DURAHOME CONSTRUCTION LTD.
v.
DEBTOR CO. LTD.

[HIGH COURT – CIVIL SUIT NO.846 OF 1994

(Payne, J. (Actg.) July 27, September 7, 1994]

(1994) 30 Barb. L.R. 365

Practice and procedure – Order 14 jurisdiction – Building contract with provision for architect to issue final certificate – Plaintiff sought order for payment of sum due under the certificate – Defendant's application for stay showing no reasonable grounds for not honouring certificate – Application refused.

Facts: By agreement dated June 14, 1992 the defendant employed the plaintiff to construct an extension to the defendant's hotel known as Bresmay in St. Lawrence Gap, Christ Church. Pursuant to the terms of the agreement, the defendant appointed an architect. On March 9, 1994 the architect issued his final certificate which showed the sum of $627,528.85 due to the contractor, less a retention of $43,919.60 in respect of defects. On March 15, 1994 the defendant's quantity surveyor wrote to the architect submitting that there were errors in the final account and requesting that it be amended to reflect the alleged errors. The architect did not amend his final certificate.

On May 17, 1994 the plaintiff filed a writ in which it sought payment of the $583, 609.25 which was certified for payment in the architech's final certificate, plus interest and costs. On the defendant giving notice of intention to defend, the plaintiff filed a summons in which it sought judgment under 14. In response, the defendant filed an application on June 19, 1994 that the action be stayed under the Arbitration Act, Cap. 110, s.6.

Held: In this case the architect issued a final certificate which was within the terms of the contract and no sustainable grounds were shown for not honouring it. The defendant's application for stay was refused. Judgment for the plaintiff against the defendant under Order 14 for the sum of $583,609.25 with interest at 4% per annum from May 17, 1994 until judgment and thereafter at the rate of 8% per annum until payment.

Case referred to:

Ellis Mechanical Services Ltd. v Wates Construction Ltd. (1976) 2 B.L.R. 57.

Statute and statutory instrument referred to:

Arbitration Act, Cap. 110, s. 6.

Rules of the Supreme Court, 1982 Orders 14 and 29.

Mr. B.L.V. Gale for the plaintiff.

Mr. Dale Marshall in association with Mr. Dennis H.L. Chandler for the defendant. [365]

Payne, J. (Actg.): By agreement dated June 4, 1992, the defendant employed the plaintiff to construct an extension to the defendant's hotel known as Bresmay in St. Lawrence Gap, Christ Church.

The defendant, pursuant to the terms of the agreement, appointed an architect. The agreement was based on the JCT Standard Form, and Clause 30 provided as follows:-

"(6) So soon as is practicable but before the expiration of 3 months from the end of the Defects Liability Period stated in the appendix of these conditions or from completion of making good defects under clause 15 of these Conditions or from receipt by the Architect of the documents referred to in paragraph (b) of sub-clause (5) of this Condition, whichever is the latest, the Architect shall issue the Final Certificate. The Final Certificate shall state:

(a) The sum of the amounts already paid to the contractor under Interim Certificates and Certificates issued under sub-clauses (4) (b) and (4) (c) of this Condition, and

(b) The contract sum adjusted as necessary in accordance with the terms of these Conditions,

and the difference (if any) between the two sums shall be expressed in the said certificates as a balance due to the contractor from the employer or to the employer from the contractor as the case may be. Subject to any deductions authorised by these Conditions, the said balance as from the fourteenth day after presentation of the Final Certificate by the contractor to the employer shall be debt payable by the employer to the contractor or as the case may be as from the fourteenth day after issue of the Final Certificate shall be a debt payable by the contractor to the employer.

(7) (a) except as provide in paragraphs (b) and (c) of this sub-clause (and save in respect of fraud), the Final Certificate shall have effect in any proceedings arising out of or in connection with this Contract (Whether by arbitration under clause 35 of these Conditions or otherwise) as

(i) conclusive evidence that where the quality of materials or the standards of workmanship are to be to the reasonable satisfaction of the architect the same are to such satisfaction, and

(ii) conclusive evidence that any necessary effect has been given to all the terms of this Contract which require an adjustment to be made of the Contract Sum save where there has been any accidental inclusion or exclusion of any work, materials, [366]

goods or figure in any computation or any arithmetical error in any computation, in which event the Final certificate shall have effect as conclusive evidence as t all other computations.

(b) If any arbitration or other proceedings have been commenced by either party before the Final Certificate has been issued the Final Certificate shall have effect as conclusive evidence as provided in paragraph (a) of this sub-clause after either

(i) such proceedings have been concluded, whereupon the Final Certificate shall be subject to the terms of any award or judgment in or settlement of such proceedings, or

(ii) a period of 12 months during which neither party has taken any further step in such proceedings, whereupon the Final Certificate shall be subject to any terms agreed in partial settlement,

whichever shall be the earlier.

(c) If any arbitration or other proceedings have been commenced by either party within 14 days after the Final Certificate has been issued, the Final Certificate shall have effect as conclusive evidence as provided in paragraph (a) of this sub-clause save only in respect of all matters to which those proceedings relate.

(8) save as aforesaid no certificate of the Architect shall of itself be conclusive evidence that any works, materials or goods to which it relates are in accordance with this Contract."

The agreement contained an arbitration clause as follows:-

"35 (i) provided always that in case any dispute of difference shall arise between the Employer or the Architect on his behalf and the Contractor, either during the progress or after the completion or abandonment of the Works, as to the construction of this Contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this Contract to the discretion of the Architect or the withholding by the Architect of any of any certificate to which the Contractor may claim to be entitled or the measurement and valuation mentioned in clause 30(5) (a) of these Conditions or the rights and liabilities of the parties under clauses 25, 26, 32, or 33 of [367]

these Conditions) then such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed between the parties, or failing agreement within 14 days after either party has given to the other a written request to concur in the appointment of an Arbitrator, a person to be appointed on the request of either party by the President or a Vice President for the time being of the Barbados Institute of Architects." On March 9, 1994, the architect issued his final certificate. It showed the sum of $627, 528.85 due to the contractor, less a retention of $43,919.60 in respect of defects. The architect's letter accompanying the final certificate, addressed to the defendant and copied to the plaintiff, contained the following paragraph –"Please be advised that the final figures were reached after meetings with the contractor, Mr. John Still at Durahome Construction and your Quantity Surveyor, Mr. John Atherley at which times the final account was reviewed in great detail in order to satisfy myself of its fairness."

On March 15, 1994 the defendant's quantity surveyor, Mr. Atherley, wrote to the architect submitting that there were errors in the final account and requesting that the final account be amended to reflect those alleged errors. The architect has not however amended his final certificate.

On May 17, 1994 the plaintiff filed a writ seeking payment of the $583,609.25 certified for payment in the architect's final certificate plus interest and costs. The defendant gave notice of intention to defend, and on May 31, 1994 the plaintiff filed a summons seeking judgment under Order 14. The defendant, on the other hand filed an application by summons on June 10, 1994 that the action be stayed pursuant to s. 6 of the Arbitration Act (Cap. 110). The defendant's affidavit in support of its application sworn by Leroy Foster is as follows:-

"1. I am the Managing Director of the defendant company herein.

2. This action is brought to recover the sum of $583,609.25 being moneys alleged to be due and owning under a contract made between the plaintiff and the defendant and dated the 4th day of June 1992.

3. The said contract which is now produced and shown to me and marked "A" provides by paragraph 35 that any disputes or differences as to any matter or thing arising under the said contract shall be referred to arbitration.

4. The matters in dispute in this action are within the scope of the said Agreement to refer disputes and differences arising thereunder to arbitration, and arose before the commencement of the action, and are fit [368]

and proper matters to be referred to arbitration and there is no reason why they should not be so referred and decided.

5. I have entered an appearance to the Writ of Summons in this action, but have taken no further step in the action.

6. At the time this action was commenced, I was, and still remain ready and willing to do all things requisite to enable all the matters in dispute as aforesaid to be determined by arbitration in accordance with the provisions of the said agreement.

7. This application is not made for the purposes of delay."

The defendant also relies on two paragraphs of the plaintiff' subsequent to the defendant's summons and affidavit, which are as follows:-

"10. That the defendant Company's Quantity Surveyor, Mr. Atherley, after the Final Certificate had been issued wrote to Mr. Douglas Luke on the 15th March 1994 submitting that there were errors in the Final Account and requesting that the Final Account be amended to reflect these alleged errors.

11. That to my knowledge Mr. Douglas Luke has not amended the Final Certificate in response to these representations made by Mr. Atherley."

The learned author of Keating on Building Contracts, 3rd Ed., 1991,commenting on the architect's final certificate at p. 94, said:-

"The parties may by the contract give the architect power to decide various matters finally between them, and to state his decision in the form of a certificate. Having given the architect this power they are not allowed by the courts, in the absence of fraud or other special circumstances, to attack his decision upon such matters. His certificate is binding and conclusive upon them. Thus, where architects have certified by final certificates that certain money is due to the contractor, employers have not been allowed to go behind the certificate and say that a smaller sum was due because the certificate included payment for extras not ordered in writing or not otherwise ordered properly, or for work which was not extra work, or for work which had not been done at all. It is a matter of construction in each case to determine whether the architect's decision is intended to be binding and conclusive on matters relating to extras. It seems that 'conclusive evidence' clauses are construed neither more nor less strictly than other clauses since, unlike clauses which seek to exclude liability, they can work to the benefit of either party." [369]

Further, at p. 399, this learned author said:-

"If there is no dispute or difference within the meaning of the arbitration agreement a stay will not be granted. A creditor does not have to go to arbitration to collect an undisputed debt. A stay is very commonly refused on the basis that there is no dispute where the plaintiff establishes that he is entitled to summary judgment under R.S.C., Order 14. If part of a claim is indisputably due, judgment may be given for that part leaving the balance, where there is a dispute, to go to arbitration. The court also has jurisdiction, first to order an interim payment under R.S.C. Order 29 before granting a stay for the balance of the claim, and has the further power to impose conditions if it decides to grant a stay. A defendant opposing an application for summary judgment who wishes to enforce the arbitration agreement has to apply for a stay at the same time to avoid taking a step in the proceedings.

In building contracts cases, applications under Order 14 and Order 29 (or both) are habitually made where, for instance, a contractor seeks payment on an architect's certificate and considers that the employer has no sustainable ground for not honouring it."

Concerning the evidence required for summary judgment, the learned author said at p.442:-

"Every case turns upon its facts but excellent evidence is either an admission by the defendant, or his authorised agent, or a certificate by the defendant's architect or engineer, which is a special and formal kind of admission. When evidence of this nature is established the court usually requires cogent evidence from the defendant before it grants leave to defend. A set-off can be a sufficient defence to a claim for summary judgment for a sum otherwise due. But where for instance a defendant seeks to set-off a counterclaim for unliquidated damages for defects or delay against a sum due upon an architect's certificate, merely to allege the existence of defects in the works, or a claim for damages for delay without in each case giving some reasonable amount of detail and of quantification it is unlikely to result in leave to defend. Neither, it seems, will the court accept bare allegations, without satisfactory supporting evidence, that a certificate is not in accordance with the contract or that, for example, extras, part of the subject matter of the claim, were not sanctioned in writing."

In this case, the architect issued his final certificate on March 9, 1994. No arbitration proceedings have been commenced. There is no suggestion of fraud or other special circumstances to deny the conclusive effect of the architect's certificate as envisaged in clause 30(7). It does not, as I see it, suffice to say that the quantity surveyor submitted that there were errors in the final account, especially without [370]

any indication what these alleged errors are. If no sustainable ground is shown for not honouring the architect's final certificate, the court will not stay the action. The balance shown in the final certificate becomes a debt payable 14 days after presentation. The defendant cannot simply say, "I do not accept your account, therefore there is a dispute, and we have to go to arbitration".

In Ellis Mechanical Services Lid v. Wares Construction Ltd (1976) 2 BLR 57, which concerned a claim brought by sub-contractors under a JCT form of contract against the main contractor for sums certified by the architect, Lawton, L.J. said at p. 63:-

"Under the form of contract used in this case, and used in many cases of this kind, all the sub-contractor can do is to look to the main contractor for payment for the work that he has done, and the materials he has supplied under clause 21 of that contract.

If the main contractor can turn round, as the main contractor has done in this case, and say 'Well, I don't accept your account; therefore there is a dispute', that dispute must be referred to arbitration and the arbitration must take its ordinary long and tedious course. Then the sub-contractor is put into considerable difficulties; he is deprived of his commercial lifeblood. It seems to me that the administration of justice in our courts should do all it can to restore that lifeblood as quickly as possible. One of the demerits of our system of justice is that in this class of case, because of our rules of procedure, an arbitration under a building contract of this size is likely to take years. For example, Mr. Keating said that the defendants would be entitled to have discovery of all the documents. Indeed they would. He said that they would be entitled to examine them and see what they could find from them; indeed they would. That would take a very long time and the delay might do injustice to the plaintiffs.

The courts are aware of what happens in these building disputes; case go either to arbitration or before an official referee; they drag on and on and on; the cash flow is held up. In the majority of cases, because one party or the other cannot wait any longer for the money, there is some kind of compromise, very often not based on the justice of the case but on the financial situation of one of the parties. That sort of result is to be avoided if possible. In my judgment it can be avoided if the courts make a robust approach, as the Master did in this case, to the jurisdiction

under order 14."

In this case the architect has as I see it issued a final certificate within the terms of the contract and no sustainable grounds have been shown for not honouring it.

For the above reasons, the defendant's application for a stay is refused, and the plaintiff will have judgment against the defendant under Order 14 for the sum of $580,609.25 with interest at 4% per annum from May 17, 1994 until today, and [371]

hereafter at the rate of 8% per annum until payment.

The plaintiff will also have costs to be agreed or taxed in respect of the plaintiff's summons dated May 31, 1994 and the defendant's summons dated June 10, 1994.

Stay of execution until end of this September 1994, except that the plaintiff is at liberty to apply for a charging order on the defendant's assets. [372]