Neutral Citation Number: [2020] EWHC 3028 (TCC)

Case No: HT-2020-CDF-000012

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Cardiff Civil and Family Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 13 November 2020

Before:

HIS HONOUR JUDGE JARMAN QC
Sitting as a judge of the High Court

Between:

RGB PLASTERING LIMITED	**Claimant**
- and -	
TAWE DRYLINING AND PLASTERING LIMITED	**Defendant**

- -
- -

Mr Gideon Shirazi (instructed by **Birketts LLP**) for the **claimant**
Ms Annie Sampson (instructed by **DJM Solicitors**) for the **defendant**

Hearing dates: 5 November 2020
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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE JARMAN QC

HH JUDGE JARMAN QC :

1. By a claim form issued on 28 July 2020 the claimant (RGB) seeks a declaration that an application (the application) for payment by its subcontractor the defendant (Tawe) on 7 May 2019 was an invalid application on the basis that it did not comply with the requirements as to such notices set out in the subcontract (the subcontract) made between them on 17 December 2018.

2. By the subcontract RGB engaged Tawe as the drylining subcontractor for a project in Portsmouth. As required by The Housing Grants, Construction and Regeneration Act 1996 (the 1996 Act) the subcontract set out a mechanism for interim payments in clause 18 of the terms and conditions and the payment schedule.

3. Clause 18 provides as follows:

> "1. The Sub-Contractor shall submit to RGB applications for payment which accurately reflect the sums due to it on the Interim Application Date refer payment schedule...
>
> 2. Application for payment must be cumulative and should specify the amount of payment claimed to be due, how that amount is calculated and to what the amount relates. Measurements and substantiation should be produced in support of any application for payment.
>
> 3. Should the Sub-Contract[or] submit an application for payment after the relevant Interim Application Date… the interim application will not be considered and no payment will become due to be made by RGB on the Final Date for Payment."

4. Clause 38 provides:

> "1. Nothing contained in any approval or consent given by or on behalf of RGB in connection with the Sub-Contract Works shall prejudice or modify or affect or otherwise relieve the Sub-Contractor for any of its obligations under this Sub-Contract.
>
> 2. No purported waiver or amendment to these provisions by RGB's management on Site or other project personnel shall be construed as an amendment to these terms and conditions. The Sub-Contractor shall comply with these conditions strictly notwithstanding."

5. The payment schedule included a table setting out the relevant dates for each payment cycle. These included for the April 2019 cycle that Tawe should issue its application on 28th of that month and the valuation or due date for such an application was 3 May. The corresponding dates for May 2019 were 29 May and 2 June respectively.

6. The payment schedule also contained the following relevant notes with the original emphasis:

> "1. All applications are to be submitted on or before the 'Subcontractor issues application' date, but valued up to the 'RGB-Subcontractor valuation date.'
>
> 2. Any applications received after the 28th of each month, will not be considered and will be administered with the following month's payments, unless by formal agreement with the Commercial Manager/Di.
>
> 4. All applications **must** be submitted electronically via the email address applications@rgb-group.org – It is advisable that where possible a hard copy is also issued via post."

7. The application was emailed to various addresses of RGB employees and not to the address set out in the payment schedule. It was headed "valuation" and specified that it was valuation number 6. On the next line this was set out; "Works Valued up to 30/04/2019." That is not a date set out in the payment schedule. Tawe says that the application was in respect of the May/June interim payment cycle.

8. The interim payments regime under the 1996 Act is intended to provide a speedy interim payment procedure to promote cash flow during the contract period, and a balancing procedure at the end. In response to such an application the recipient must issue a "payer notice" by a specified date setting out the sum which it says is due but may also issue a "payless notice" saying that it will pay a lower sum and giving reasons. The recipient must then pay the sum set out in the final notice which is called the notified sum. Each party has a right to have a balancing payment made at the end so that the true value is paid.

9. In the present case RGB did not pay sums in respect of the application and a day or so later notified its intention to terminate the subcontract. In all previous applications, it put in its own valuation of Tawe's works and paid the true value that it considered due. There is now ongoing litigation between the parties as to what sums if any are due and owing between them on a final basis. However, I am only concerned with whether the application referred to in the present claim was a valid interim application.

10. The payment regime has been considered by the courts in several cases. In *Caledonian Modular Ltd v Mar City Developments Ltd* [2015] EWHC 1855, Coulson J (as the then was) said:

> "But it seems to me that, if contractors want the benefit of these provisions, they are obliged, in return to set out their interim payment claims with proper clarity. If the employer is to be put at risk that a failure to serve a payless notice at the appropriate time during the payment period will render him liable in full for the amount claimed, he must be given reasonable notice that the payment period has been triggered in the first place."

11. *Henia Investments Inc v Beck Interiors Ltd* [2015] EWHC 2433 (TCC) was a case where the application for payment was late. It was dated 28 April 2015 and showed

the valuation as of that date. The contractor argued that should be viewed as an application for May. Akenhead J said at paragraph 17:

> "I consider that the document relied upon as an Interim Application must be in substance, form and intent an Interim Application… stating the sum considered by the Contractor as due at the relevant due date and it must be free from ambiguity… If there are to be potentially serious consequences flowing from it being an Interim Application, it must be clear that it is what it purports to be so that the parties know what to do about it and when."

12. He concluded that the application in that case was invalid because it stated the amount which was said to be due in April and not the amount which would be due on the May interim payment date. Accordingly, it was not clear and unambiguous that an application relating to a specific due date was being made.

13. In *Jawaby Property Investments Ltd v Interiors Group Ltd and Black* [2016] EWHC 557 (TCC) Carr J (as she then was) at paragraphs 39-44 emphasised that a document can be an application only if it is clear in substance, form and intent that it was intended to be an application for a particular month so that the recipient could properly appreciate the consequences of the document and the need to respond. The judge at paragraph 39 referred to the 1996 Act as follows:

> "The interim payment provisions in the Contract reflect the requirements of s. 110A and s. 111 of the Act. Their effect is to require an employer at periodic intervals to pay "the notified sum" by a final date for payment, irrespective of whether or not that sum in fact represents a correct valuation of the work to date. If an employer fails to give relevant notice, irrespective of whether this is by mistake, administrative oversight or any other reason, then a sum for which the contractor has applied becomes immediately contractually payable, even if it is wrong in valuation terms."

14. Section 110A(1) and (3) of the 1996 Act provides:

> "(1) A construction contract shall, in relation to every payment provided for by the contract— …(b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.
>
> (3) A notice complies with this subsection if it specifies— (a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and (b) the basis on which that sum is calculated."

15. The judge then referred to *Caledonian* and *Henia* and continued at paragraphs 43:

> "The requirement for "form", "substance" and "intent" has often been repeated in the authorities (see for example Token

> Construction v Charlton Estates [1973] BLR 48). In construing the document or documents relied upon, the exercise is to assess it against its contextual setting how it would have informed a reasonable recipient - see Mannai Ltd v Eagle Star Ass. Co. Ltd [1997] AC 749 (per Lord Steyn at 772H)."

16. In the following paragraph Carr J dealt with waiver or estoppel in respect of the strict contractual requirements in respect of such applications as follows:

> "There are instances where it can be found that an employer has waived the need for contractor compliance with strict contractual requirements and/or that an estoppel by convention has arisen between the parties. A useful summary of the well-known requirements for an estoppel by convention to exist can be found in The Law of Waiver, Variation and Estoppel (3rd Ed 2012 Wilken & Ghaly) at paragraph 10.01:
>
> "(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
>
> (ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it.
>
> (iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely forming his own independent view of the matter.
>
> (iv)That reliance must have occurred in connection with some subsequent mutual dealing between the parties.
>
> (v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

17. Applying those principles to the present case, Mr Shirazi for RGB submits that the application was late for the April/May deadline of 28 April 2019 but early for the May/June deadline of 28 May 2019. The payment due date for May/June cycle was 2 June 2019. The application states on its face that it valued works up until 30 April 2019, which is not a payment due date under the subcontract. The payment schedule requires payment applications to be valued up to the 'RGB/Subcontractor valuation date' but this application does not. Moreover, it was not emailed to the address set out in the schedule. It is not clear or unambiguous in substance form or intent. An application with a 30 April 2019 date would make sense for a due date at the start of May. A reasonable recipient would think that it was a late application for the April payment cycle.

18. Mr Shirazi also submits that note 2 of the payment schedule does not assist Tawe because the application is not valid so that note does not apply. Even if it were, the note does not transform it into a May application, but simply makes clear that Tawe is not prevented from making an application for the same sums in the next month. The note provides that the application will be administered with the next month's payments, not that it itself becomes an application for payment the next month.

19. Ms Sampson, for Tawe, submits that the application is clear that it is what it purports to be so that the parties knew what to do about it and when, to use the phrase of Akenhead J in *Henia.*

20. She points to the fact that the application was made on RGB's template and was accompanied by supporting documents from which a breakdown of the works may be obtained. In my judgment neither of these points are of assistance. It is how the application was filled out that gives rise to questions about its compliance with the subcontract, rather than which template was used. Moreover, the subcontract required the application to comply with certain requirements, and the fact that it has supporting documents attached does not assist on whether it does so comply.

21. As for the date, Ms Sampson submits that as the application was sent on 7 May 2019, it is clear that it fell to be considered as part of the cycle beginning on 28 May. Even if it is a late April application, note 2 of the payment schedule makes clear that it would be administered as part of the following month's payment. In my judgment these submissions only serve to emphasise that there is a lack of clarity as to whether it was an April application or a May application, in similar fashion to the lack of clarity in respect of the application in *Henia.*

22. The reference in the application in the present case to the works being valued as at 30 April 2019 adds to the confusion rather than clarifies it. Note 2 in the payment schedule is an administrative provision for late applications, and does not in my judgment give a great deal of assistance in determining whether apart from lateness, an application complies with the requirements of the subcontract. The application does not value the works to 3 May 2019 or 2 June 2019 and in that respect, whether late or not, it does not comply with the payment schedule and hence does not comply with the subcontract.

23. Ms Sampson further submits that although the application was not submitted to the email address set out in the payment schedule, it was submitted to the email address of RGB's employee at the time who was dealing with such applications Elliot Emery. The covering email referred to the valuation "as discussed." In the subject line of the email, there was a reference to "28-02-2019" but, submits Ms Sampson, that was clearly a typographical error. She submits that from this it can be inferred that RGB knew or ought reasonably to have known what to do about the application and when.

24. Tawe sought permission to rely upon a witness statement from Mr Emery dated 2 November 2020. He no longer works for RGB. The statement was filed on 3 November 2020 only two days before the hearing. By order dated 29 September 2020 I directed that Tawe should file evidence by 6 October 2020. This witness statement was nearly 4 weeks late. Accordingly, under CPR 8.6 Tawe needs permission to rely upon such evidence. For the reasons set out below I do not give permission.

25. In my judgment, it is not a proper inference from the matters relied upon by Ms Sampson that RGB knew or ought reasonably to have known what to do and when. The application was not only late, which if otherwise valid would simply delay payment by a month, but it did not value the works to 3 May or 2 June 2019. It was not sent to the email address set out in the payment schedule. In these respects, the application did not comply with the requirements of the subcontract. It was not clear or unambiguous so that the parties could know what to do about it or when. In my judgment it is invalid.

26. Ms Sampson seeks to rely upon an estoppel argument which was first raised in the witness statement of Mr Emery. In my judgment to be able to rely upon that statement Tawe needs permission, and that question should be considered having regard to the overriding objective and the principles set out in *Denton v TH White Ltd* [2014] EWCA Civ 1537.

27. Ms Sampson realistically accepts that the failure to comply with directions as to the filing of evidence and filing the witness statement of Mr Emery just two days before the hearing is a serious breach. In my judgment it is towards the high end of seriousness. Part 8(2)(a) CPR provides that a claimant may use the Part 8 procedure on a question which is unlikely to involve a substantial dispute of fact. Under Part 8.6(1) written evidence may be relied upon at the hearing of the claim providing it has been served in accordance with Part 8.5 or the court gives permission. Under Part 8.6(2) and (3) the court may require or permit oral evidence to be given and may give directions requiring the attendance of witnesses for cross-examination. When directions were given for the filing of written evidence and for a hearing of the claim, Tawe did not raise the issue of estoppel and did not then or later indicate that it wished to cross-examine any of RGB's witness.

28. Tawe filed its witness statements pursuant to directions, some of which dealt with post contractual conduct of the parties. RGB's solicitors wondered whether this suggested that an estoppel claim may be raised and wrote to Tawe's solicitors on 13 October 2020 asking if that was the case. There was no response so on 16 October 2020 they wrote again saying that in the absence of a response RGB would proceed on the basis that no such claim would be raised. There was still no response. No explanation for that lack of response has been put forward. RGB's solicitors, reasonably in my judgment, therefore prepared its responsive evidence on the basis that no such claim was being made.

29. A director of RGB, Neil Rigby, in his third witness statement dated 23 October 2020, says that for the avoidance of doubt RGB did not agree to accept defective applications for payment from Tawe. He continued that RGB did make payments on applications which were late or sent to the wrong address, but these were made on RGB's own valuations of the value of the work done to date and to help Tawe with its cash flow.

30. In his witness statement, Mr Emery seeks to contradict much of that. In Ms Sampson's skeleton argument, dated 3 November 2020, she invites the court to "prefer the evidence of Mr Emery as to the process adopted by the parties and the basis upon which it was adopted," particularly as she says he was responsible for administering the subcontract. It is difficult to see how this could justly or effectively be done without hearing oral evidence which is subject to cross examination.

31. As for the reasons for the breaches, Ms Sampson submits that it wasn't until Mr Rigby's third witness statement that it became clear precisely what defects in the application were being alleged, and these were not set out in the particulars of claim. So, it was only then that the need for evidence from Mr Emery became apparent.

32. Whilst it is true that the defects were not so particularised, the particulars of claim did refer to three adjudications which have taken place between the parties under the subcontract. In the first of these the validity of the application under the subcontract was in issue and in the award dated 23 December 2019 the adjudicator found that in accordance with the terms of the subcontract RGB was not required to consider the application. Neither party challenged that finding.

33. However, in June 2020 Tawe served another notice of adjudication alleging that the application was valid. RGB asserted that that was substantially the same dispute as was dealt with in the first adjudication and so jurisdiction to revisit the issue should be declined. All of this was pleaded in the particulars of claim. In the event the third adjudicator did not decline jurisdiction and in his award dated 4 July 2020 decided that RGB should pay the amount set out in the application less sums received.

34. In my judgment, therefore, it is likely that issues regarding the validity of the application were adequately apparent between the parties by the time of the third award and before the present claim was issued. I do not regard it as a satisfactory explanation for the very late filing of Mr Emery's witness statement that precise notice of the alleged defects in the application only appeared in Mr Ribgy's third witness statement. The requirements of the subcontract as to such applications are clear and the form of the application is clear. Even if that were the case however, there is no explanation for the lack of response to the letters of RGB's solicitors, or why it took a further 10 days to file Mr Emery's statement just two days before the hearing.

35. Turning to the third stage of the *Denton* test, I must also have regard to all the circumstances of the case. Mr Shirazi submits that any estoppel argument is bound to fail in any event for several reasons. These include that RGB had made its own valuations in past applications, and that it is not inequitable for RGB to insist on the strict requirements in relation to this application when Tawe would still be able to recover the true value of the works it has carried out. He also referred to clause 38 of the subcontract.

36. In my judgment those are difficulties which an estoppel claim would face, although I would not go so far as to accept that such would be bound to fail. However, if permission were given for Mr Emery's witness statement to be relied upon, that in my judgment would involve substantial prejudice to RGB who prepared for the hearing that no estoppel claim would be pursued. It is clear from Ms Sampson's skeleton argument that it is that evidence which is principally relied upon on such a claim. She says that his evidence "clearly demonstrates that the parties acted on an assumed state of facts of law and that that assumption was shared by them."

37. Having regard to the overriding objective, it would not be fair to give permission for that statement to be relied upon without giving RGB a chance to file evidence in response. That may well lead to a need to hear oral evidence and cross-examination, leading to further delay and expense.

38. For all those reasons, I do not give permission for Tawe to rely upon the witness statement of Mr Emery or raise an estoppel claim.

39. In conclusion, RGB is entitled to a declaration that the application is invalid for the reasons given above.

40. Counsel helpfully indicated that any consequential matters in dispute could be dealt with on the basis of written submissions. A draft order, and any such submissions, should be filed within 14 days of handing down this judgment.