Gipping Construction Ltd v Eaves Ltd [2008] Adj.L.R. 12/11

JUDGMENT : MR. JUSTICE AKENHEAD: TCC. 11th December 2008

1. In this matter the Claimant, Gipping Construction Limited *("Gipping"*), seeks summary judgment for the purpose of enforcing an adjudicator's decision. Gipping is represented by counsel whilst the Defendant appears by its director, Mr. Eaves. Mr. Eaves appears by telephone whilst Mr. Webb, Counsel for the Claimant, appears before me.

2. This case is very simple. Eaves Limited, the Defendant ("Eaves"), wanted to develop a site at 1 to 3 Lyndhurst Avenue, Ipswich, Suffolk so as to build two timber-framed bungalows. By a written contract in the JCT 1998 edition of the Prime Cost Contract, incorporating amendments 1 to 5, Eaves employed Gipping to build the bungalows. Disputes arose between the parties as to whether the bungalows were complete and free of defects and whether, and, if so, what sums were due to Gipping. As Gipping was entitled to do, it referred the disputes to adjudication and Mr. Peter Barnes was duly appointed as adjudicator. Gipping was represented by claims consultants whilst Eaves was represented by its directors.

3. Following the exchange of submissions and evidence, and an agreed extension of time, Mr. Barnes issued his decision on 10th October 2008. There had been no site inspection during the adjudication by the adjudicator. Mr. Barnes' decision was thorough and well-reasoned. He decided in effect that Gipping was entitled to a net sum of £59,582.86, plus interest of £2,043.34, continuing after 10th October at £16.27 per day, plus the adjudicator's fees of £9,226.69; the total comes to £70,852.89.

4. Eaves having not paid, proceedings were issued by Gipping on 6th November 2008. Mr. Justice Ramsay made an order on 10th November 2008 in the following material terms:

   "1. [Gipping] shall as soon as practicable after receipt of this order serve upon [Eaves] the claim form and response back, this order and [Gipping's] application pursuant to Part 24 and [Gipping's] evidence in support".

   Time for acknowledgement of service was abridged to five days and it was ordered that the Part 24 application -- that is the summary judgment application which I am hearing today -- will be heard on 27th November at St. Dunstan's House in the Technology & Construction Court in London.

5. For one reason or another Gipping's solicitors felt unable to serve those documents (the claim form, response back, the order and the application and evidence in support) until they did so by letter dated the 17th November 2008, and it probably arrived, at Eaves' registered office on the following day. I was told, and I accept it, that Mr. Eaves, due to a family bereavement, was unable to give any attention to the case for the rest of that week; the consequence was that on 27th November, he applied, successfully, for an adjournment of this case so that he could instruct solicitors and decide what, if any, defence he had. I ordered on 27th November that the application was adjourned and re-listed for 10.30 am on 11th December, with Eaves to serve any witness statement in response by 4th December, 2008.

6. What has happened since then is that Mr. Eaves instructed solicitors, who do not appear for him today but have clearly given him some advice; Mr. Eaves has submitted their draft skeleton argument which indicates as follows,

   "The defendant has had the benefit of taking legal advice since the last hearing and has accepted that judgment be entered in effect for the sums claimed".

7. Mr. Eaves, however, does not seek to detract from that, except he has raised a point relating to natural justice, or a possible breach of natural justice, arising out of the fact that the adjudicator did not have an on-site inspection to have a look particularly at the alleged defects. I will deal with that point first.

8. This court (the Technology & Construction Court) and the Court of Appeal has said on many occasions that adjudication is a form of rough justice, in the sense that within a very short period of time (28 days usually) the adjudicator has to receive submissions and evidence from the parties and produce his or her decision; inevitably the justice that is meted out is not always as pure and as well prepared for as cases which proceed to a full trial in this court or to a substantive hearing before an arbitrator. The issue arises as to whether the adjudicator failed to apply the rules of natural justice because he did not carry out a site inspection. I am wholly satisfied that there was no breach of the rules of natural justice. The reasons are as follows. First, there is no obligation as such on the adjudicator to have a site inspection. It is a matter entirely for his or her discretion in the circumstances. In this case, the adjudicator formed the view that because there was no withholding notice, there could not be a set-off and counterclaim as such but he did proceed to consider the alleged defects by way of abatement. He felt clearly that he had sufficient evidence and argument before him to decide what was the primary issue, so far as defects were concerned, namely whether or not the defects complained of were design defects or bad workmanship defects. If they were design defects, he formed the view, under the JCT contract, that the contractor was not responsible.

9. This court should not criticise an adjudicator for deciding not to have a site visit when it is clear that the adjudicator believed in good faith that he had sufficient information for him to reach his decision within the fairly short period allowed by the parties and where it has not been and cannot be established that it was essential that a site visit take place. I am satisfied that there is no breach of the rules of natural justice given the context of adjudication.

10. I now move on to the next two matters, the first relating to whether or not there should be an extension of time for, in effect, time to pay. One of the reasons I am giving a formal judgment in this case is that this particular issue has come up for the third time in front of me this week, and it arises out of CPR Part 40.11:

"A party must comply with the judgment or order for the payment of an amount of money, including costs, within 14 days of the date of judgment or order unless,

(a) the judgment or order specifies a different date for compliance, including specific payment by instalments".

11. Therefore the normal rule is that judgment sums should be paid within 14 days unless the judge otherwise orders. The judge has an absolute discretion. It seems to me that the following principles or practice can and should apply. First, if a party wishes to persuade the court that a period greater than 14 days should be allowed for payment, it is necessary that that application is supported by proper evidence. Secondly, it is much better generally that, if there is a genuine problem about the defendant paying, or being able to pay, that that is a matter first fully discussed on a *"without prejudice*" or even open basis between the parties. Ultimately, of course, the court can be asked to rule upon it, but it is much better if commercial parties meet and discuss the issue between themselves and it would only be if they were unable to agree that the court should consider an alternative longer period. It is unlikely that mere inability to pay will suffice to justify the extension of the normal fourteen day period; usually, inability to pay is no defence and an insolvent debtor must take the usual consequences of its insolvency.

12. I have formed the view in this case that since there is little or no evidence before me about the inability to pay, and because I do feel that this is a case in which the parties should talk to discuss times for payment, I am not going to alter the usual order. What I have done in other cases is to give permission to the defendant to apply to the court at a later stage to extend the 14-day period. That seems to me to be a sensible course in cases where there have not yet been discussions but any discussions may break down. So in this case I would give such permission to apply, which will be incorporated in the judgment, provided that an application, supported by written evidence, is filed before the end of next week, that is within the fourteen day period so that the Court may reach a decision on the application within that period. What I would very much hope is that the parties, as those best qualified to form a judgment on the matter, would talk first in some detail about what is to be done about payment. If the matter comes back in front of me, I cannot in any way undertake to tie the court's hands but the court will probably not be sympathetic to any such application unless at least some money has been paid on account of this judgment before such an application is made.

13. I now move on to the final matter, which is to do with costs. Mr. Eaves has put forward a careful, courteous and reasoned argument as to why the costs claimed should be reduced somewhat. Essentially, there is no challenge to two elements of the claimant's summary bill of costs. The first relates to counsel's fees for the hearing on 27th November and the second relates to the court fees. What has been put forward by the claimant is a bill which in terms of solicitors' costs is £3,202, and there is counsel's fee for the hearing today of £350 in addition to the sum of £630 for the earlier hearing.

14. Mr. Webb argues, with some force, that this is a case for indemnity costs. There are two bases for costs assessment. The first the standard basis, which tends to reduce a costs bill by something between 25 and 30 per cent, whilst the indemnity costs bill usually tends to reduce the costs bill by as little as 5 per cent or, indeed, less than that. What Mr. Webb argues, again with some force, is that this Court has said on previous occasions that where there is no real defence to a summary enforcement application, indemnity costs should apply. I consider that that is a good argument. That said, what indemnity costs means is that the onus is on the defendant in a case like this to show that elements of the bill were unreasonable; the onus, the burden of showing that a bill of costs is unreasonable falls on the defendant. I am satisfied that there are several respects in which the defendant has established that the bill is unreasonable.

15. The first is that an element of these costs relates to the fact that the court documentation was not served as promptly as the order made by Ramsay J. envisaged. He ordered that as soon as practicable the originating and the summary judgment application documents referred to earlier in this judgment should be served. The claimant's excuse and explanation is that they felt unable to serve all these documents because some of them had not been formally sealed by the court although they clearly had the judge's order. In those circumstances, it was incumbent upon the claimant's solicitors to serve what they could, even if it was not formally sealed, as soon as possible, particularly given that the judge had ordered a 17-day period between the date of the order and the hearing. The result was that, with the best will in the world, this delayed service left Eaves with inadequate time in the circumstances to instruct solicitors and to obtain the requisite advice. Whilst the Technology and Construction Court will do all that it can to bring on adjudication enforcements as soon as is practicable and is consonant with fairness, it is incumbent on the claimant to play its part in the process and serve documents promptly.

16. The second aspect in which the costs bill seems to me to be unreasonably high relates to the time spent on documents. What has been claimed is effectively something approaching 12 hours' work on this aspect. This was a very simple case and, although it appears that Gipping's solicitors have not been instructed for the adjudication and would have needed to consider a number of documents, the reality is that the dispute was simple, the adjudication enforcement was likely to and has proved to be simple and the documents put before the court, unsurprisingly, are limited to two (the Referral and the Decision). It is not reasonable or fair for a defendant to have to pay all the costs of a claimant in those circumstances.

17. Doing the best that I can, an appropriate amount to allow for Gipping's costs is £3,400. I have taken VAT off Gipping's bill because I have assumed that the claimant is registered for VAT and the VAT payable in respect of solicitors and counsel fees will be recoverable by Gipping from the Revenue or a VAT credit is available.

18. I discount the second fee for counsel, not because it is in itself unreasonable but because it seems to me that the main reason why there have been two hearings is related to Gipping's failure to serve the court documentation within a time that was as short as practicable. Disallowing that and what seems to have been excessive time spent on the documents, I have reduced the total appropriately to produce a net figure of £3,400.

19. So in those circumstances there will be judgment for the claimant in the sums claimed, and the rate of interest should be as the adjudicator ordered up to today. It will continue after the date of judgment. The ordinary order will be payment within 14 days and there will be an order that the defendant pay the claimant's costs summarily assessed at £3,400 within 14 days as well.

WILLIAM WEBB appeared on behalf of the Claimant.
THE DEFENDANT (represented by Mr. Eaves) appeared in person via telephone conference.