Case No: 2022-BRS-000017

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS AT BRISTOL
TECHNOLOGY & CONSTRUCTION COURT (QBD)

[2022] EWHC 2978 (TCC)

Bristol Civil & Family Justice Centre
2 Redcliff Street
Bristol
BS1 6GR

BEFORE:

HIS HONOUR JUDGE RUSSEN KC

BETWEEN:

FAÇADE CONCEPTS DIRECT UTD **CLAIMANT**

- and -

CRESTWELL LTD **DEFENDANT**

Legal Representation
Mr Martin Hirst (Barrister) on behalf of the Claimant
Mr John Churchill (Barrister) on behalf of the Defendant

Other Parties Present and their status
None known

Judgment

Judgment date: 8 September 2022
Transcribed from 11:55:02 until 12:22:40

Reporting Restrictions Applied: No

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His Honour Judge Russen KC:

1. I have before me today an application for summary judgment in a Part 7 Claim to enforce a decision of an adjudicator, Mr Michael Harris, dated 12 July 2022, upon which application I have heard helpful submissions, written and oral, from Mr Martin Hirst on behalf of the Claimant and Mr John Churchill on behalf of the Defendant.

2. The issues have narrowed somewhat since the articulation of points relied upon by the Defendant in letters firstly of 6 August 2022 and then later 16 August 2022, certainly so far as the issue of VAT on the adjudicator's invoice for services is concerned.

3. It is sensible, I think, on any adjudication enforcement application to remind myself of what is described in section 9 of the TCC guide as the limited grounds upon which a Defendant may resist an application seeking to enforce an adjudicator's decision given that the numerous authorities on the point, many of which have been referred to me in Mr Hirst's skeleton argument, emphasise that adjudication is part of the 1996 Act; and that decisions under the adjudication process are aimed at supporting cashflow for those working under a construction contact and reflect the principle of "pay now and argue later", as it has been expressed in more than one case.

4. It follows that, as Lord Briggs said in the case of *Bresco Electrical Services Ltd v Michael J Lonsdale* [2020] UKSC 25 at paragraph 26, the Court is generally able and prepared to summarily enforce an adjudicator's decision, regardless of whether it is considered to be of doubtful, legal correctness, provided that the adjudicator acted independently and it was one made within his or her jurisdiction.

5. In this case, and material to the two points raised by the Defendant in resisting the suggestion that it is liable to pay the balance of the adjudicator's decision as sought by the Claimant, it is sensible to look at the adjudicator's decision, which is at page 169 of the bundle, on which he gave his decision on what was a 'true value' adjudication. It concerned the true value of the materials and/or labour provided by the Claimant's subcontractor, for which further outstanding payment was sought.

6. At page 169 the adjudicator said this, and there are a couple of repeat paragraph numbers, certainly the two paragraphs 502, he said:

> *"For the reasons given I have decided the true value of FCL's interim application for payment dated 3 March 2022 is £373,483.05 and the sum due to FCL is £108,609.31."*

7. At paragraph 504, the next paragraph, he says:

> *"For the reasons given I hereby decide the final date of payment is 3 April 2022."*

8. At 502, the second 502, he says:

> *"For the reasons I have given I hereby decide FCL, the Claimant, is entitled to the additional sum for interest and compensation the sum of £2,705.61."*

9. At 503, he says:

> *"For the reasons given I hereby decide CWL shall immediately pay FCL the principal amount of £111,296.92 made up of £108,609.31 plus £2,650.10 interest plus VAT as applicable."*

10. At 504, the second:

> *"For the reasons given I hereby decide CWL should bear 100% of my fees in this adjudication."*

11. At 505:

> *"FCL is to pay 100% of my fees within seven days of the date of my invoice which accompanies this decision. On receipt of the decision FCL shall immediately invoice CWL for 100% of my fees and expenses, which CWL shall pay immediately to FCL."*

12. The dispute that the Defendant raises, having paid much of but not all of the sums approved by the adjudicator, has arisen as a result of the decision and as a result of an invoice rendered by the Claimant two days after it. At page 242 of the bundle is the Claimant's Invoice No. 135 dated 14 July 2022 and it says:

> *"Re adjudication (inaudible) sum due from adjudication decision £108,609.31."*

There is no VAT I should mention on that £108,000 odd figure. And:

> *"Adjudicator's fee £19,750.50 plus VAT of £3,950.10."*

13. The rival positions of the parties have been set out in evidence beginning with Mr Mould's first witness statement at paragraphs 10 to 16 in particular where he says, on behalf of the Defendant, that:

> *"In circumstances where invoice number 135 does not specify any division between materials and labour it was appropriate and indeed mandated by the Construction Industry Scheme that the Defendant should deduct 20% on account of tax to cover what might be, if you like, the labour element behind that invoice, payable direct to HMRC in accordance with the CIS as I summarise the scheme."*

14. At paragraph 18 of his witness statement Mr Mould said here will be no loss to the Claimant because the extent of that was reparable to tax properly due on the Claimant's services then the Claimant would get appropriate credit for it and indeed if an overpayment of tax it would, in effect, stand to the credit of the Claimant's account with HMRC.

15. Mr Morris, on behalf of the Claimant, in response to that said that the Defendant had taken it upon itself to decide the 20% deduction should be made. It has also taken upon itself, as appeared from correspondence of 6 and 16 August 2022, to say in relation to the adjudicator's fees, despite how the decision reads (as I have read it out) on that aspect, that the Defendant should not have to pay the VAT element of the fees. This

is said be because the Claimant, to whom the adjudicator was to render his fee note and for payment within seven days, would be able to reclaim the VAT element of it. Therefore, only the net of VAT sum should be passed over to the Defendant.

16. That element of the challenge to pay by the Defendant has now disappeared. It has been clarified that the Defendant will pay the VAT element, although Mr Churchill suggests on behalf of the Defendant, there should be a recital to the Order to confirm that the Claimant, who has not in fact borne or at least will not ultimately bear, the adjudicator's fees will not itself make a VAT reclaim for the VAT element of it.

17. In any event, whether or not there should be such a recital or stipulation, it is now accepted, but was not accepted in August, that as expressly required by paragraph 505 in the decision, the whole of the adjudicator's fees including the VAT charged by him should be paid by the Defendant.

18. The real issue between the parties is whether or not the Defendant is correct in its contention which it does pursue; which was that, faced with Invoice No. 135, it was appropriate, in the absence of any further specificity and any division between materials and labour, to apply a 20% deduction under the CIS on the whole of the invoice amount.

19. I should, at this stage, emphasise that the Claimant says two things in response to that.

20. Firstly, as a matter of principle/instruction of the CIS scheme, it is not right to go for a blanket 20% deduction as opposed to a fair assessment of what the labour element might be which attracts a 20% deduction.

21. Secondly, and more fundamentally, the Claimant says that the fact that no deduction is appropriate because all and any labour element under this subcontract has already been fully accounted for so far as CIS deductions are concerned.

22. Mr Churchill for the Defendant said that is not a point which the Court can decide today in circumstances where the evidence he relies upon, in particular paragraphs 6 to 9 of the witness statement of Mr Geer on behalf of the Defendant's, throw up a doubt as to whether or not that assertion by the Claimant - that no further CIS deduction would be appropriate or applicable - can be correct.

23. Although there was, at my suggestion, some initial exploration of the invoices that may be behind the £108,000 figure relied upon by the adjudicator, I accept Mr Churchill's point that the Court cannot, on this application, given its nature and purpose being directed to the question of whether or not the adjudicator's decision should be enforced, and the court time allowed for that, get into the underlying factual position as to what, if any, further CIS would be deducted or as to deductions made prior to the adjudicator's decision.

24. The inability of the Court to get into that question rather reinforces the fundamental nature of this application, which is one for summary judgment to enforce an adjudicator's decision, resistance of which is only available on limited grounds under the authorities that I have mentioned in passing.

25. When I come back to the decision itself and bear in mind the submissions attractively made by Mr Churchill, as to why it should not be taken to mean what on the face of it

it appears to say, I find myself compelled to the conclusion that the adjudicator's decision should be enforced.

26. The adjudicator, as I have read out, said not only was £108,000 odd due to the Claimant on the true value of the adjudication dispute before me but he said also, crucially, at paragraph 503 thereby decided that the Defendant should immediately pay the Claimant the principal amount of £111,296.92. Equally significantly, he also included within that figure an element of interest in the sum of £2,605.61, which was computed by reference to an entitlement in the Claimant to have received that sum (not a lesser one fixed by reference to the CIS) as at 3 April 2022.

27. In other words, sums that should have been paid to the Claimant had not been paid. Mr Churchill, by reference to the CIS and also The Finance Act section 61 and the definition of terms section 60, says that this does not mean that this adjudicator was deciding anything other than a 'contract payment' for the purpose of the Act must be made to the Claimant.

28. The definition of a 'contract payment' under The Finance Act 2004, section 60, is as follows:

> *"In this chapter contract payment means any payment which is made under a construction contract that is so made by the contractor."*

29. I need to read on, as section 61 says:

> *"On making a contract payment the contractor must deduct from it a sum equal to the relevant percentage of so much of the payment that is not shown to represent the direct costs to the subcontractor of materials used or to be used in carrying out the construction operations to which the contract payment is to made relates."*

30. I accept, certainly for the purposes of the argument on summary judgment application, Mr Churchill's point that the fact that the adjudicator decided that the payment should be made does not mean that the payment somehow ceases to be categorised other than as a contract payment within the meaning of section 60.

31. Mr Churchill drew my attention to clause 17.4 of the subcontract and the connection with the provision for adjudication at page 302 of the bundle, which he says reinforces the point that anything the adjudicator was deciding should or should not be paid was nevertheless a 'contract payment' for the purposes of section 60 and 61.

32. He relies on clause 17.4 which says:

> *"Notwithstanding the provisions of clauses 17.1 and 17.3 if a dispute or difference arises under the subcontract which either party wishes at any time to refer to adjudication the scheme shall apply subject to the following."*

33. That includes the adjudicator giving written reasons for his decision. Mr Churchill also relies upon clause 13.18 of the subcontract which says that:

"In addition to the defining sectors the obligation of the contractor to make any payment under the subcontract is subject to the provisions of the Construction Industry Scheme."

34. In other words, both points, Mr Churchill submits, point against the impact of section 61 as somehow having been been lost or lapsed. That is well arguable. What, however, in my judgment is not well arguable or sufficient to persuade the Court from granting summary judgment is the challenge to the fact that the adjudicator decided, rightly or wrongly, having regard to the point now made by the Defendant, that the sum of £111,000 including the interest computed as I have explained; and this included the sum of £108,609.31 to be paid immediately to the Claimant.

35. The adjudicator, therefore, did not provide for any 'deduction' from that sum as if it was caught by the CIS in a way that the Defendant contends it might well be. The Claimant resists the idea that it was but, as I have explained, I cannot properly decide on the figures by reference to earlier invoices on today's application.

36. The simple fact of the matter is the adjudicator said that £108,000 plus interest should be paid to the Claimant, not less any deduction.

37. The Defendant says that still does not meet the point relied upon by it which is efendant that section 61 might apply when it comes to making the payment decided upon by the adjudicator.

38. The Defendant's argument at this stage highlights, to my mind, the signal point which leaps out from the evidence on this case; which is that this point about CIS deduction is one which, as the VAT point had been, is raised unilaterally by the Defendant after the adjudication decision.

39. Mr Churchill accepted in the course of his submissions that the adjudicator was not dealing with CIS under the Finance Act but therein lies the rub because the Defendant, now seeking to rely upon the CIS deduction point, should have ensured the adjucator was dealing with it if it wanted the adjudicator to say something other than the sum of £108,,609.31 should be paid immediately to the Claimant.

40. This point should, in my judgment, have been flushed out prior to the adjudicator's decision. Had it been raised, of course, the issue would have been a matter for the decision by the adjudicator. Had it been raised before the present defence to the adjudication enforcement then the Claimant would have advanced its case that no CIS deduction was appropriate.

41. I suspect, but it is only a suspicion, that had it been raised before the adjudicator's decision then that might have led to a post adjudication invoice which addressed itself a little more clearly and directly to the split, if any, between materials and labour. In fact, the invoice has been rendered, and in my judgment quite properly rendered, is the full sum of £108,000 odd plus interest under the adjudicator's decision.

42. A payment in the round sum of £50,000 was made, on 28 or 29 July 2022, before lawyers were instructed on behalf of the Defendant and then took the VAT point and the CIS deduction point,. In other words, what might be described as a payment on account, of the sum that he had ordered to be paid.

43. No contemporaneous evidence related to that payment appears in the bundle before me. I mention that because it is apparent from the letters written by the solicitors then duly instructed, on 6 August and 16 August, that what I called, I think not unfairly, the "retro-fitting" of the £50,000 paid had to be accommodated by a change in the figures between the letters of 6 August and 16 August.

44. It may well be that had solicitors been instructed at an earlier stage in the context of the adjudication and the point about CIS, if a good one, had been raised then that would have impacted upon a decision whose actual terms I have read out from page 169 of the bundle.

45. As things stand, however, it seems to me that in essence the Defendant is arguing that the decision is wrong in requiring, as it plainly does, as a matter of clear language that the whole sum of £111,296 including interest shall be paid to the Claimant.

46. That suggested error must be the consequence of statute requiring a mandatory deduction given the language of the invoice which was rendered under the decision. One therefore comes back again to the fact that, the invoice having been rendered by reference to the decision and the decision having been made without regard to any argument about such a deduction rather than complete payment to the Defendant, this is a point that has been unilaterally raised by the Defendant after the adjudicator's decision.

47. It does not follow, in my judgment, that the adjudicator's decision was wrong and even if it was wrong in requiring the whole sum to be paid to the Claimant I am not persuaded, given the authorities, that it should not be summarily enforced.

48. I propose to grant whatever judgment is appropriate to reflect the sums that have been paid along the way and, subject to identifying what the balance is of the invoice sum directed to be paid by the adjudicator's decision, there should be judgment in that sum.

49. There shall also be judgment in the amount of the VAT that should have been paid without quibble. It is perfectly obvious what was required. In my judgment, a completely unmeritorious point was raised by the Defendant about how it should benefit from the VAT registration status of the Claimant when, clearly, the adjudicator was requiring all of his fees, including the VAT, to be paid by the Defendant.

50. I am not persuaded that the order in relation to the VAT element should carry a recital reflecting any promise, if that is the right way of the putting it, by the Claimant not to claim VAT. I see from the evidence the Claimant was properly advised by Mr Garner, an accountant.

51. I have no reason to suspect, and indeed the evidence suppresses any suspicion, from what is said by Mr Small and Mr Garner that the unwarranted claim for a VAT refund, as if the Claimant was liable for the adjudicator's fees, would be made and I am not going to specify in any order words that bear upon that aspect.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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