IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION COURT (QBD)

No. HT-2018-000291

[2019] EWHC 141 (TCC)

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 21 January 2019

Before:

MR JUSTICE FRASER

B E T W E E N :

(1) GERARD FERNS
(2) KERRY-ANN FERNS — Claimants

- and -

(1) KEITH WEST
(2) ADAM WEST
(3) LINDA WEST
(T/A HAVEN BUILD) — Defendants

MR A KEARNEY (instructed by Ward Williams Associates) appeared on behalf of the Claimants.

MR M FINN (instructed by Kitsons LLP) appeared on behalf of the First and Second Defendants.

The Third Defendant did not appear and was not represented.

J U D G M E N T

MR JUSTICE FRASER:

1 This is an adjudication enforcement brought by Mr and Mrs Ferns against three defendants. I am going to clarify this further, but I will first explain that the proceedings are issued against Mr Keith West, the first defendant, Mr Adam West, the second defendant, and Ms Linda West, the third defendant, trading as Haven Build. Mr Finn has appeared before me today on behalf of the first and second defendants. The third defendant, Ms West, has failed to acknowledge service and Mr Kearney, for Mr and Mrs Ferns, seeks judgment in default of acknowledgement of service against her. I am going to put that point off to one side and come back to it at the end, after I have given judgment on the substantive issues against Mr Keith West and Mr Adam West.

2 The background is as follows. Mr and Mrs Ferns entered into a contract with an entity called Haven Build, who are described in the contract simply in that way, as "Haven Build". It is accepted by Mr Finn that Haven Build is a trading name of Mr Keith West and Mr Adam West but is not a limited company. It is therefore what is sometimes described as a firm, although he says it is more properly and accurately described as a general partnership. On either description, it does not have its own separate legal personality.

3 The contract is on a standard form issued by the Federation of Master Builders. It is a domestic contract for minor building work. It is dated 27 September 2014 and the actual contract had a contract sum of £137,000 plus VAT, which was a modest difference with the quotation which had been provided by Haven Build. That is as a result of Mr and Mrs Ferns entering into a direct contract with Anglian Windows for the provision of double glazing. The works were to have been carried out at 98 Honiton Road, Exeter, which was a house into which Mr and Mrs Ferns, together with their young family, were intending to move, to be their house after their existing property had been sold. The contract was for limited building works which they wished to have performed before that move took place.

4 It is safe to say that the course of the building works was not a smooth one. In the adjudication referral, Mr and Mrs Ferns described how they were excluded from even visiting the site by Haven Build during the construction phase, which was for reasons, they were told, connected with insurance. They were, for that reason, not able to consider the works as they were performed. It was their case in the adjudication that they were provided with regular fallacious claims by Haven Build for the payment said to be due for works which Haven Build had either failed to complete, completed to a very poor and/or unsafe standard, and charged to them at vastly inflated amounts. They paid numerous invoices, as they describe it, in good faith and because they were told if they did not pay, Haven Build would withdraw from site. Whatever the rights and wrongs of that situation, Haven Build did in fact withdraw from site on 13 March 2015, which Mr and Mrs Ferns maintain was prior to completion of the works. Defective and incomplete works were left behind.

5 The contract undoubtedly has an adjudication provision within it. It is an express legal right in any event to parties to a construction contract to be able to adjudicate at any time, but residential occupiers have an exemption. As Mr Kearney identifies, this *was* a residential occupier case, but the parties had expressly agreed that adjudication be available. There was an express term for the ability to adjudicate. The exception in the Housing Grants Reconstruction and Regeneration Act 1996 for the right to adjudicate if it is a residential property is not therefore of relevance. In this case, clause 28.2 of the contract included adjudication and this states at 28.23:

> "Although condition 28.22 applies, you and we agree that adjudication under this clause will apply to this contract."

6 When Mr and Mrs Ferns decided to take their dispute with Haven Build further, they engaged a firm of claims consultants called Ward Williams Associates. On 29 June 2018, a letter was sent to Ward Williams Associates by Mr Turner of Kitsons LLP, who describe themselves in that letter, in the header, as "Our client: Haven Build", and Mr Turner stated in that letter:

> "As you have already stated, this dispute has now crystallised and in our view the dispute should now move into adjudication."

He then referred Ward Williams to certain provisions of the contract dealing with adjudication and says:

> "Can we also agree that our respective clients will enter into a separate agreement that the adjudicator's decision will be final and binding?"

7 There is no doubt when he wrote that letter that, by his client, he referred to Haven Build, the firm. In the answer to that letter, which was 4 July 2018, Ward Williams Associates wrote to him and again used, at the top of the letter, "Our client: Mr and Mrs Ferns; Your client: Haven Build", and pointed out that Mr and Mrs Ferns were not prepared to depart from the usual position of adjudication and quoted the following sentence:

> "Our client is not prepared to enter into a separate agreement that the adjudicator's decision will be final and binding."

8 That led to a letter back, 19 July 2018, from Mr Turner, again describing Haven Build as "our client". He said:

> "Thank you for your letter of 4 July 2018. If your clients are not prepared to be bound by the adjudication process, we see little point in going down that route. It seems as if the adjudication process found in favour of our client, your clients would not agree to be bound by such a decision. It appears to us the only way of resolving this dispute is by way of court proceedings. That is the route we are instructed to take."

9 Whatever the scope of the instructions at that point, Kitsons LLP have not issued court proceedings on behalf of Haven Build and on 22 July 2018, Ward Williams Associates wrote back and said:

> "My client is not prepared to agree to your suggestion that both parties accept an adjudicator's decision as final and binding and thus deny either party the ability to pursue the matter to ultimate conclusion under arbitration or court proceedings. As you have been previously advised, it was our client's intention to refer this matter to adjudication and in connection, therefore, please find attached a notice of adjudication in this regard."

10 That notice of adjudication is headed as follows:

> "In the matter of an adjudication between Mr and Mrs Ferns and Haven Build in respect of the building contract referred to as 98 Honiton Road, Exeter.
>
> Notice of adjudication."

It stated within the notice itself what the dispute was, and in the referral notice which followed, the same heading was adopted. Haven Build is described within that as "the responding party". I am going to quote paragraph 1.2 of the referral notice:

> "The responding party is Haven Build, the main contractor appointed under the building contract, hereafter referred to as 'HB', whose office is at 34 Antron Way, Mabe, Falmouth, Cornwall",

And then the post code of the firm is given.

11 The response to that referral, which was prepared by Kitsons on behalf of Haven Build, has the heading, "In the matter of adjudication between Mr and Mrs Ferns and Haven Build", and in section 1, which deals with "the parties to the contract" – it uses that as a heading – item 1 describes the claimants and item 2 states, "The responding party is Haven Build (HB) whose office is 34 Antron Way, Mabe, Falmouth, Cornwall." Within it, Kitsons state that HB challenges the claim; HB also seeks its own relief, in paragraph 49, which is:

> "HB seeks the following decision by way of decision from the adjudicator: (a) the owner pays such sum as the adjudicator shall decide; (b) the adjudicator determines HB's entitlement to interest on the sums due; (c) a decision that the owner pays the adjudicator's fees and expenses."

And at the bottom of the document it says, "Served on this day of 8 August 2018 by Kitsons Solicitors on behalf of Haven Build." There is nowhere within that documentation any statement that the wrong party is being adjudicated against by Mr and Mrs Ferns, or that there is any doubt as to the responding party in the adjudication.

12 What then happened was Mr and Mrs Ferns were successful in their adjudication. A sum was ordered in their favour. There was a correction issued to the adjudicator's decision by the adjudicator, but the terms of the correction are not relevant and they are also not in dispute. The sum was not paid by Haven Build, and a claim form was issued by the claimants, seeking summary judgment on the adjudicator's decision. The total amount, including the court fee, is £82,053.93.

13 As I explained at the beginning of this judgment, that was issued against three people called West. They are (1) Keith West, (2) Adam West, (3) Linda West, trading as Haven Build, with the same address, 34 Antron Way, Mabe, Falmouth, Cornwall, TL10 9HS. Those proceedings were served upon those defendants and, in the acknowledgement of service which came back, that was signed by Mr Turner, Mr Turner gave the acknowledgement of service in respect of the first two of those people and, on form N9, which goes in the response pack which is provided with service of High Court proceedings, he has filled in: "Defendant's full name, if different from the name given on the claim form". Here he has written, "(1) Keith West; (2) Adam West, trading as Haven Build", and he has ticked the box, "I intend to defend all of this claim."

14 He also provided a short witness statement. The heading to that makes it clear that proceedings were issued against Keith West, Adam West and Linda West, trading as Haven Build and within that statement he makes certain points:

> "(2) I make this witness statement in support of the defendants' position in relation to the claimants' summary judgment application.
>
> (3) The defendants have acknowledged service and have also filed and served a defence.
>
> (4) The defendants' primary defence is the adjudicator's decision is not binding on the defendants because (i) the contract entered into between the parties did not make an adjudication decision binding unless the parties expressly agreed to that position, which they did not; (ii) the Housing Grants, Construction and Regeneration Act of 1996 ("the Act") does not apply to the contract as the claimants are residential occupiers."

Both of those points have been abandoned, very sensibly if I may say so, by Mr Finn because they are both completely hopeless (my expression, not that of Mr Finn). They demonstrate a fundamental misunderstanding of what adjudication is, and also what the contract itself says in terms of adjudication as an express term.

15 In para graph 8 of his witness statement, Mr Turner says:

> "Because of the above terms of the contract, my firm, Kitsons LLP, who are acting for the defendants, wrote to Ward William Associates, who are acting for the claimants, by way of letters dated 29 June and 19 July and asked whether the claimants would agree to be bound by the adjudicator's decision."

16 I should say, by summary, that Mr Finn's point (which he accepts it is a wholly technical point) is effectively that the adjudication itself and the decision proceeded against an incorrectly named party for this reason. He says that instead of stating Haven Build on the notice of adjudication, it should have stated "(1) Keith West and (2) Adam West", followed either in brackets by "trading as Haven Build" or in brackets "a firm under the name of Haven Build". He essentially submits that by simply putting the name "Haven Build" on the adjudication provisions, the whole adjudication was defective. He has referred me to well-established law that, although an adjudicator's decision is ordinarily enforceable by means of summary judgment, it has to be a decision that is reached by an adjudicator having jurisdiction.

17 He frankly accepts that the upshot of his argument, were it to be correct, would mean – and I am endeavouring to do these in chronological order – that all the following cases would be either distinguishable or, if not distinguishable, wrong. Those cases are: *Total M & E Services Ltd v ABB Building Technologies Ltd* [2002] EWHC 248 (TCC), a decision of His Honour Judge Wilcox, a TCC judge; *ROK Build v Harris Wharfe Development Company Ltd* [2006] EWHC 3573 (TCC), another decision of His Honour Judge Wilcox; *Andrew Wallace Ltd v Artisan Regeneration Ltd & Anor* [2006] EWHC 15 (TCC), a decision of Her Honour Judge Kirkham, a TCC judge; *Williams (t/a Sanclair Construction) v Noor (t/a India Kitchen)* [2007] EWHC 3467 (TCC), a decision of Hickinbottom J, as he then was, now Hickinbottom LJ; *Durham County Council v Jeremy Kendall (t/a HLB*

Architects) [2011] EWHC 780 (TCC), a decision of Akenhead J, who was not only a TCC judge, but was the Judge in Charge of the TCC.

18 He also accepts that the consequence of his argument being correct is that the Act itself is arguably deficient. This is because s.108 of the Act gives the right to adjudication to a contracting party, or a party to a construction contract, and does not have within it a legal mechanism similar to the provision in the CPR for legal proceedings to be issued where, as here, a firm is the trading name of what is a partnership. Here, "Haven Build" was the name chosen by the defendants to be entered actually in the contract documents; yet Mr Finn's argument would, if correct, mean that the name on the adjudication documents had to be different from that in the contract itself.

19 In Part 7 of the CPR, practice direction 7A is said to apply as a result of the wording of CPR Part 7.2A. In practice direction 7A, it says at paragraph 5A.3:

> "Where that partnership has a name, unless it is inappropriate to do so, claims must be brought in or against the name under which that partnership carried on business at the time cause of action accrued."

20 That is exactly what Mr and Mrs Ferns did *vis-à-vis* the adjudication. Not only that, but two important points must be made. The first is that Mr and Mrs Ferns (or their representative) replicated the builder's name exactly as it appeared on the contract document itself and, secondly, there was never any doubt whatsoever that they were bringing an adjudication against Haven Build, the firm. The subsidiary point to that is that Haven Build had a solicitor acting for them throughout, but at no stage in the adjudication, or indeed subsequent to that, until the Defence was served in these proceedings, was the point taken that those proceedings were technically defective in the way now argued.

21 It was not even mentioned in Mr Turner's witness statement. I am of the view that the point advanced by Mr Finn is not only wholly unmeritorious, which he frankly accepts, but it is in fact a bad point. He has argued it persuasively and attractively, but I am very clear that it is wrong in law. The same point has been considered in the case of *Durham County Council v Kendall*, to which I have referred, and in that case, at [38], when a similar point was considered by Akenhead J, he said:

> "In my view, this point, apart from being wholly without merit, is a bad one. In law, HLB Architects was in effect and reality Mr Kendall, that is the name under which he traded."

22 I could paraphrase that and say for this case before me today, in my view, this point, apart from being wholly without merit, is also a bad one. In law, Haven Build was in effect and reality at least Mr Keith West and Mr Adam West, trading as Haven Build, if not including Ms West as well. There is nothing in this point whatsoever, and this attempt to avoid enforcement is, quite correctly, characterised by Mr Kearney (as similar attempts in other cases have been) as a party scrabbling around for some reason to try and avoid enforcement of an adjudicator's decision.

23 I therefore consider that Mr and Mrs Ferns are entitled to summary judgment against Defendant 1 and Defendant 2. Turning to the point to which I said I was going to return,

they are also entitled to judgment in default of acknowledgement of service against Defendant 3, Ms West. I am satisfied that those proceedings were correctly served.

24 Just for completeness, I should add that there was no reservation of this point in any respect in the adjudication at all and, if it were to have any prospect of life whatsoever, a reservation of rights would have been required. However, it is unnecessary to dwell on that point because of my conclusion on the primary argument. In all the circumstances, therefore, Mr Kearney's application for summary judgment against those first two defendants, for whom Mr Finn appears before me today, succeeds. Mr and Mrs Ferns are entitled to summary judgment against the first and second defendants, and to judgment in default of acknowledgement of service against the third defendant.

CERTIFICATE

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

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