. Whilst it is undoubtedly the case that many adjudicators do call for payment within a specified period of time, that is not essential in my view if it is clear from the wording of the decision and in context that payment is required to be made. If, as here, there is the clearest contractual requirement that an adjudicator's decision is binding and is to be “implemented”, the absence of a specific period for payment in the decision does not undermine the requirement that the sum is to be paid. One would need wording which made it clear that later certificates were to be issued to reflect the decision and less directive wording to avoid an interpretation that what the Adjudicator meant was that Celtic should pay, without more. Properly construed, the Adjudicator was requiring in effect immediate payment but simply legislating for continuing interest to be payable if payment was delayed beyond 7 September 2009.

27. The fact that there are and were certification procedures in place set up by the contract between the parties to reflect adjudicators’ decisions or to correct or revise earlier certified values does not mean that an adjudicator cannot direct in the decision that payment is to be made. Mr Murray, frankly and properly, accepted the proposition that if the Adjudicator in this case had specified that payment was to be made within, say, 7 or 14 days, he would have no argument and would have to accept that Celtic would have to pay even though the later certificates would need to be adjusted to reflect the Adjudicator's decision.

28. Mr Murray argued that, if he was wrong, it was unfair on Celtic to have to pay out on an adjudicator's decision in effect before Celtic was able (if at all) to recover from Devon County Council a similar amount. His concern was, he believed, that Rok had only come up with the necessary support for the flooding event during the adjudication

and that if Rok had done that before Celtic would have had a greater opportunity to secure payment from the County Council. Unfortunately, the Sub-contract into which it entered with Rok was not by its terms a pay when paid contract; in any event and as accepted by Mr Murray, the HGCRA by Section 113 has, broadly, prohibited the "pay when paid" arrangements which were common in sub-contracts prior to the Act. It may therefore be that there is a disparity between what a main contractor can recover from its employer and what it has to pay its subcontractor. That very much depends on the terms which it has agreed with its subcontractor. Mr Murray was also concerned that Celtic would have to pay out on the adjudication without the liquidated damages being taken into account. I do not see that there is any unfairness, because Celtic entered into the subcontract on the basis of a well-known standard form which in its amended form does not, at least in this instance, relate what payments are due to the subcontractor to those due from the employer in respect of the subcontractor's work; furthermore, it was open to Celtic to raise the issue of liquidated damages in the adjudication, although I can not judge whether this would have been effective as it would involve a question as to whether an effective withholding notice had been raised.

29. It follows from the above that the Adjudicator's decision should be enforced with a requirement that the sum found to be payable should be paid without set off within 14 days of the date of the hearing, 22 October 2009, at which I indicated to the parties what my decision what was albeit that the reasons would follow in this judgement. That is subject however to one refinement which is that it is clear that in effect the payment made pursuant to Certificate No 16, £64,020.79, inclusive of VAT, £55,670.25 exclusive of VAT, was made in part satisfaction of the Adjudicator's decision because the main reason that Certificate No 16 increased in gross value was by way of the addition of the principle sum awarded by the Adjudicator.

Decision

30. There will be judgement for the Claimant in the sum of £173,191.73 (£204,465.14 less £55,670.25 paid on 16 October 2009 plus VAT at 15%). There is to be interest as awarded by the Adjudicator, continuing on the unpaid sums until 22 October 2009. Interest at the rate of £10.19 a day thereafter until payment shall be due.