

Neutral Citation No. [2011] NIQB 102

Ref: **WEA8305**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **16/9/2011**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

HENRY BROTHERS (MAGHERAFELT) LIMITED

Plaintiff;

-v-

BRUNSWICK (8 Lanyon Place) LIMITED

Defendant.

WEATHERUP I

[1] The plaintiff applies under Order 14 of the Rules of the Court of Judicature for summary judgment in respect of an Adjudicator's decision of 7 April 2011 for the payment of £259,058.46 to the plaintiff contractor by the defendant developer. Mr Humphries appeared for the plaintiff and Mr Dunford for the defendant.

[2] In June 2007 the parties entered into a JCT98 contract, as amended, for the construction of an office block and a residential block in Belfast for the contract sum of £24 million.

Clause 16 of the contract contains the provisions in respect of Practical Completion and the Defects Liability Period. When the works have reached Practical Completion the employer shall issue a notice to that effect. The employer shall issue a Schedule of Defects not later than 14 days after the expiry of the Defects Liability Period, which defects shall be made good by the contractor within a reasonable time. When the defects are made good the employer shall issue a Notice of Making Good Defects.

Clause 30.3 contains the provisions in relation to payments. The contractor may make application for payment. Within 5 days the employer gives notice of the amount of proposed payment and makes payment in 21 days. Not later than 5 days before the date for payment a notice may be given to the contractor of any amount to be withheld or deducted from the payment.

One half of the retention monies will be released at Practical Completion and the other half at the Completion of Making Good Defects.

[3] The plaintiff served a Notice of Adjudication on 7 March 2011 which stated the dispute to be (1) whether the works were complete (2) if so when they were so complete and (3) what sums are due for payment. The plaintiff claimed the release of all retention money. The Adjudicator awarded one half of the retention money. The Adjudicator decided that the works, except for fit-out, were complete by 3 March 2010 and Brunswick took partial possession of the site with the consent of Henry Brothers. Practical Completion of the relevant part of the works was deemed to have occurred and the Defects Liability Period commenced on 3 March 2010 and ended on 2 March 2011. Thus one half of the retention monies was due to be released. The Adjudicator awarded one half of the retention monies and that sum is the subject of these proceedings.

[4] In respect of the other half of the retention monies it was stated that the second half of the retention can be held until Notice of Making Good Defects has been issued; that after the expiry of the Defects Liability Period Brunswick had 14 days to provide a Schedule of Defects and the Schedule should have been provided by 18 March 2011; although Brunswick had referred in its response to defects in general terms, no particulars had been given; it was stated by the Adjudicator that there may be outstanding notified defects so he could not decide when the second half of the retention should be released.

[5] The plaintiff served a second adjudication notice on 5 May 2011 which stated the dispute to be (1) whether alleged defects were properly notified in accordance with the contract and (2) when the defendant should release the second part of the retention monies to the plaintiff. The second Adjudicator's decision was issued on 1 June 2011. The end of the Defects Liability Period was 2 March 2011; the defendant did not give notice of defects within the 14 days as specified in the contract; the plaintiff applied for the second half of the retention; the defendant's position was that it could not issue a Schedule of Defects because it did not consider that Practical Completion had been achieved and by 7 April 2011, when the Adjudicator decided otherwise, the period for the issuing of a Schedule had expired; further the defendant contended that it was not precluded from withholding sums due for defects even if prior notice had not been given. The Adjudicator decided that the defendant was entitled to withhold the money for defects even though no notice had been given.

[6] A Defence and Counterclaim has been served by the defendant. The defendant contends that there are defects in the work, that the value of defects exceeds the total retention and that the second Adjudicator's decision of 1 June 2011 supports the defendant in withholding money for defects. Accordingly the defendant contends that it has a defence to the plaintiff's claim and a counterclaim for a greater amount and thus the plaintiff should not recover summary judgment. In the alternative the defendant contends that if the plaintiff is to recover judgment there should, in the interests of justice, be a stay on the payment of the sum due on the judgment. The relevant interests of justice are said to arise from the circumstances referred to above concerning the findings of the Adjudicator in the first and the second adjudications.

[7] An Adjudicator's decision operates under Article 5 and clause 39A of the contract. Article 5 states that if any dispute or difference arises under the contract either party may refer to adjudication in accordance with clause 39A.

39A.7.1 states that the decision of the Adjudicator shall be binding on the parties until the dispute or difference is finally determined by arbitration or legal proceedings or by an agreement in writing between the parties made after the decision of the Adjudicator has been given.

39A.7.2 states that the parties shall, without prejudice to their other rights under the contract, comply with the decision of the Adjudicator and the employer and the contractor shall ensure that the decision of the Adjudicator is given effect.

39A.7.3 states that if either party does not comply with the decision of the Adjudicator the other parties shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 39A.7.1.

[8] The adjudication system was described by Dyson J in Macob Civil Engineering v. Morrison Construction [1999] BLR 92 as being an intervening provisional stage in the dispute resolution process and that crucially it has been made clear that the decisions of Adjudicators are binding and are to be complied with until the dispute is finally resolved.

[9] While it is the general position that Adjudicators' awards are to be paid, an exception has been developed in respect of liquidated and ascertained damages as summarised by Jackson J in Balfour Beattie Construction v. Serco Limited [2004] EWHC 3336 -

"I derive two principles of law in the authorities, which are relevant for present purposes.

- a. Where it follows logically from an adjudicator's award that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided that the employer is given proper notice (insofar as required).
- b. Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set off liquidated and ascertained damages against sums awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case."

The defendant relies on the second limb.

[10] I had occasion in Charles Brand Limited v. Donegal Quay Limited [2010] NIQB 67 to consider an application for summary judgment to enforce an award made by an Adjudicator. The defendant claimed a right of set off in respect of liquidated and ascertained damages claimed for a period of delay in completion of the works and further for a sum claimed to have been included in the Adjudicator's award and also paid on an Interim Certificate. In respect of the claim for liquidated and ascertained damages it was found that there had been non compliance with notices required under the contract. In respect of the duplication of payment in the Adjudicator's award and an Interim Certificate it was recognised that there was a right to adjustment of the amount payable in the next certificate. It was held that in the circumstances there was no right of set off and that judgment would be entered for the plaintiff for the amount of the Adjudicator's award with no stay on the enforcement of the judgment.

[11] In the present case, after the first Adjudicator's decision on 7 April 2011, the defendant issued a Schedule of Defects on 15 April 2011. On 19 April 2011 the defendant issued a notice of payment due for those defects in the sum of £425,000. On 7 April 2011 the Adjudicator had decided that there may be defects and that he would not release the second part of the retention. Further on 1 June 2011 the Adjudicator's second decision acknowledged that the defendant did not issue the Schedule of Defects at the required time as the defendant did not consider that there had been Practical Completion. The practical reality is that the defendant took the position in the first adjudication that there had not been Practical Completion and therefore, consistent with that position, could not be expected to comply with the terms of the contract in relation to notices. However in the first adjudication the Adjudicator decided against the defendant and concluded that there had been Practical Completion. Certain contractual consequences flow from that finding. The defendants rely on the dilemma that was created. Further, as the Adjudicator found

in the second adjudication, the defendant could withhold retention monies for defects, even in the absence of notice. Thus the defendant contends that these circumstances engage the second limb of the qualification recognised in Balfour Beattie Construction and provide a basis for resisting judgment under Order 14.

[12] In the present case there has been no specific sum found due for damages, nor has it been established that any sum is due as damages. The defendant has made a claim for damages for alleged defects and the claim has yet to be determined. The Adjudicator did recognise in the first adjudication that the defendant may have a claim for damages but he made no finding in that regard. At the date of the Adjudicator's first decision the defendant had no entitlement to any sum for damages.

[13] After the Adjudicator's first decision the defendant issued the Schedule of Defects and the notice of withholding payment as required by the contract. At the second adjudication the defendant's earlier dilemma was recognised, as was the entitlement to withhold payment for defects in the absence of notice. However the terms of the contract do not provide any basis for withholding the amount of the claim for damages from an Adjudicator's award. I do not accept that the findings or comments by the Adjudicator create a right of set off against the adjudication award of 7 April 2011.

[14] The defendant relied on the wording of 39A.7.2 which requires the parties to comply with the decision of the Adjudicator "without prejudice to their other rights under the contract". The defendant contends that the other rights under the contract permit the defendant to withhold the payment.

[15] In MJ Gleeson v. Devonshire Green Holdings Limited [19/03/2004] at paragraph 10 it was stated

"It seems to me that clause 39A.7 is the important provision in this case. It provides that the parties shall ensure that the adjudicator's decision is given effect and that they shall comply with it. Compliance with the decision is, under clause 39A.7.2 stated to be "without prejudice to their other rights under the contract" but that does no more, it seems to me, than have the effect of preserving any contractual right which the employer or paying party might otherwise have under the contract. The matter was considered in VHE Construction v. RBSTB Trust Company [70 Con LR] and if one looks at paragraph 64 of the judgment in that case one can see that the interpretation which was given by the court to the words "without prejudice" meant simply that compliance with the decision of the adjudicator did not have the effect of depriving the parties of their other rights under the contract if and when they came to challenge the decision of the adjudicator by litigation or an arbitration. It is

not, however, a provision which was directed to resisting the adjudicator's decision, it seems to me."

[16] Under the adjudication scheme the plaintiff is entitled to payment of the Adjudication award. The defendant is entitled to have a determination of the issue about the defects and of any entitlement to damages in respect thereof and to recover any amount that is found due in respect of those defects in any arbitration or in any litigation or by agreement. The defendant will in time recover that money if it is due. None of the above prevents the plaintiff obtaining judgment against the defendant for the sum found due to the plaintiff under the Adjudicator's award.

[17] The defendant's alternative position is that if there is to be judgment for the plaintiff there should be a stay in the interests of justice. McLaughlin J had occasion to consider the issue of a stay in D G Williamson Ltd v NI Prison Service [2009] NIQB 8. He referred to the power of the Court to grant such a stay in equity and under Order 14 rule 3(2) and adopted the approach of HH Judge Toulmin QC in Hillview Industrial Developments (UK) Limited v Botes Building Limited [2006] EWHC 1365 (TCC) where he stated at paragraph 33 -

".... the purpose of 1996 Act is to provide a statutory framework which would enable justice to be done between parties to a dispute. It was not intended to cause injustice. This can, in appropriate cases, be dealt with by the grant of a stay. I am satisfied that the jurisdiction in adjudication enforcement cases to grant a stay under the CPR must be limited to cases where there is a risk of manifest injustice."

[18] One well recognised area for the grant of a stay in the interests of justice is where the plaintiff is in financial difficulties and there is a question mark over the ability of the plaintiff to repay any sum of money that might later be found due to the defendant.

[19] The defendant contends that the circumstances of this case are such that it would be unjust for the defendant to have to make the payment. I do not accept this. This is not a case of potential financial disadvantage to the defendant in the event of a repayment being found to be due from the plaintiff. I do recognise that the special circumstances that might warrant a stay are not limited to potential financial disadvantage. However the injustice that is said to arise in the present case concerns the matters relied on by the defendant to resist the summary judgment. Given the nature of the adjudication scheme I am satisfied that the discretion to grant a stay should not be exercised in the present circumstances. Unfortunate as it may be, the defendant made the wrong call in relation to practical completion and certain consequences follow. However that does not warrant non payment of the Adjudicator's award or a stay of that award. Accordingly, there will be judgment for the plaintiff.