NOLAN DAVIS Ltd V STEVEN P.CATTON [2001] Adj.L.R. 03/06

JUDGMENT : HIS HONOUR JUDGE DAVID WILCOX JUDGE : TCC. 6th March 2001.

1. There are a number of applications arising out of the compromise agreement and consent order, incorporated into a Tomlin order made by this court on 2 May 2000.

   The relevant parts of the order provide as follows:
   Order: Upon the parties to this claim agreeing terms of settlement as hereinafter set out in the schedule hereto and upon reading the endorsements appearing hereunder made by the solicitors for the claimant and solicitors for the respondent respectively and by consent it is ordered
   That the judgment entered herein on 22 February 2000 and the attendant order in costs in favour of the claimant be and the same is hereby set aside.
   That all further proceedings herein and the same are hereby stayed with liberty for either party to apply in relation to performance or enforcement of the terms of settlement set out in the schedule attached to this order.
   There be no order as to costs.

Schedule 1

2. In paragraphs 1 and 2 the parties agreed that the Demolition contract of 11 January 1999 and Development contract of 25 March 1999 were made between Hazel Green Village Management Limited and Nolan Davis Limited.

   Paragraph 3 provides: *"The defendant herein being the managing director of Hazel Green Village Management Limited will in that capacity cause to be paid from Hazel Green Village Management Limited to Nolan Davis Limited £175, 000.00 ".*

   Paragraphs 3.1, and 3.2 make provision for that money to be paid in 2 instalments of £131218.12 and £43781.88 respectively.

   Paragraph 4 provides that in the event of non payment by Hazel Green Village Management Limited the defendant Steven Catton will become personally liable to pay.

   Paragraph 5 provides for the payment of interest on unpaid sums.

   Paragraph 6:- *"The Claimant and the Defendant (in his personal capacity and as director of and/or as authorised officer of Hazel Green Village Management Limited andlor any companies within the Hazel Green group of companies andlor any other company acknowledge and agree that the aforesaid terms of agreement and payment of the sum of £175, 000.00 will effect a full and final settlement of all claims and issues arising out of both the Demolition and Development contract including but not limited to the adjudication proceedings (case HT99 000267) by either of those parties to those proceedings or Hazel Green Village Management Limited or the defendant personally or any of the companies within the Hazel Green group of companies or any other company of which the defendant is a director and/or authorised officer ".*

The Applications

3. The first application by the defendant is for a declaration that on a true construction of the consent order of 2 May 2000 the parties agreed that the defendant would pay or procure to be paid to the claimant £148,936.18 plus VAT properly payable thereon.

4. Alternatively that the order, and an agreement reached in correspondence should be so construed.

5. Alternatively, that the consent order, and the consent order and agreement be rectified by adding further wording after clause 3A of the schedule to the Consent order as follows:

   The sums set out in clause 3 above and referred hereinafter to include VAT and are therefore calculated upon the common assumption that VAT is payable on the principal sums in each case. In the event VAT is not so payable the Defendant is under no liability to pay or procure to he paid a sum equivalent to it to the claimant.

6. Alternatively leave to appeal the consent order out of time.

7. Alternatively a declaration that *"no further performance of the term of the schedule to the consent order (beyond the payment of one for £8936.18) is necessary and the defendant is not entitled further to enforce the same enforcement ".*

Background

8. Nolan Davis' claims relate to demolition and construction works carried out by it in early to mid 1999 at a time share development in the Isle of Wight known as Hazel Green Village. The works were carried out by Nolan Davis pursuant to a demolition contract and a development contract.

9. No payment was made to Nolan Davis in respect of the works carried out by it under either contract. In consequence the disputes between the parties as to, payment and valuation under both contracts was referred to adjudication by Nolan Davis under the Housing Grants Construction and Regeneration Act 1966. The adjudication proceedings were brought against Mr Catton personally. The question as to whether he was personally liable on both contracts was by the agreement of the parties determined by the adjudicator by way of a preliminary issue. He decided that Mr Catton was personally liable on both contracts and correctly named as the respondent in the adjudication. He then went on to determine payment and the valuation disputes between the parties and made awards requiring Mr Catton to pay under both contract adjudications including the adjudicators fee of £212,908.26. Nolan Davis sought to recover these sums by a subsequent application for enforcement under the Civil Procedure Rules part 24. Subsequently this court gave judgment for Nolan Davis in the sum of £208,123.94 inclusive of interest until the date of payment at the rate per diem of £44.69, together with the adjudicators fee of £9,292.87 and costs of £9,677.18 payable within 14 days. The sum in total was £226,830.99.

10. The court also made directions for the determination of Mr Catton's counterclaim. Prior to the determination of the counterclaim the plaintiff and defendant and Hazel Green Village Management Limited entered into a compromise agreement recorded in the Tomlin order endorsed by solicitors acting for all parties on 12 April 2000. The order was sealed by the court on 2 May 2000.

11. I have no doubt that discussions leading to compromise were wide ranging and covered many matters and the breadth of range of such discussions is perhaps indicated in the letter written on behalf of the defendant on 9 February 2000. It anticipated that judgment in the part 24 application would be in favour of their client.

    a) *"6. There is little doubt in our mind that the suggestion that Steven Catton is personally liable for the debt arises out of nothing more than a clerical error will be rectified by the court. We are sure that your client appreciates that long term position and the matters arising out of such rectification.*

    b) *7. In addition to the fact that our client will obtain rectification, there is also no doubt that your client is in breach of contract in relation to his performance of the contract. His leaving the site without having satisfactorily completed the works which were contracted has caused our client considerable loss and we enclose a summary of our clients counterclaim. You will note that the preliminary figures amount to nearly f400, 000.00. Our understanding is that the counterclaim has not been fully crystallised as yet and all losses have not as yet been included. It is possible that the losses may increase by a further sum of about £30,000.00 .....*

    c) *11. One of the matters which gives us particular cause for concern is the relationship between the contract with Hazel Green Village Management Limited for the 8 villas on the Isle of Wight and the leisure complex for Steven Catton personally at his domestic residence. In particular, we refer to the various witness statements of David Norvill which sets out all details of this particular transaction. We have serious concerns about the implications arising out of that arrangement and particularly in relation to any VAT or other tax irregularities which may arise from the nature of the transaction. We have already had some preliminary accountancy advice in relation to this point which does indeed suggest that further investigation of this matter is relevant. We are advising our client on this point. However, because of our concerns in relation to this aspect, we would ask you to pay particular attention to this point and would welcome your observation at the earliest opportunity together with confirmation that these points have been discussed with your clients. We await your comments ..... However, our client is prepared to put forward a proposal to dispose of all matters. Our client is prepared to offer as follows: -*

        i) *A payment of £100,000,00 to your client in settlement of all claims which your client has against ours arising out of the contract between our client.*

ii) Our client will not pursue his claim for rectification,

iii) Our client will abandon its counterclaim.

iv) Both sides will be responsible far their own costs.

v) Please note that this offer remains open until 12.00 noon on Friday 11 February 2000. If it is not accepted by that time then the offer is withdrawn. In any event, if the judgment is delivered prior to that date and time then the offer will be withdrawn immediately prior to publication of the judgment ".

12. The parties to the agreement incorporated in the consent order are the claimant and the defendant Steven Catton. The defendant had a number of roles. He was held to be personally liable by the adjudicator and that conclusion was not interfered with by this court which gave summary judgment against Steven Catton. He was also the authorised officer, major share holder and director of Hazel Green Village Management Limited. That company though not a party to the proceedings were, and had to be, party to the agreement resulting in the consent order and set out in the schedule to the order.

13. In the negotiations leading up to the settlement agreement Hazel Green Village Management Limited were represented by separate solicitors Messrs Titmuss Sainer and Dechert.

14. In relation to these applications there is no direct evidence from Mr Catton. There is direct evidence from Mr Geoffrey Nolan of Nolan Davis Limited.

15. These applications are predicated on the basis that the negotiations were concluded on the basis of a mistake common to the claimant, the defendant and Hazel Green Village Management. Namely that the claimant and Mr Catton understood, and concluded their agreement on the basis that Hazel Green Village Management Limited were liable to pay VAT in the sum of £26,063.00.

16. The sum of £175,000.00, it is submitted by Mr Green, represents the cost of the actual demolition and building work carried out by Nolan Davis and the 17'/2% VAT that such work was assumed by the parties in agreement, to attract.

17. In fact it turns out that the work carried out by Nolan Davis Limited could be classified as new works and therefore would not attract VAT.

18. There was clearly correspondence in the course of negotiations which made mention of VAT liability but nowhere was a sum identified as an apportioned element of the total settlement sum.

19. Reference is made to VAT questions in paragraph 11 of the letter earlier referred to of 9 February 2000, and in subsequent correspondence.

The applications

20. The first application. The wording of the schedule of the Tomlin order is clear and unambiguous. The executory part of the order provided for the payment of £175,000.00 by Hazel Green Village Management Limited in 2 instalments in default of which Steven Catton personally is liable to pay. It is in full and final settlement of all claims. The figure of £175,000.00 is not apportioned and allocated to any particular claim, or part of claim whether it represents costs, interest, counterclaim, adjudication claims, summary judgment enforcement or any of the other connected claims variously made mention of in the correspondence.

21. Mr Green accepts that there is no ambiguity in the wording of the order. The Tomlin order cannot possibly have the meaning attributed to it by Mr Green in his submissions.

22. Mr Green contends that the agreement between the claimant, Steven Catton, the defendant and Hazel Green Village Management Limited was arrived at on 7 April and that this assumed that VAT was chargeable on the demolition and development contracts and that such assumption was both wrong and fundamental to the whole agreement.

23. Miss Louise Randall submits that the agreement arrived at was in fact concluded on 12 April 2000 and that there was no such common assumption. I accept that the agreement was in fact concluded on 12 April 2000. It is clear from the correspondence.

24. There was not a fully endorsed consent order until 12 April. Titmuss Sainer Dechert could not signify their consent on behalf of Hazel Green Village Management Limited because until that date they did not have the written instructions from Mr Catton in his capacity of managing director of Hazel Green Village Management Limited, which they required before endorsing consent.

25. It is clear from the letter of Titmuss Sainer and Dechert of 7 April 2000 that they were still taking instructions on 7 April far from signifying their agreement to any proposals on behalf of their client.

26. I accept that, as to part of the matters, the subject of full and final settlement there were discussions about whether or not some work was the subject of VAT liability. The claimants were willing to furnish appropriate invoices if that was the case. But nowhere is there any basis for concluding that there was an understanding common to all of the parties to the agreement which was fundamental to the agreement that VAT should or should not be payable.

27. Had that been the case it would have been open to the defendant and Hazel Green Village Management Limited to make specific provision in the agreement contained in the schedule to the Tomlin order which it is accepted incorporates the agreement made between the parties.

28. However, the wording of the Tomlin order is plain and clear. This court has no jurisdiction in these applications to interfere with the provisions which exactly accord with the wording agreed and signed on behalf of the relevant parties. This is not a case where there is some accidental slip or clerical error that could be corrected.

29. It appears on the face of the correspondence that the Tomlin order consented to by the 3 parties in fact reflects the agreement arrived at between them.

30. There is no evidence before this court that it does not, save inferences that I am asked to draw from parts of the correspondence in the course of negotiation.

31. There is no application to set aside the Tomlin order. Fresh proceedings would be required for such an application. None of these applications are, or could be under the "liberty to apply" provisions contained in paragraph 2 of the Tomlin order which apply for the purposes of facilitating the performance and enforcement of the terms set out in the schedule. The effect of these applications is not for the performance or enforcement of the terms set out in the schedule, on the contrary they seek to go behind those provisions.

The claim for rectification,

32. The defendant seeks to incorporate by way of rectification a further provision into the agreement he contends was concluded. It is for him to satisfy the court that the Tomlin order and the agreement underlying it does not represent the true intention of all parties. He must also satisfy the court that the Tomlin order and agreement as rectified does in fact accord with the parties true intentions. In my judgment insurmountable difficulties lie in the way of the defendant trying to discharge that burden. As I have already observed the settlement sum covers many matters and was not apportioned by the claimant; neither did the defendant or Hazel Green Village Management Limited require it to be apportioned. There is no evidence before me that any discussion or agreement took place as to apportionment between any of the parties. It cannot be contended, therefore, that there was any agreement as to what element of the settlement sum of £175,000.00 was attributable to the works which might attract VAT. It is impossible to conclude that any of the parties regarded the question as to whether or not VAT would be attracted by any element of claims or potential claims within the settlement as being of fundamental importance. The applications are predicated upon the basis that neither the defendant or Hazel. Green Village Management Limited knew that the works were zero rated, believing that they were chargeable at the rate of 17.5% and they only discovered the proper position after the agreement had been concluded. If that is right the term sought to be added by rectification cannot accord with the parties intentions since none of them applied their minds to the possibility that VAT would not be payable on part of the claim.

Permission to appeal the Tomlin order out of time

33. The defendant became apprised of the facts upon which he now founds these applications in February 2000. The delay is inordinate and there is no explanation for it. It is difficult to see how the Court of Appeal could entertain an appeal against the consent order.

The fifth application

34. This is another aspect of the first application which has no merit. Summary of conclusions

Summary of conclusions

35. None of these applications have merit. Costs

36. The applicant will pay the costs of these applications. I will consider the basis of such an assessment on hearing submissions from both parties.

Ms Louise Randall (instructed by Speechly Bircham for the CLAIMANT)

Mr Patrick Green (instructed by Eaton Ryan & Taylor for the DEFENDANT)

HIS HONOUR JUDGE DAVID WILCOX JUDGE OF THE TCC 6 March 2001

His Lordship

1. There are a number of applications arising out of the compromise agreement and consent order, incorporated into a Tomlin order made by this court on 2 May 2000.

   The relevant parts of the order provide as follows:

   Order: Upon the parties to this claim agreeing terms of settlement as hereinafter set out in the schedule hereto and upon reading the endorsements appearing hereunder made by the solicitors for the claimant and solicitors for the respondent respectively and by consent it is ordered

   i) *That the judgment entered herein on 22 February 2000 and the attendant order in costs in favour of the claimant be and the same is hereby set aside.*

   ii) *That all further proceedings herein and the same are hereby stayed with liberty for either party to apply in relation to performance or enforcement of the terms of settlement set out in the schedule attached to this order.*

   iii) *There be no order as to costs.*

Schedule 1"

2. In paragraphs 1 and 2 the parties agreed that the Demolition contract of 11 January 1999 and Development contract of 25 March 1999 were made between Hazel Green Village Management Limited and Nolan Davis Limited.

   Paragraph 3 provides: *"The defendant herein being the managing director of Hazel Green Village Management Limited will in that capacity cause to be paid from Hazel Green Village Management Limited to Nolan Davis Limited £175, 000.00 ".*

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The Applications

3. The first application by the defendant is for a declaration that on a true construction of the consent order of 2 May 2000 the parties agreed that the defendant would pay or procure to be paid to the claimant £148,936.18 plus VAT properly payable thereon.

4. Alternatively that the order, and an agreement reached in correspondence should be so construed.

5. Alternatively, that the consent order, and the consent order and agreement be rectified by adding further wording after clause 3A of the schedule to the Consent order as follows:

   The sums set out in clause 3 above and referred hereinafter to include VAT and are therefore calculated upon the common assumption that VAT is payable on the principal sums in each case. In the event VAT is not so payable the Defendant is under no liability to pay or procure to he paid a sum equivalent to it to the claimant.

6. Alternatively leave to appeal the consent order out of time.

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Background

8. Nolan Davis' claims relate to demolition and construction works carried out by it in early to mid 1999 at a time share development in the Isle of Wight known as Hazel Green Village. The works were carried out by Nolan Davis pursuant to a demolition contract and a development contract.

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        i) *A payment of £100,000,00 to your client in settlement of all claims which your client has against ours arising out of the contract between our client.*
        ii) Our client will not pursue his claim for rectification,
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        v) Please note that this offer remains open until 12.00 noon on Friday 11 February 2000. If it is not accepted by that time then the offer is withdrawn. In any event, if the judgment is delivered prior to that date and time then the offer will be withdrawn immediately prior to publication of the judgment ".

12. The parties to the agreement incorporated in the consent order are the claimant and the defendant Steven Catton. The defendant had a number of roles. He was held to be personally liable by the adjudicator and that conclusion was not interfered with by this court which gave summary judgment

against Steven Catton. He was also the authorised officer, major share holder and director of Hazel Green Village Management Ltd. That company though not a party to the proceedings were, and had to be, party to the agreement resulting in the consent order and set out in the schedule to the order.

13. In the negotiations leading up to the settlement agreement Hazel Green Village Management Limited were represented by separate solicitors Messrs Titmuss Sainer and Dechert.

14. In relation to these applications there is no direct evidence from Mr Catton. There is direct evidence from Mr Geoffrey Nolan of Nolan Davis Limited.

15. These applications are predicated on the basis that the negotiations were concluded on the basis of a mistake common to the claimant, the defendant and Hazel Green Village Management. Namely that the claimant and Mr Catton understood, and concluded their agreement on the basis that Hazel Green Village Management Limited were liable to pay VAT in the sum of £26,063.00.

16. The sum of £175,000.00, it is submitted by Mr Green, represents the cost of the actual demolition and building work carried out by Nolan Davis and the 17'/2% VAT that such work was assumed by the parties in agreement, to attract.

17. In fact it turns out that the work carried out by Nolan Davis Limited could be classified as new works and therefore would not attract VAT.

18. There was clearly correspondence in the course of negotiations which made mention of VAT liability but nowhere was a sum identified as an apportioned element of the total settlement sum.

19. Reference is made to VAT questions in paragraph 11 of the letter earlier referred to of 9 February 2000, and in subsequent correspondence.

The applications

20. The first application. The wording of the schedule of the Tomlin order is clear and unambiguous. The executory part of the order provided for the payment of £175,000.00 by Hazel Green Village Management Limited in 2 instalments in default of which Steven Catton personally is liable to pay. It is in full and final settlement of all claims. The figure of £175,000.00 is not apportioned and allocated to any particular claim, or part of claim whether it represents costs, interest, counterclaim, adjudication claims, summary judgment enforcement or any of the other connected claims variously made mention of in the correspondence.

21. Mr Green accepts that there is no ambiguity in the wording of the order. The Tomlin order cannot possibly have the meaning attributed to it by Mr Green in his submissions.

22. Mr Green contends that the agreement between the claimant, Steven Catton, the defendant and Hazel Green Village Management Limited was arrived at on 7 April and that this assumed that VAT was chargeable on the demolition and development contracts and that such assumption was both wrong and fundamental to the whole agreement.

23. Miss Louise Randall submits that the agreement arrived at was in fact concluded on 12 April 2000 and that there was no such common assumption. I accept that the agreement was in fact concluded on 12 April 2000. It is clear from the correspondence.

24. There was not a fully endorsed consent order until 12 April. Titmuss Sainer Dechert could not signify their consent on behalf of Hazel Green Village Management Limited because until that date they did not have the written instructions from Mr Catton in his capacity of managing director of Hazel Green Village Management Limited, which they required before endorsing consent.

25. It is clear from the letter of Titmuss Sainer and Dechert of 7 April 2000 that they were still taking instructions on 7 April far from signifying their agreement to any proposals on behalf of their client.

26. I accept that, as to part of the matters, the subject of full and final settlement there were discussions about whether or not some work was the subject of VAT liability. The claimants were willing to furnish appropriate invoices if that was the case. But nowhere is there any basis for concluding that there was an understanding common to all of the parties to the agreement which was fundamental to the agreement that VAT should or should not be payable.

27. Had that been the case it would have been open to the defendant and Hazel Green Village Management Limited to make specific provision in the agreement contained in the schedule to the Tomlin order which it is accepted incorporates the agreement made between the parties.

28. However, the wording of the Tomlin order is plain and clear. This court has no jurisdiction in these applications to interfere with the provisions which exactly accord with the wording agreed and signed on behalf of the relevant parties. This is not a case where there is some accidental slip or clerical error that could be corrected.

29. It appears on the face of the correspondence that the Tomlin order consented to by the 3 parties in fact reflects the agreement arrived at between them.

30. There is no evidence before this court that it does not, save inferences that I am asked to draw from parts of the correspondence in the course of negotiation.

31. There is no application to set aside the Tomlin order. Fresh proceedings would be required for such an application. None of these applications are, or could be under the "liberty to apply" provisions contained in paragraph 2 of the Tomlin order which apply for the purposes of facilitating the performance and enforcement of the terms set out in the schedule. The effect of these applications is not for the performance or enforcement of the terms set out in the schedule, on the contrary they seek to go behind those provisions.

The claim for rectification,

32. The defendant seeks to incorporate by way of rectification a further provision into the agreement he contends was concluded. It is for him to satisfy the court that the Tomlin order and the agreement underlying it does not represent the true intention of all parties. He must also satisfy the court that the Tomlin order and agreement as rectified does in fact accord with the parties true intentions. In my judgment insurmountable difficulties lie in the way of the defendant trying to discharge that burden. As I have already observed the settlement sum covers many matters and was not apportioned by the claimant; neither did the defendant or Hazel Green Village Management Limited require it to be apportioned. There is no evidence before me that any discussion or agreement took place as to apportionment between any of the parties. It cannot be contended, therefore, that there was any agreement as to what element of the settlement sum of £175,000.00 was attributable to the works which might attract VAT. It is impossible to conclude that any of the parties regarded the question as to whether or not VAT would be attracted by any element of claims or potential claims within the settlement as being of fundamental importance. The applications are predicated upon the basis that neither the defendant or Hazel. Green Village Management Limited knew that the works were zero rated, believing that they were chargeable at the rate of 17.5% and they only discovered the proper position after the agreement had been concluded. If that is right the term sought to be added by rectification cannot accord with the parties intentions since none of them applied their minds to the possibility that VAT would not be payable on part of the claim.

Permission to appeal the Tomlin order out of time

33. The defendant became apprised of the facts upon which he now founds these applications in February 2000. The delay is inordinate and there is no explanation for it. It is difficult to see how the Court of Appeal could entertain an appeal against the consent order.

The fifth application

34. This is another aspect of the first application which has no merit.

Summary of conclusions

35. None of these applications have merit.

Costs

36. The applicant will pay the costs of these applications. I will consider the basis of such an assessment on hearing submissions from both parties.

MS LOUISE RANDALL (instructed by SPEECHLY BIRCHAM for the CLAIMANT) MR PATRICK GREEN (instructed by EATON RYAN & TAYLOR for the DEFENDANT)