

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEEN'S BENCH DIVISION (COMMERCIAL)

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CHARLES BRAND LIMITED

**Plaintiff;**

**v.**

DONEGALL QUAY LIMITED

**Defendant.**

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**WEATHERUP I**

[1] The plaintiff applies under Order 14 of the Rules of the Court of Judicature for summary judgment to enforce payment of £205,342.87 together with VAT and interest, as the balance of the amount awarded by an Adjudicator's decision of 1 October 2009. In essence this is a claim by the plaintiff, as contractor, against the defendant, as employer, on the basis that there is no defence to the enforcement of the Adjudicator's award. On the other hand the defendant claims an entitlement to set off against the Adjudicator's award, first of all the amount of a claim for liquidated and ascertained damages and secondly that part of the Adjudicator's award that the defendant contends has been paid to the plaintiff under an Interim Certificate. Mr Millar appeared on behalf of the plaintiff and Mr Humphries appeared on behalf of the defendant.

[2] The plaintiff and defendant entered into the JCT Standard Form of Building Contract 1988 edition, with amendments, Private With Quantities, for the construction of a two storey basement car park and other ground and associated works. Additional works were carried out by the plaintiff and the contract works were not completed by the agreed completion date. The parties disputed the value of the additional works and responsibility for the extended period of the works. By notice dated 17 August 2009 the plaintiff

referred the dispute to adjudication and the Adjudicator gave his decision on 1 October 2009 and awarded the plaintiff approximately £400,000. This was made up of (in round figures) £229,000 for additional work, £69,000 for loss and expense incurred during the extended period of the contract, £27,000 for interest in respect of late payment of certified amounts and a sum for interest on the total amount found to be due.

[3] On 16 October 2009 the defendant confirmed its intention to pay to the plaintiff the sum of £197,000 plus VAT which the defendant contended was in satisfaction of all sums then due to the plaintiff. On 23 October 2009 the defendant paid that amount, being a total of some £211,000. The plaintiff being dissatisfied with the amount paid by the defendant issued a Writ of Summons and Statement of Claim on 4 December 2009 claiming the balance due on foot of the Adjudicator's award and made this application for summary judgment on 11 January 2010.

[4] The defendant filed a replying affidavit on 19 March 2010 setting out its version of events. The affidavit refers to the adjudication and indicates that the plaintiff's total claim against the defendant was approximately £1.5 million and included a claim for extension of the contract period for 147 days. The Adjudicator's award agreed to an extension of 44 days. The date for completion of the works had been 17 November 2006 and the works were certified as practically complete on 14 May 2007, being the 147 days, of which the Adjudicator awarded 44 days to the plaintiff, leaving 103 days which the defendant claims must be the responsibility of the plaintiff. The defendant claims that under Clause 24 of the JCT contract the defendant is entitled to claim liquidated and ascertained damages, which are specified in the appendix at the rate of £10,000 per week. As 103 days equates to 18 weeks, the amount of liquidated and ascertained damages is claimed at £180,000. On 5 October 2009 the defendant issued a withholding notice under the contract stating that the sum of £180,000 would be withheld from the payments to the plaintiff.

[5] Interim Certificate 21 issued on 30 September 2009 and included the net amount due for works at almost £90,000. The defendant asserts that that sum of £90,000 certified under IC No 21 was a sum that was found in the adjudication proceedings to be due to the plaintiff in respect of the additional works. On 16 October 2009 the defendant issued a further withholding notice in respect of Interim Certificate 22 issued on 7 October 2009 and the total amount due to the plaintiff was thus calculated by the defendant to be the sum of £197,000, which sum together with VAT was the amount paid by the defendant to the plaintiff, leaving the balance that is now claimed by the plaintiff.

[6] The defendant maintains the position that it has discharged all liabilities in respect of the Adjudicator's award, having taken into account the amount due for liquidated and ascertained damages and the amount due in

respect of additional works which the defendant claims has been paid on foot of the Interim Certificates.

[7] The Construction Contracts (Northern Ireland) Order 1997 provides for adjudication and for the withholding of payments where due notice has been given. The standard form of JCT contracts have been amended so as to provide for this process of adjudication and notices of the withholding of payments. The structure of the adjudication system has been described by Dyson J in Macob Civil Engineering v. Morrison Construction [1999] BLR 92. 97 as follows -

“The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement.

Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved.”

[8] I refer to three matters in the JCT contract entered into between the plaintiff and the defendant. First of all, in relation to adjudication, Article 5 states that if any dispute or difference arises under the contract either party may refer it to adjudication in accordance with clause 41A. Clause 41A.7 provides -

“1 The decision of the Adjudicator shall be binding on the parties until the dispute or difference is finally determined by arbitration or by legal proceedings or by an agreement in writing between the parties made after the decision of the Adjudicator has been given.

2 The parties shall, without prejudice to their other rights under this 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.

3 If either party does not comply with the decision of Adjudicator the other party shall be entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute or difference pursuant to clause 41A.7.1."

Secondly, in relation to liquidated and ascertained damages, clause 24.1 provides that if the contractor fails to complete the works by the completion date the Architect shall issue a certificate to that effect. Clause 24.2 provides a mechanism in respect of the payment or deduction of liquidated damages and there are three steps in the process -

(1) The Architect has issued a non completion certificate under clause 24.1.

(2) The employer has informed the contractor in writing before the date of the final certificate that he may require payment of, or may withhold or deduct, liquidated and ascertained damages.

(3) The employer may, not later than five days before the final date of payment of the debt due under the final certificate, either,

require in writing the contractor to pay the employer the liquidated and ascertained damages at the rate stated in the appendix and the employer may recover the same as a debt, or alternatively,

give notice under clause 30 to the contractor that he will deduct the liquidated and ascertained damages from monies due to the contractor under an Interim Certificate or the Final Certificate.

Finally, in relation to payments for the contract works, clause 30.1.1.1 provides for Interim Certificates to be paid within 14 days, subject to certain written notices to the contractor -

30.1.1.3 - Not later than five days after the date of issue of an Interim Certificate the Employer shall give a written notice to the Contractor which shall, in respect of the amount stated as due in that Interim Certificate, specify the amount of the payment proposed to be made, to what the amount of the

payment relates and the basis on which that amount is calculated.

30.1.1.4 - Not later than five days before the final date for the payment of the amount due pursuant to clause 30.1.1.1 the Employer may give a written notice to the Contractor which shall specify an amount proposed to be withheld and/or deducted from that due amount, the ground or grounds for such withholding and/or deduction and the amount of withholding and/or deduction attributable to each ground.

30.1.1.5 - Where the Employer does not give any written notice pursuant to clause 30.1.1.3 and/or clause 30.1.1.4 the Employer shall pay the Contractor the amount due pursuant to clause 30.1.1.1.

(Clause 30.8.2 and .3 and .4 contain similar provisions in relation to the Final Certificate)

[9] The general position in relation to Adjudicators awards is that the amount of the award will be paid without deduction but an exception has been developed in respect of liquidated and ascertained damages as summarised by Jackson J in Balfour Beatty Construction v. Serco Limited [2004] EWHC 3336 (TCC) at paragraph 53 -

“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.

[10] In order to determine whether this case falls within the general rule that payment must be made on the Adjudicator's decision or within the exception which permits the set off of liquidated and ascertained damages, it is necessary to consider in the first place the nature of the Adjudicator's decision and secondly the requirements of the contract between the parties in relation to the notices which the employer is required to give if there is to be a claim for liquidated and ascertained damages.

[11] In relation to the nature of the Adjudicator's decision, Balfour Beatty also concerned the issue of an entitlement to set off liquidated and ascertained damages against an Adjudicator's award. Such entitlement was rejected on the basis that the Adjudicator's decision was but an interim decision and not a conclusive decision on entitlement to liquidated and ascertained damages. Jackson J determined that the adjudication resulted in an interim extension of time and the award of loss and expense for the period of that interim extension. Thus there was no finding in relation to any entitlement to recover a specific sum by way of liquidated and ascertained damages.

[12] In relation to the impact of the notice requirements under the contract, VHE Construction v. RBSTB Trust [2000] EWHC 181 concerned an Adjudicator's award for the value of works, which was sought to be enforced by summary judgment, which in turn was resisted on the basis that there was an entitlement to liquidated damages. The contract was the JCT 1981 as amended which had equivalent provisions to those set out above in relation to certificates of non completion, notices for payment or deduction of liquidated and ascertained damages, notice of withholding an amount due on an Interim Certificate and the binding effect of an adjudication decision. Notice of non completion had been issued before the adjudication. After the Adjudicator's decision the defendant made the claim for liquidated and ascertained damages. Summary judgment was granted for the amount of the Adjudicator's award.

[13] On the other hand in David McLean Housing Contractors v. Swansea Housing Association [2001] EWHC 30 TCC the Adjudicator's award included consideration of the extension of time for completion of the contract works and the consequential loss that might be due to the contractor. Summary judgment on foot of the Adjudicator's award was resisted on the basis of a claim for entitlement to liquidated damages. It was again the JCT 1981 contract and the requisite notices for liquidated and ascertained damages had been given. The Court was satisfied that there was a reasonable prospect of a defence to the claim and the claim for summary judgment was dismissed. The different outcomes in VHE Construction and David McLean Housing reflected compliance or non compliance with the requirements of the contracts in relation to notices of the claims for liquidated and ascertained damages.

[14] The plaintiff relied in particular on M J Gleeson Group v. Devonshire Green Holding Limited (19 March 2004). The Adjudicator's decision that the contractor was entitled to payment under an Interim Certificate was resisted by the defendant on the basis first of all that on a date prior to the Adjudicator's decision a further Interim Certificate had been issued for less than the amount stated to be due by the Adjudicator's decision and secondly that on a date after the Adjudicator's decision a notice for the payment or deduction of liquidated and ascertained damages had been issued. In respect of the further Interim Certificate that indicated that less money was due than previously certified and found due on the Adjudicator's decision, the Court concluded that whatever may have been decided in relation to the later Interim Certificate could not affect the claimant's clear right under the contract to be paid under the first certificate or the Adjudicator's decision as to the amount of that entitlement. The defendant was bound to give effect to the Adjudicator's decision which was by the contract expressly binding until set aside by arbitration or litigation or agreement. On the issue of the claim for liquidated damages the Court stated that at the commencement of the adjudication the defendant had no right to liquidated damages; the question of liquidated damages was not raised before the Adjudicator; the defendant could not then rely on liquidated damages as a defence; the effect of the contract made it clear that the award of the Adjudicator was to be enforced as it stood and not be subject to deductions of one sort or another; if the defendant was entitled to liquidated damages there was nothing to prevent it proceeding to seek to recover the same by action or otherwise or by adjudication if it wished, but it was not entitled to refuse to comply with the Adjudicator's decision given within his jurisdiction merely because of the assertion, possibly rightly, that it was entitled to have money paid to it by the receiving party.

[15] In the present case the Adjudicator's decision considered the issue of the additional 147 days and the Adjudicator allowed the plaintiff 44 days and in respect of prolongation costs during the extended period the Adjudicator allowed approximately £69,000. Accordingly the Adjudicator refused 103 additional days that it took to complete the works and the defendant may be entitled to liquidated and ascertained damages in respect of that additional period but that was not an issue before the Adjudicator.

[16] In any event the plaintiff contends that the amount fixed in the appendix for liquidated damages of £10,000 per week amounts to a penalty and is not a proper measure of the damages which would be due for any extended period of work. Hence the plaintiff contends that there is no specific sum that can be said to be recoverable in respect of liquidated and ascertained damages. I should add that this point was not raised by the plaintiff until the defendant opposed this application for summary judgment.

[17] I return to Jackson J's two principles and the first principle has two parts. The first part is whether it follows logically from the Adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, in which event the employer may be entitled to set off. In the present case the plaintiff contends that it does not follow that the defendant is entitled to recover a specific sum as there is a dispute as to the amount of any liquidated and ascertained damages. The second part of the first principle is the proviso that the employer has given proper notice, in so far as it is required, that is, proper notice in respect of entitlement to liquidated and ascertained damages as required by the contract.

[18] I have referred above to the provisions of the contract and the three steps that are required to be taken in respect of the payment or deduction of liquidated and ascertained damages. First of all there must be a certificate of non completion issued by the Architect. Once that is done there are two notices that may be issued by the employer within certain time limits. The first notice is in effect a written warning that the employer may require the payment or the withholding of liquidated damages. The second notice is a notice actually requiring the payment or deduction of the amount of the liquidated damages. In the present case the certificate of non completion was issued on 12 March 2010. A notice of deduction of liquidated and ascertained damages had issued on 5 October 2009 in respect of Interim Certificate 21 of 30 September 2009. A second notice of the total deductions had issued on 16 October 2009 in respect of Interim Certificate 22 of 7 October 2009.

[19] I am satisfied that the notice requirements under the contract have not been satisfied. At the date the payment on foot of the Adjudicator's decision became due there was no Architect's certificate of non completion, there was no warning notice of payment or deduction of liquidated and ascertained damages and there was no notice of a specific payment to be made or to be deducted. At that time the defendant had no entitlement to any specific sum for liquidated and ascertained damages. Accordingly the defendant had no right to a set off in respect of a sum for liquidated and ascertained damages. The defendant might refer the issue of liquidated and ascertained damages to adjudication. That has not happened but overall this is a matter which has been referred to arbitration where a determination can be made in respect of entitlement to liquidated and ascertained damages. Accordingly, by reason of non compliance with the procedural requirements, the defendant has no entitlement to set off liquidated and ascertained damages against the amount due under the Arbitrator's decision.

[20] The defendant's second ground for claiming a right to set off relates to approximately £90,000 of the sum due to the plaintiff for additional works as included in the award of the Adjudicator on 1 October 2009. The defendant contends that the same £90,000 was included in Interim Certificate 21 of 30 September 2009. Thus the defendant contends that payment of this amount on



foot of the Adjudicator's award and the summary judgment would result in double recovery by the plaintiff as the amount was paid by the defendant in the settlement of the amount payable under the Interim Certificates. The defendant paid £211,000 to the plaintiff on 23 October 2009 which has been calculated in accordance with the notice of deduction of 16 October 2009 and the defendant thus contends that it has paid the £90,000. This may have arisen because this sum may have been conceded during the course of the adjudication and the Architect then issued a certificate to award that sum to the plaintiff while the Adjudicator issued his decision to award the same sum. I proceed on the basis of the above version of events set out in the defendant's affidavit and in the absence of any contrary affidavit evidence from the plaintiff, although that version of events was not agreed by Counsel for the plaintiff.

[21] I am satisfied that the defendant is not entitled to set off the sum of £90,000. The Adjudicator's award is payable and enforceable until it has been decided otherwise by arbitration or by legal proceedings or by agreement as provided for under the contract. There is the limited exception that applies in respect of liquidated and ascertained damages when certain conditions are satisfied. It might be said in respect of this £90,000 that perhaps the Architect was rather hasty in including that amount in an Interim Certificate as the value of work completed when liability for that amount was to be determined by the Adjudicator. However the amount due to the plaintiff, if incorrectly stated, may be adjusted in the next certificate or in the final certificate and may be subject to arbitration or legal proceedings.

[22] If it had been considered to be the position that this conclusion might produce injustice to a party then the Court has power to consider a stay of the Order that might otherwise be made for summary judgment but no such case arises in the present application. I reject the defendant's two grounds for set off. I am satisfied that there should be an Order for summary judgment in the amount claimed together with interest.