Case No: HT-2016-00034

[2016] EWHC 1852 (TCC)

IN THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Thursday, 17 March 2016

BEFORE:

MR JONATHAN ACTON-DAVIS QC

Sitting as a Deputy Judge of the TCC

BETWEEN:

LULU CONSTRUCTION LIMITED

Claimant/Respondent

- v -

MULALLEY & CO LIMITED

Defendant/Appellant

MS SERENA CHENG (instructed by Direct Access) appeared on behalf of the Claimant

MS ANNA LANEY (instructed by Silver Shemmings) appeared on behalf of the Defendant

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JUDGMENT

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8th Floor, 165 Fleet Street, London, EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7404 1424
Web: www.DTIGLOBAL.com Email: TTP@dtiglobal.eu
(Official Shorthand Writers to the Court)

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1. **THE DEPUTY HIGH COURT JUDGE**: This is an application under Part 24 of the CPR to enforce the unpaid element of an Adjudicator's decision made on 12th August 2015 which he corrected on 17th August. The decision was that the Defendant pay the Claimant £240,324.77 within seven days of that decision. On 24th August 2015, the Defendant paid £182,863.80 of that sum. The outstanding balance at the time of issue of the Particulars of Claim was £57,460.97. That was formed of 2 claims: accrued interest (and continuing interest at the rate of £37.35 per day from the date of decision until payment) and what are described as debt recovery costs of £47,666.27.

2. In her skeleton argument, Ms Laney accepted that the interest element of that disputed sum is due and I think (but I will be corrected, if I am wrong) accepts that the sum of £261.45 is due. However, the claim in respect of debt recovery costs is disputed on the ground that the Adjudicator was without jurisdiction to make any decision in respect of those claims because it was not part of the dispute referred to him.

3. In response to that, Ms Cheng makes two arguments. First, the claim for debt recovery costs was referred to the Adjudicator in the manner which I develop below and, second, through some of kind of ad hoc submission, there was a waiver of the jurisdiction point.

4. The context is that, by letter dated 15 May 2015, Lulu made a claim in respect of disputed sums under the contract said to be around £1 million and said that they were preparing a final account in respect of variations to which they were entitled . That letter was met by a Notice of Adjudication dated 1 June 2015, which triggered the appointment of the Adjudicator. The Notice refers to payments due on the subcontract.

5. The entitlement to debt recovery costs arises out of sections 1(1) and 5A (3) of the Late Payment of Commercial Debts (Interest) Act 1998. That claim is not specifically referred to in the Notice of Adjudication, nor in the Referral Notice, nor in the Response. It was pleaded, for the first time, in the Rejoinder and it was met by a jurisdictional objection which, on the evidence of Mr Legg and Mr Silver was raised at a meeting called by the Adjudicator on 28th July 2015.

6. An unusual feature of the Adjudication is that the dispute was referred to Adjudication by a Notice of Adjudication brought by the paying party, Mulalley, to resolve the value of Lulu's claim under the sub-contract. Hence, perhaps, it is hardly surprising that the claim for debt recovery costs was not referred to in the Notice of Adjudication and whilst it might have been raised in the Response, it was raised for the first time in the Rejoinder when it was met by the jurisdictional objection, to which I have referred. On this aspect of the case, Ms Laney takes 2 points. First, the claim was not pleaded in the Particulars of Claim in these enforcement proceedings. However, she made plain that she was not, because of that, unable to deal with the argument and, in those circumstances, it seems to me that if the failure to plead is accurate and if it is a good point, it could be dealt with under the question of costs, if it arises. More substantially, she said it was not within the scope of the Referral and the claim is not something which can be run as what might be called a defence.

7. So far as not being within the wording of the Dispute referred, I accept that it is not. The reason that it is not is because the Notice of Adjudication was, as I have said, issued by Ms Laney's clients and their only concern was to try to sort out the payments due under

the sub-contract which are listed at number 2 to 4 (a) to (f) of the Notice of Adjudication, although the Notice does also refer to such other sums as the Adjudicator may decide.

8. Ms Cheng's responsive argument is taken from the decision of Akenhead J in **Allied P& L Limited and Paradigm Housing Group Limited** [2009] EWHC 2890 (TCC) where Akenhead J (and I begin at paragraph 30) goes through various matters of principle which have been established by the previous authorities. In particular, having referred to those previous authorities, he said at paragraph 30(c):

> "The ambit of the reference to arbitration or adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration… In my view, one should look at the essential claim which has been made and the fact it has been challenged as opposed to the precise grounds upon which it had been rejected or not accepted. Thus, it is open to any defendant to raise any defence to the claim when it's referred to adjudication…"

Then, at paragraph 30(d):

> "It follows from the above that if the basic claim, assertion or position has been put forward by one party and the other disputes it, the dispute referred to adjudication will or may include claims for relief which are consequential upon an incidental to it and which enable the dispute, effectively, to be resolved. Thus, even if the claim did not as such seek a declaration or discretionary interest or costs, it is so connected with and ancillary to the referred dispute as properly to be considered as part of it. There must be limits to this which can be determined by analysing what the essential dispute referred is."

9. Here, the controversial claim is that for debt recovery costs. They are the costs of running the adjudication which was instituted by the Notice of Adjudication. In my view, such costs are clearly connected with and ancillary to the referred dispute and must properly be considered part of it. It follows, in my view, that the adjudicator was correct to say that he had jurisdiction to decide this element of the dispute: although it was not within the scope of the referral, it was something which was connected with and ancillary to that referred dispute. So, therefore, in my judgment, there is no answer to the application for summary judgment in relation to that sum.

10. I can deal with the waiver issue shortly. Ms Cheng argues that there was an ad hoc submission to jurisdiction. Because this is an application for summary judgment I have to decide it on the basis of the factual assertions made in the witness statements put in by Mr Legg and Mr Silver for Mullaley. Based on Mr Legg's witness statement, there was a broad reservation by Mullaley in respect of jurisdiction at the meeting held by the Adjudicator. That broad reservation having been given, I do not think that the mere failure not to repeat that broad reservation in the written submissions served subsequent to the meeting constitutes waiver of that broad reservation. It seems to me that it would be unreal for me to reach that conclusion on an application for summary judgment. Had the matter just fallen to be decided by reference to that issue, I would have refused the

application for summary judgment. As it is, I grant summary judgment on the basis of the first argument maintained by Ms Cheng.