



Neutral Citation Number: [2014] EWHC 1 (Comm)

Case No: 2011 Folio 782

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Date: 27 June 2014

Before:

MR. ROBIN KNOWLES CBE QC

(Sitting as a Deputy High Court Judge)

Between:

COMAU UK LIMITED

Claimants

- and -

LOTUS LIGHTWEIGHT STRUCTURES LIMITED

Defendants

MR. RUPERT ALLEN (instructed by Clyde & Co LLP) for the Claimant

MR. MATTHEW LAVY (instructed by Olswang LLP) for the Defendant

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this judgment and that copies of this version may be treated as authentic.

Judgment

Introduction

1. The Claimant ("Comau") is part of the Fiat group. It seeks summary judgment on liability against the Defendant ("Lotus"), part of the Lotus group, with damages to be assessed, and an interim payment.
2. The claim arises from a written contract between the parties dated 30 November 2011 ("the Agreement"). By the Agreement Comau (replacing Comau Estil) agreed to supply to Lotus goods and services relating to the installation of a new production line for the manufacture of the chassis for a new model of car at Lotus' factory.

The Agreement and events following

3. The Agreement provided for Lotus to pay the contract price in accordance with a staged payment schedule. Lotus failed to pay sums due on two invoices rendered by Comau in accordance with the schedule. The invoices were in the sums of £293,061.18 and £586,122.36 and were due for payment by 30 December 2011.
4. On 14 February 2012, Comau sent a letter to Lotus stating that the invoices were overdue for payment and giving 7 days' notice of its intention to suspend the performance of its own obligations as it was entitled to do under a clause of the Agreement. On or about 12 March 2012, the first invoice for £293,061.18 was paid by Lotus. Lotus paid a further £50,000 on 24 April 2012. Thus at that point £536,122.36 remained outstanding from Lotus under the second invoice. Comau's performance of its own obligations remained suspended in accordance with the Agreement.
5. Clauses 12 of the Agreement includes these terms:

"12. TERM AND TERMINATION

- 12.1 This Contract shall commence on the Effective Date and shall (subject to the provisions of this Contract) continue in force unless and until terminated in accordance with this Clause 12.
- 12.2 This Contract may be terminated by either Party giving the other not less than 12 months notice in writing.
- 12.3 Either Party may terminate this Contract forthwith by notice in writing to the other Party if:
 - 12.3.1 the other Party commits any material breach of any condition of this Contract and fails to remedy the same (assuming that the breach is

capable of remedy) within thirty (30) days of service of a written notice by the non-defaulting Party specifying the breach and requiring it to be remedied ...

...

12.4

...

12.5 In addition to any other rights of Lotus to terminate the Contract Lotus may, at its option, and provided it is not then in breach of any payment obligation to [Comau] under the Contract immediately terminate the whole of the Contract but not only part at any time and for any reason, by giving written notice to [Comau]. Upon such termination ... Lotus' sole liability to [Comau] shall be, subject to Clause 12.7, to pay to [Comau] the aggregate of the following amounts without duplication:

12.5.1 the part of the Price attributable to all Goods or Services which have been completed in accordance with the Contract and not previously paid for provided that the property in such goods shall pass to Lotus upon such payment; and

12.5.2 the whole of the cost to [Comau] of work-in-progress and raw materials as at the date of termination together with [Comau's] margin on the same and costs which [Comau] has committed itself to incur (before or after the date of termination) in furnishing the Goods or Services under this Contract and/or having out itself in a position to comply with the Detailed Timing Plan and

12.5.3 any and all additional costs reasonably incurred by [Comau] as a result of termination under clause 12.5 ... which shall include but not limited to the termination of sub-contracts entered into by and between [Comau] and its sub-contractors, and material and equipment kept in stock, and

12.5.4 the cost to [Comau] of its on Site and/or project specific labour for a period of 30 days following termination but not longer, and

12.5.5 payment of any portion of the Price due and unpaid by Lotus to [Comau] under the Contract

provided that the margin to which [Comau] shall be entitled as referred to in clause 12.5.2 shall equate to the same percentage margin which [Comau] can show on an accountancy basis it had (on the date of this Contract) anticipated earning in the performance of its obligations under the Contract as reflected in the Price at such date.

12.6

...

12.7 In respect of the sums which may become payable by Lotus to [Comau] pursuant to Clause 12.5, [Comau] agrees to use reasonable endeavours to

mitigate the exposure of Lotus to pay such sums to [Comau] which mitigation shall include but not be limited to

12.7.1 disposing of or redeploying surplus material acquired in relation to the Goods or Services at such prices or values as may be reasonably available on the UK market, and

12.7.2 promptly informing its subcontractors and suppliers to stop work and cease to incur additional costs, and

12.7.3 negotiating such settlement with its suppliers as may result in any material saving.”

6. By letter dated 24 August 2012 Comau wrote to Lotus. The full text of the letter is as follows:

“Dear Sir

Lotus Lightweight Structures Limited (“Lotus”)

Project Fuji – Contract number 025720 (“the Contract”)

Notice of Material Breach of Contract

We refer to our notice dated 14 February 2012, to our meeting in Hethel with yourselves on 22 March 2012 and to the email from Andrew Lloyd to David Hewitt dated 3 July 2012.

Performance of the Contract was suspended by notice dated 14 February 2012 pursuant to clause 5.9 of the Contract due to the non-payment by Lotus of invoices E/11231 and E/11230.

Invoice E/11230 has since been paid.

Invoice E/11231 (copy attached) remains unpaid.

Pursuant to clause 5.2 of the Contract, the Specification and the Payment Schedule, Invoice E/11231 was due for payment on 30 December 2011.

Lotus’s failure to pay invoice E/11231 amounts to a material breach of the Contract.

Please accept this letter as our written notice pursuant to clause 12.3.1, specifying that Lotus is in material breach of the Contract and requiring this breach to be remedied within 30 days.

In order to remedy this material breach, Lotus must:

1. Pay invoice E/11231 in the amount of £488,435.30;
2. Pay interest (calculated at 4 per cent above the Bank of England Base Rate pursuant to clause 5.8 of the Contract) in the amount of £14,231.85 as at the date of this letter and increasing at the rate of £60.05 per day.

The total outstanding is therefore £502,667.15.

Payment of the total outstanding sum should be made to the following account:

[Bank details were set out]

If the above total sum is not provided within 30 days of the date of this notice, we shall terminate the contract pursuant to clause 12.3 and commence action against Lotus without further notice to recover all costs and losses incurred as a result of the breach and termination.

In addition to the outstanding payment, we require the technical information and data necessary to perform our contractual activities pursuant to clause 9.3 of the Contract along with Lotus's authority to proceed on the basis of the information provided.

Finally, we reserve our right to recover those costs and losses incurred by us as a result of Lotus's breach and the resulting suspension of services.

We look forward to receipt of the above payment within 30 days of this letter.

All our rights remain reserved.

Yours faithfully"

7. Lotus did not pay the sums still due, or otherwise respond to the letter. On 8 October 2012, Comau wrote again. It gave notice to Lotus that it had decided to terminate the Agreement with immediate effect.

The Claim and the Application

8. Although the Agreement contains a number of provisions dealing with contractual termination, Comau alleges that Lotus' conduct was also in common law repudiatory breach of the Agreement and that Comau accepted that repudiatory breach on 8 October 2012, entitling it to damages. In due course it began these proceedings.
9. At an early stage in these proceedings Lotus consented to judgment being entered on a claim in debt in the principal sum of £536,122.36 (the sum still outstanding on the second of the two invoices). The damages that Comau now presses on to seek are what it says are its lost profits on the entire project as a result of the termination of the Agreement, profits that it alleges would have been earned but for termination of the Agreement.
10. The Court has the power under CPR r 24.2 to grant summary judgment in favour of a claimant on a claim or issue if it considers that the defendant has no real prospect of successfully defending the claim or issue and there is no other compelling reason why the case or issue should be disposed of at a trial. The Court should not conduct a "mini-trial" on an application for summary judgment. The relevant principles to be applied were helpfully summarised by Lewison J (as he then was) in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 at paragraph [15].
11. Lotus accepts that if it was in repudiatory breach, then the letter of 8 October 2012 operated as an acceptance of such repudiation. Consequently, the question on liability is whether Lotus has real prospects of successfully defending Comau's allegation that it was in repudiatory breach of the Agreement as at 8 October 2012.

Liability

12. In Dalkia Utilities Services plc v Celtech International Ltd [2006] 1 Lloyd's Rep 599; EWHC 63 (Comm) at [131] Christopher Clarke J (as he then was) derived the following propositions from authority relating to the making of time of the essence:

“(a) Equity, before the Judicature Acts, insisted that *prima facie* time for payment was not essential. But equity's patience was exhaustible. It would allow the contract to be treated as repudiated if the party in default had been given the opportunity to mend his ways by the giving of a notice to comply within a reasonable time. Whilst this is described as making time of the essence in reality the notice is the means of bringing to an end equity's interference with the contract: Behzadi v Shaftesbury Hotels Ltd [1992] Ch 1;

(b) Such a notice, which may be given in respect of any species of term, may not be served until the time for performance has expired; but it may be served as soon as that time arrives;

(c) Such a notice must state clearly what the other party is required to do and the consequence if he fails ie that the contract may be terminated; Afovos Shipping Co SA v R Pagnan and Fili (The Afovos) [1982] 1 Lloyd's Rep 562, 565 col 2' [1882] 1 WLR 848, 854C;

(d) If the defaulting party fails to perform after service of such a notice, the failure is not automatically a repudiation of the contract, giving rise to a right to terminate. The breach must go to the root of the contract;

(e) The notice operates as evidence of the date by which the promisee considers it reasonable to require the contract to be performed, failure to perform by which is evidence of an intention not to perform: see Lord Simon of Glaisdale in United Scientific Holdings Ltd v Burnley Borough Council [1978] AC 904, 946E-947A; Astra (UK) Ltd v Time Group Ltd [2003] EWHC 725 (TCC) para 147.”

13. Comau accepts that Lotus' obligation to pay in accordance with the schedule was not a condition of the Agreement in the sense that not every failure to pay a sum on time would amount to a repudiatory breach. In oral submissions Mr Rupert Allen, its Counsel, also rightly conceded that inability to pay was not an automatic inference from a failure to pay. Comau contends however that as a result of Lotus' prolonged failure to pay or to make any proposals to pay the sums due under the Agreement Lotus had clearly and unequivocally evinced an intention not to perform its obligations under the Agreement.

14. Comau argues it was reasonably entitled to conclude that Lotus did not intend or was unable to perform its payment obligations under the Agreement and was deprived of substantially the whole of the benefit of the obligations of Lotus under the Agreement which remained unperformed. Mr Allen submits that on the facts this was the only reasonable inference from the way Lotus was behaving, and he emphasises that Lotus has not put in evidence to say what further facts would require exploration at trial. How long, he asks rhetorically, was Comau expected to wait?

15. The points emphasised by Comau in written and oral submissions include these: the sums fell due in respect of both invoices on 30 December 2011; together the invoices amounted to just 15% of the Price; the payment of the first invoice was late; nothing followed a meeting in March; only partial payment (less than 10%) of the second invoice was made in the sum of £50,000 and that was later still; the terms used by Comau in writing to Lotus on 24 August 2012; Lotus' absence of response to that letter to make any proposals for payment of the outstanding sums or to explain its previous failure to pay; and the fact that by October Lotus had only paid 5.9% of the total contract price and Comau's obligations under the Agreement had been suspended for almost 8 months.
16. After due consideration I take the view that Lotus has real prospects of successfully defending Comau's allegation that it was in repudiatory breach of the Agreement as at 8 October 2012. I draw particular attention to these features:
- (a) Read closely the letter dated 24 August 2012 concerns one of the several routes available under the terms of the Agreement towards contractual termination, rather than termination following common law repudiation. When it referred to termination it was referring, alone, to contractual termination under Clause 12.3.
 - (b) Lotus' silence in response does it no credit, but must be construed in the context of what the letter dated 24 August said and the fact that the Agreement remained in the interim condition of suspension.
 - (c) As circumstances, the previous late payment and additional part payment are consistent with an intention to perform rather than evidence of intention not to do so.
 - (d) The percentages invoiced or paid as a proportion of the total contract price paid leave out of account the point that by reason of Clause 12.5 the total contract price might be a great deal less; a subject to which I return below.
 - (e) The period of suspension since the letter dated 24 August 2012 was 7 weeks, and in context that is a comparatively modest period of continuation of the suspension.
 - (f) It was open to Comau to send a further letter making quite clear that it was proposing now to rely on its rights at common law, and to that end that it was making time of the essence and that it would treat continued unexplained failure to pay as in repudiatory breach. It did not do this.
17. Comau argues that it cannot be the case that it was required to wait indefinitely for Lotus to pay the sums due without terminating the Agreement and claiming damages for its loss of bargain. I agree. But as Mr Matthew Lavy, Counsel for Lotus, pointed out in oral argument the question is not whether Comau would have to wait indefinitely but what the position was at 8 October 2012.

Quantum

18. Comau submits that the purpose of requiring Lotus to pay the contract price in accordance with the schedule was to fund the substantial work which Comau was required to carry

out under the Agreement. I interpose to note that that may be right but equally it may not be, or it may not be the whole picture; the schedule might at least to some degree be there to manage credit risk or to deliver some profit early. Comau also submits that unless and until Lotus paid the outstanding sums due, Comau could not reasonably be expected to resume work and accordingly unless Lotus paid there was no prospect of Comau being able to raise invoices for the balance of the contract price under the Agreement and thereby to make the profit that it reasonably expected to make under the Agreement.

19. Contained within these submissions on behalf of Comau is the premise of an entitlement to a "full life" contract. Although if I am right on the application for summary judgment the application for an interim payment falls away, and if I am wrong it is in the nature of an interim payment application that I would not rule finally on the final figure for damages, in light of the full argument I have heard, it may be useful if I record that even had I been persuaded on liability I would have declined to order an interim payment in the sum of £500,000 sought, or in fact any sum.
20. The reason is that in my judgment the existence of Clause 12.5 shows that Comau probably did not have the entitlement it suggests and on which the thrust of its claim is premised. Mr Allen submitted that one could not treat Clause 12.5 as defining the scope of the parties' reasonable expectations, and that it did not cut down what he described as Comau's "expectation interest". In my judgment, the Clause probably does both these things.
21. Leaving out of account its claim for additional lost profit on variations to the Specification which it believes would have been made if Lotus had complied with its payment obligations under the Agreement Comau says its expected profit on the entire project absent any changes (i.e. the Price less anticipated costs) was £1,147,332.62 (i.e. £4,884,353.00 less £3,737,020.38). Comau accepts however that it must give credit against this sum for the sums received from Lotus in payment of the invoices less the amount of any costs already incurred. The total amount of the invoices which have been paid by Lotus or in relation to which judgment has already been obtained against Lotus is £732,652.95. The costs incurred by Comau in relation to the project before the Agreement was terminated were £207,272.00. The difference between these amounts is £530,380.95. This must be deducted from Comau's expected profit figure to give a lost profit figure of £616,951.67. In that context it seeks an interim payment of £500,000.
22. Lotus argues that the quantum of any claim for damages is nil because Lotus would have been entitled to terminate the Agreement pursuant to Clause 12.5 if it had not been in breach its obligations to pay the sums due under the Agreement and that damages should therefore be assessed on the basis that LLS would have exercised this right. The payment schedule was structured so that sums were payable at the start of each phase of the project. By the time of termination, the sums Lotus had already paid under the Agreement exceeded the costs that Comau had incurred in its performance of the Agreement. According to Lotus the position once (as I understand has happened) the whole of invoice E/11231 has been paid is that Comau has made a profit of approximately £500,000 under the Agreement.
23. In my judgment, viewing things at this interim stage in the proceedings:
 - (a) The present appears to be in the class of case in which the defendant's contractual obligations might have been lawfully performed in different ways.

(b) Accordingly the approach considered by the Court of Appeal in Durham Tees Valley Airport Ltd v BMI Baby Ltd, [2011] 1 All ER (Comm) 731 at [79], cited by Comau, is probably not in point. Patten LJ was there concerned with the question of what level of performance is to be assumed in the assessment of damages in the context of a contract which imposed a single obligation that did not specify any particular level of performance (e.g. number of aircraft movements).

(c) Rather, the present case appears to fall for analysis in accordance with the reasoning of Atkin LJ in Abrahams v Herbert Reich Ltd [1922] 1 KB 477 at 483:

“[i]f a merchant makes a contract to deliver goods to a shipowner to be carried by him for reward, and the merchant fails to provide the goods, the Court must first find what is the contract which has been broken; and if it was to carry the goods to one of two alternative ports at different distances from the port of loading at rates of freight differing according to the distance, the only contract on which the shipowner can sue is a contract for carriage to the nearer port. The plaintiff cannot prove a contract for performance of the more onerous obligation. This explains why in cases of this kind the Court regards only the lesser of two alternative obligations.”

(d) Comau’s contractual expectation interest accordingly appears to be limited to such profit as it might have made until such time as Lotus chose to “terminate for convenience” under Clause 12.5.

(e) It appears that Comau’s loss is to be assessed on the basis that but for its breach Lotus would have availed itself of clause 12.5 to reduce its liability to Comau. In point is this passage from Chitty on Contracts 31st edition Vol 1 at 26-074:

“If the defendant fails to perform, when he had an option to perform the contract in one of several ways, damages are assessed on the basis that he would have performed in the way which would have benefited him most, e.g. at the least cost to himself... A similar situation arises where the contract-breaker had an option to terminate the contract: if the claimant accepts the anticipatory breach of the defendant as a ground for terminating the contract, but the defendant could have exercised his option to terminate the contract so as to extinguish or reduce the loss caused by the anticipatory breach, the court will assess the damages for breach on the assumption that the defendant would have exercised the option”

See also Lord Denning MR in The Mihalis Angelos [1971] 1 QB 164 at 196G-197A.

(f) The fact, to which Mr Allen draws attention, that Lotus was only entitled to invoke clause 12.5 if it was not in breach, does not appear to be relevant because the assessment looks at what Lotus would do if there had not been a breach.

(g) It appears that any assessment of damages would proceed on the assumption that Lotus would have exercised its rights under clause 12.5, because any other assumption ignores the limited nature of Comau’s “expectation interest” – that Comau was never entitled to profits on the whole of the goods and services to be supplied pursuant to the Agreement but was only ever entitled to such profit as it might have gained prior to any “termination for convenience”. If the effect of clause 12.5 is

ignored when assessing damages, the effect would be to give Comau the benefit of a better bargain than it actually made.

(h) In light of what has happened it appears that Comau will not be awarded more than nominal damages even if it does establish liability.

Conclusion

24. In all the circumstances I refuse the application for summary judgment and for an interim payment.