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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

(COMMERCIAL HUB)

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2020 No. 017992
2020 No. 017989

BETWEEN:

QMAC CONSTRUCTION LIMITED

Plaintiff

-and-

NORTHERN IRELAND HOUSING EXECUTIVE

Defendant

_____

HORNER J

INTRODUCTION

[1] The plaintiff has made two applications to enforce two awards by way of summary judgment made by Mr Latham, the Adjudicator, on 27 January 2020. The first award is that the defendant should pay to the plaintiff the sum of £143,454.71 plus VAT together with £121,501.95 interest and the Adjudicator's fees in the sum of £4,176.90 plus VAT in respect of the Springhill contract ("the Springhill adjudication") on the grounds that the plaintiff's interim application for payment number 4 established the notified sum and in the absence of a Pay Less Notice this was the amount that the defendant should have paid before the final date for payment. The Adjudicator also found the defendant liable to pay the plaintiff the sum of £65,995.94 plus VAT together with £54,116.67 interest and the Adjudicator's fees in the sum of £3,685.50 plus VAT in respect of the Ardoyne contract ("the Ardoyne decision") on the grounds that the plaintiff's interim application for payment number 7 established a notified sum and in the absence of a Pay Less

Notice this was the amount that the defendant should have paid before the final date for payment.

BACKGROUND INFORMATION

[2] The plaintiff is a building contractor which carries on business in Dungannon, County Tyrone. The plaintiff entered into a contract with the defendant known as the Framework Agreement which allowed the defendant to schedule improvement schemes in order to update older houses or to ensure properties were kept in a good state of repair. Since its commencement in January 2014 the defendant has awarded the plaintiff a total of 80 such schemes under the Framework Agreement. Each scheme has a separate contract between the parties. The two contracts to be considered here are the Ardoyne contract and the Springhill contract. The terms of the contracts are the NEC Engineering and Construction Short Contract (June 2005) with amendments (September 2011) as amended by the parties ("the Contract"). QMAC alleged that the Contract did not contain provisions that complied with the Construction Contracts (Northern Ireland) Order 1997 as amended by the Constructions Contracts (Amendments) Act (Northern Ireland) 2011 ("the Order") in relation to payment terms and therefore the relevant provisions of the Scheme for Construction Contracts in Northern Ireland Regulations (Northern Ireland) 1999 as amended by the Scheme for Construction Contracts (Amendments) Regulations (Northern Ireland) 2012 ("the Scheme").

In respect of both the Ardoyne contract and the Springhill contract applications were made for interim payment in respect of each of the contracts. An application was also made for interest under the terms of the Contract at the rate of 0.5% of the delayed amount for each complete week of delay.

[3] The defendant denied any liability to pay the sums under either Contract. It claimed that there were "true value" adjudications pending which were in the process of being finalised for service which would determine that the defendant was owed money by the plaintiff. The adjudications were described as "smash and grab" and that the adjudicator had made an obvious error in his calculation of interest and/or the award of interest constituted a penalty.

[4] Significantly in neither case did the defendant dispute jurisdiction or argue that there was a breach of the rules of natural justice. More importantly the defendant did not serve a Pay Less Notice in respect of either contract.

[5] Before me the defendant raised similar arguments but concentrated its fire on alleging that the interest award was manifestly incorrect and arguing that if the judgment sums were paid over by the defendant to the plaintiff then it would be difficult for the plaintiff to pay the defendant should the defendant ultimately succeed in the forthcoming adjudications.

[6] Expert reports have been received from Mr Neill, chartered accountant of HNH Partners Limited on behalf of the defendant and from Mr McAllister, chartered accountant of ASM, on behalf of the plaintiff. Both experts are well qualified to give expert testimony and both have obligations to the court. It is pointed out that Mr McAllister's firm is the auditor of the plaintiff. However, an auditor provides an independent financial opinion and I do not see why this should preclude Mr McAllister from giving an independent expert opinion in the present case.

[7] Finally, I should thank counsel for their helpful written submissions. It was agreed that I would decide this application for summary judgment on the papers because of the difficulty in the court sitting during the present lockdown. All counsel are to be congratulated on taking such a pragmatic approach to ensuring that legal business carries on at the present time. The Commercial Hub is dedicated to working with all legal representatives to ensure that the court can hear and determine disputes and give judgments in these present troubled times.

LEGAL PRINCIPLES

[8] Under Order 14 Rule 1:

> "… the plaintiff may, on the ground that the defendant had no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against such defendant."

Order 14 Rule 3(1) provides that:

> "Unless on the hearing of an application under Rule 1 either the court dismisses the application or the defendant satisfies the court with respect to the claim, or the part of the claim, to which the application relates that there is an issue or dispute in question which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed."

[9] In *Carrillion Construction v Devonport Royal Dock Yard Limited* [2005] PLR 310 Jackson J at paragraph [80] of his judgment set out four general principles which apply to adjudication which are based on five decisions of the Court of Appeal and

two decisions of the TCC (see 7.04 of Coulson on Construction Adjudication 4th Edition). They were as follows:

> "(1) The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).
>
> (2) The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law: see *Bouygues (UK) Limited v Dahal-Jenson (UK) Limited* [2001] All ER (Comm) 1041, *C and B Scene Concept Design Limited v Isobars Limited* [2002] BLR 93.
>
> (3) Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not have to enforce his decision: see *Balfour Beatty Construction Limited v Lambeth London Borough Council* [2002] BLR 288.
>
> (4) Judges must be astute to examine technical offences with a degree of scepticism, consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the court accepts that such errors constitute excessive jurisdiction or serious breaches of rules of natural justice: see *Pegram Shop Fitters Limited v Tally Weijl (UK) Limited* [2003] PWCA Civ 1750."

[10] The relevant principles for an application for a stay of execution were considered in *Wimbledon Construction Co 2000 Limited v Derek Vago* [2005] EWHC 1086 (TCC). The judge said that:

> "If the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:
>
> (i) The claimant's financial position is the same or similar to its financial position at the time when the relevant contract was made (see *Herschel v Breen Property Limited [2000] BLR 272*); or

(ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator ..."

DISCUSSION

[11] On the evidence adduced for the purposes of this application I do not see the basis on which the Adjudicator could have awarded interest at 0.5% per week. The contract extract produced to the court makes it clear that the rate is 0.16% per week. I consider that on the basis of the contractual documents shown to the court, and I appreciate that they may not be complete, the Adjudicator has erred in his assessment of the interest rate in respect of both awards. There is also the argument that has been made that interest is discretionary and that the plaintiff should not be able to take advantage of the generous rates of interest by its excessive delay in instituting proceedings to recover its due debts. However, I do not consider there is any substance in the argument that the interest provision is a penalty. This was an agreement entered into between the parties. There is no suggestion of oppression and the "courts should not be astute to decry a penalty clause …".

[12] However, even if the adjudicator has erred in awarding interest on the basis on which he did in respect of those adjudications, this is of no moment. As Edwards-Stuart J said in *Urang Commercial Limited v Century Investment Limited* [2011] EWHC 1561 (TCC):

> "It is now firmly established that an error of law or fact made by an adjudicator when deciding an issue referred to him is no defence to an application to enforce the award."

[13] However, the ability of the plaintiff to repay the sums awarded at a later date should that be the outcome of legal proceedings or arbitration has been called into question. It is unnecessary for me to rehearse the arguments made between the experts on either side, save to say that Mr Neill, chartered accountant, for the NIHE and Mr McAllister, chartered accountant for the plaintiff have arrived at different conclusions. Both are experts and owe a duty to the court. It is clear that the defendant is not insolvent but there has been:

(a) An increase in the cash outflow position.

(b) A drop in turnover.

(c) An increase in overdraft and borrowings.

According to Mr Neill, this does not seem to be disputed the D/E ratio is higher than the industry averages. He says at 2.17:

> "As such, it would be in my opinion that, whilst QMAC has recorded profits in the last two years, the balance sheet and cash flow statements of the Company indicate that QMAC has experienced cash flow pressures in the year ending 30 September 2018 to 30 September 2019, which is compounded by the highly geared position of the company and a 34% drop in turnover in FY ending. I therefore conclude that the evidence does suggest that QMAC may have difficulty in repaying the sums claimed."

[14] Mr McAllister has responded by saying, inter alia, that:

(a) The plaintiff has reported profits in the last three years.

(b) It is obviously solvent.

(c) It has paid all its tax liabilities to date.

I conclude that the plaintiff's financial situation is worse than when it entered into these contracts and will struggle to pay back the full amounts awarded including interest given the cash flow pressures it has experienced and its relatively high gearing. The justice of this case demands that in these particular circumstances the court takes a broad brush approach. Accordingly the plaintiff should have judgment for the full amounts awarded in respect of both adjudications with a 14 day stay in respect of those amounts less £120,000 apportioned £80,000 in respect of Springhill contract and £40,000 in respect of the Ardoyne contract. In respect of these sums there should be a general stay of execution on enforcement until further order with both parties having liberty to apply to the court to remove the stay.

CONCLUSION

[16] In the circumstances I consider that the plaintiff is entitled to summary judgment in respect of both these applications. There will be a 14 day stay. However, in respect of the sums awarded I direct that there be a stay of execution in respect of £120,000 apportioned between the two contracts, £80,000 to Springhill and £40,000 to Ardoyne until further order both parties having liberty to apply. Counsel should provide a draft order for approval. I will hear or receive written submissions from the parties on the issue of costs, if this is required. I do not consider it is an appropriate case for indemnity costs but my provisional view is that costs should follow the event.