

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

MEL DAVIDSON CONSTRUCTION

Plaintiff

-v-

NORTHERN IRELAND HOUSING EXECUTIVE

Defendant

Ruling on costs of the application for summary judgment

WEATHERUP J

[1] The plaintiff obtained summary judgment against the defendant on 26 June 2014 as the means of enforcing an award made by an adjudication decision of 14 February 2014. The background appears from the judgment in Mel Davidson Construction v NIHE [2014] NIQB 110. The plaintiff seeks an order for the costs of that application for summary judgment. The defendant resists the plaintiff's application for costs and asks that the Court makes no order as to costs. Ms Danes QC appeared for the plaintiff and Mr Lockhart QC for the defendant.

[2] The defendant's approach is that the plaintiff ought to have included the claim, which succeeded in the adjudication and on the application for summary judgment, in an earlier adjudication between the parties. By proceeding to deal with the matter by two adjudications the defendant contends that the plaintiff increased the costs and should not recover the costs of the enforcement of the award in the second adjudication. The defendant seeks to address what Counsel described as a mischief in the adjudication system, being serial adjudications, which the defendant contends ought to be discouraged by appropriate awards of costs.

[3] The first adjudication decision was given on 15 March 2013 and related to a claim by the plaintiff for an inflation increase on agreed rates, known as percentage A uplift, under a maintenance contract. The Adjudicator accepted that the plaintiff was entitled to the uplift and ordered the defendant to calculate the figure thereby due to the plaintiff and to pay that figure to the plaintiff. The figure was calculated by the defendant in the sum of £1.1m and notified to the plaintiff. The plaintiff then claimed interest on the sum calculated and the defendant refused to pay interest. The defendant paid the £1.1m.

[4] The plaintiff changed solicitors and 6 months later proceeded with the claim for interest and referred the dispute about interest to the second adjudication. By the decision of 14 February 2014 in the second adjudication the plaintiff was awarded interest of £53,000. However, it was necessary for the plaintiff to proceed by High Court action to enforce the Adjudicator's award. In the application for summary judgment the defendant resisted judgment on two main grounds. First of all, that the Adjudicator did not have jurisdiction because the claim for interest was the same or substantially the same as the claim that had been made in the first adjudication and secondly, that the plaintiff was estopped from pursuing the claim for interest as it should have been made in the first adjudication. These grounds were rejected by the Adjudicator as a basis for not making an award against the defendant in the second adjudication and were rejected by this Court on the application for summary judgment.

[5] Order 62 of the Rules of the Court of Judicature deals with costs. Rule 33 states that if the Court, in the exercise of its discretion, sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except where it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs. There are three steps -

- (1) If the Court in the exercise of its discretion sees fit to make an order.
- (2) If so, the Court shall order that costs follow the event.
- (3) That costs follow the event subject to an exception where, in the circumstances, the Court considers that some other order should be made.

[6] The defendant contends that in the circumstances the plaintiff should not recover costs. The circumstances concern essentially two main themes. The first theme is the delay of the plaintiff. That delay relates in the first place to a period of four years between the date when the issue about inflation rates could have been raised to the date when the issue was taken to adjudication. The second delay relates to the period of six months which elapsed between the plaintiff's success in the first adjudication and the pursuing of the interest claim in the second adjudication. In particular the delays are stated to have been to the prejudice of the

defendant arising from the passage of four years and also because a policy decision had to be made by the defendant as to how it would deal with the plaintiff's claim and other similar claims. The defendant made the policy decision in the belief that it then knew the full extent of its liabilities. However the subsequent emergence of the claim for interest upset its anticipated liabilities.

[7] The second theme that emerges from the defendant's resistance is what is identified as the mischief of serial adjudications. More particularly in this case the mischief is said to be the omission of the plaintiff to include the claim for interest in the first adjudication.

[8] The issue as to whether a claim is the same claim or substantially the same as an earlier claim is a basis on which an Adjudicator is deprived of jurisdiction to deal with the adjudication. That issue was raised before the Adjudicator who found that the claim for interest was not the same or substantially the same as the earlier claim. Upon the application for summary judgment the Court agreed. Therefore the Adjudicator did have jurisdiction and was obliged to determine the dispute.

[9] The defendant contends that if the interest claim was not the same or substantially the same as the earlier claim, that interest claim could and should have been included in the first adjudication. It is said that the Adjudicator cannot impose a penalty in costs save in relation to the apportionment of his fees. Thus the defendant contends that the costs sanction should be imposed on the plaintiff by the Court by an Order that the plaintiff should not recover costs in these proceedings.

[10] The plaintiff's submissions on the other hand are to the effect that the plaintiff has succeeded in its application for judgment and that there are no circumstances in which the Court should make any other order than that the costs follow the event and are awarded to the plaintiff. The plaintiff states that in the first adjudication the plaintiff sought a ruling on the principle of entitlement to the uplift. The plaintiff did not claim a monetary award and the Adjudicator ruled in principle that the plaintiff was entitled to the uplift and ordered the defendant to calculate the payment accordingly. Only then did the plaintiff raise the issue of interest. Thus, says the plaintiff, this was not an instance of an omission to claim interest in the first adjudication. Further, the plaintiff points out that the basis of the defendant's resistance to summary judgment was rejected by the Court. In addition, the plaintiff contends that this is not a case of serial adjudication.

[11] The criticisms of the plaintiff are reflected in two matters arising in the adjudication. First of all in relation to the power of the Adjudicator to order the payment of his fees he ordered that they be paid by the defendant as costs following the event. Thus when faced with the same situation that is now being presented to the Court the plaintiff as the successful party was not required to pay any costs of the Adjudicator.

[12] Secondly the Adjudicator had powers in relation to the award of interest under section 5 of the Late Payments of Commercial Debts Interests Act 1998 which provides that there may be remission of statutory interest by the Adjudicator. Where the interests of justice require that statutory interest should be remitted in whole or in part in respect of a period then that may be done and there may be a reduced rate for a period and this may be required by reason of conduct on the part of the other party.

[13] The decision of the Adjudicator in the second adjudication records a claim made by the plaintiff for interest on the sum claimed of £53,000 which was itself interest on the principal sum calculated after the first adjudication. The claim was for interest to be awarded on the sum of £53,000 up to the date of the award by the Adjudicator and further up to the date of payment by the defendant of the £53,000. In the event the Adjudicator awarded the £53,000 but refused the claims for the two additional periods of interest on that sum. The Adjudicator referred to section 5 of the Act and concluded "I believe it was open to the plaintiff to claim interest as a remedy in adjudication one thereby mitigating further interest beyond 3 April 2013 which was the date of payment of the principal and therefore in exercise of the discretion afforded to me by section 5 of the Act I decline to award further interest."

[14] Thus the Adjudicator was mindful of the circumstances in which the claim was made by the plaintiff in the second adjudication, stated his opinion that it was open to the plaintiff to claim interest as a remedy in the first adjudication and apparently as a sanction he did not award any further interest.

[15] Further, in the second adjudication the plaintiff sought costs against the defendant but the Adjudicator found that the plaintiff should pay its own costs in accordance with the contract between the parties, which so provided.

[16] Against that background I am satisfied as a first step that, as an application for judgment was required further to the adjudication decision, an order for costs should be made. As a second step costs should follow the event. The 'event' is the success of the plaintiff in obtaining summary judgment against the defendant. The third step is to consider whether there are circumstances by which the Court would make any other order.

[17] The defendant points to the delays of the plaintiff and the mischief of serial adjudications. In relation to the issue of delay it was four years after the dispute arose before the first adjudication was undertaken and six months after the payment of the uplift payment before the second adjudication was undertaken. The four years in the first adjudication is too remote from this judgment which was by way of enforcement of the award in the second adjudication. I do not consider the four year period to be a circumstance that should affect the order for costs now to be made.

[18] The six months period does relate to the second adjudication with which this application is concerned. However if there was no basis for obtaining a favourable

ruling on this point in the adjudication then less so I believe is there a basis for obtaining such an outcome in the Court. It may be that the statutory adjudication scheme should make further provision for circumstances where a claim could have been made in an earlier adjudication. Insofar as it is a background circumstance I do not believe that it should affect the order for costs that should be made in the present case.

[19] The alternative basis proposed for refusing the plaintiff the costs of the application concerns the plaintiff's failure to include the claim in the first adjudication. The Construction Contracts (NI) Order 1997 at article 7(1) provides for the referral of 'a dispute' to adjudication. The Scheme for Construction Contracts at paragraph 20 provides that the Adjudicator may take into account matters under the contract which he considers are necessarily connected with the dispute. In particular it is provided that the Adjudicator may, having regard to any term of the contract relating to the payment of interest, decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest may be paid. The Adjudicator may award interest if it is a matter in dispute referred to adjudication and where it is agreed that the Adjudicator may award interest or where there is a contractual right to interest or where the statutory scheme under the 1998 Act is applied.

[20] This is a case where the issue of interest on the payment due for the percentage uplift could have been raised in the first adjudication. Ms Danes refers to the fact that the first adjudication was concerned with entitlement to the payment of the percentage uplift and that is correct. However there was no reason why it could not also have been concerned with the principle of entitlement to interest on the percentage uplift. The Adjudicator believed that the claim could have been made in the first adjudication and he refused to award additional interest for that reason. Entitlement to interest should be a consideration on any claim for late payment.

[21] The defendant resisted judgment on two grounds and on those two grounds he was unsuccessful. The plaintiff was required to come to Court to recover the award made by the Adjudicator and was successful in so doing and the costs should follow the event. The Adjudicator could have ordered the plaintiff to pay the Adjudicator's costs or he could have ordered that the costs be shared, which he did not do. I have not been satisfied on any of the defendant's grounds that some other order should be made than that the costs follow the event. Indeed the defendant's grounds of resistance for an order for costs being made against the defendant relate to matters outside the proceedings to enforce the adjudication award and rather relate to matters within the adjudication scheme. If I make no order as to costs there is a risk of another mischief emerging by offering encouragement in summary judgment proceedings to debates concerned with the employer's disapproval of the contractor's conduct in the performance of the contract or the conduct of the adjudication. The plaintiff has the costs of the application for summary judgment.

