JUDGMENT : His Honour Judge Richard Seymour QC : 25th March 2002. TCC.

Introduction

1. The Claimant, Chamberlain Carpentry & Joinery Ltd. ("Chamberlain") carries on business as a carpentry and joinery contractor. The Defendant, Alfred McAlpine Construction Ltd. ("McAlpine ") is a well known building contractor.

2. In about May 2001 McAlpine was engaged in a project which involved the undertaking of construction work at Arora Hotel, Old Bath Road, Poyle, Berkshire for Arora Park Heathrow Ltd. That work included various carpentry works, to which I shall refer in this judgment as "the Sub~Contract Works ".

3. By an agreement ("the Sub-Contract") in writing dated 10 May 2001 and made between McAlpine and Chamberlain Chamberlain agreed to undertake the Sub Contract Works for McAlpine. The Sub-Contract was in a standard form of Sub Contract Agreement used by McAlpine. That form of agreement included provision that:

   "The Sub-Contract Conditions set out contained or referred to under the Domestic Sub-Contract DOM/2 Articles of Agreement/1981 Edt. (including amendment(s) 1 to 8 (1998 Reprint) as recommended for use where the Main Contract is the J C. T. Standard Form " With Contractor's Design " (1981) as published by the Building Employers Confederation and approved by them and the Federation of Associations of Specialists and Sub-Contractors and the Committee Of Associations of Specialist Engineering Contractors, shall apply to this Sub-Contract as completed by the Schedule hereto as if fully set out hereunder and shall be fully incorporated herein, and the Sub-Contractor hereby acknowledges that he fully appreciates and understands the terms of the said Sub-Contract with the following additions and/or revisions and notwithstanding that the said Sub-Contract Conditions are not set out in full, the said Sub-Contract Conditions shall nonetheless apply."

4. The standard form of sub-contract identified in the form of Sub-Contract Agreement used by McAlpine was modified for the purposes of the Sub-Contract by the introduction of a clause 3 8.1 which was in the following terms:
   "Either Party shall be entitled to refer any dispute or difference (other than a matter as to which a decision is provided by this sub-contract to be final and conclusive) to adjudication in accordance with the Housing Grants, Construction and Regeneration Act 1996 and any such adjudication shall be undertaken in accordance with the Alfred McAlpine Special Projects Adjudication Rules (June 2000 Edition)."

   In this judgment I shall refer to the Alfred McAlpine Special Projects Adjudication Rules (June 2000 Edition) as "the Rules "

5. The Rules included the following:-

   "2(1) Any party to a construction contract as defined by the Act [that is, Housing Grants, Construction and Regeneration Act 1996] ("the referring party') may give written notice (the "notice of adjudication') of his intention to refer any dispute arising under the contract to adjudication ...

   (3) The notice of adjudication shall set out and provide:
   - *(a) the nature and a description of the dispute, details and relevant copies of the contract documents under which it arises (and of any related contract) and of the parties involved,*
   - *(b) details of where and when the dispute has arisen, and*
   - *(c) the nature and details of the redress which is sought, and*
   - *(d) the names and addresses of the parties to the contract (including the addresses which the parties have specified for the purpose of the giving notices)*
   - *(e) copies of a core set of relevant correspondence, instructions and other project material upon which the claim is based...*

   9(1) The adjudicator may, if requested by McAlpine, adjudicate at the same time on one or more disputes under the same contract.

   21 The adjudicator shall decide only the matters in dispute as identified in the notice of adjudication ....

   22 The decision of the adjudicator shall reflect the legal entitlements of the parties.

   25 Subject to paragraph 21 (b):

(1) In his decision, the adjudicator may, if he thinks fit, order any of the parties to comply peremptorily or otherwise with his decision or any part of it.

(2) The decision of the adjudicator shall be binding on the parties and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration), or by agreement of the parties.

26(1) The referring party shall be responsible for all of the costs of the parties incurred in the adjudication (including those of the adjudicator) on a full indemnity basis, save in circumstances where the referring party is McAlpine in which case the parties shall bear their own costs and expenses incurred in the adjudication and the parties shall be jointly and severally responsible for the adjudicator's fees and expenses, including those of any legal or technical adviser appointed under paragraph 14(g). "

6. In a letter dated 11 January 2002, headed "Notice of Adjudication " Chamberlain wrote to McAlpine so far as is presently material as follows:
"Notwithstanding previous discussions between ourselves, no agreement has been reached as to the value of our works on site.

Accordingly as at today's date a dispute arising under the Sub Contract exists between Chamberlain Carpentry and Joinery Ltd. and Alfred McAlpine Construction Ltd. as to the following matters, all of which are detailed in an enclosed referral notice.

a) The wrongful deduction of amounts included for acceleration of the works.

b) The wrongful deduction of amounts included for Preliminaries

c) The wrongful deduction of amounts for cost of Agency labour

d) The wrongful deduction of the alleged duplication of measured works

e) The non-payment of amounts for Prolongation of the Works on site.

f) The rates for measured works to the following items
1) Doors
2) Security Worm bolts
3) Lever handles
4) Pod architraves

g) Quantity of plastic architrave.

h) The ascertainment of fair and reasonable costs incurred by the Responding Party reference Clause 26. 1 of the AMSP Adjudication Rules.

i) In view of items a) - g) included above, the release of monies incorrectly withheld by Alfred McAlpine Special Projects.

For the avoidance of doubt the above matters constitute "The Dispute" arising under the Sub-Contract and which we intend to refer to Adjudication.

Given your continuing failure to reinstate amounts wrongfully deducted, we have no alternative but to refer this matter to Adjudication and the redress which we seek is as follows:
1) The Adjudicator's decision as to the amount owing and due to us of the amounts wrongfully withheld.
2) An order by the Adjudicator that his decision as to 1) above, be complied with peremptorily, ie forthwith, by Alfred McAlpine Construction Ltd.

In accordance with the Conditions of Sub-Contract we have applied to the Institution of Civil Engineers for the appointment of an Adjudicator and a copy of the Referral Notice is included with this notice of Adjudication."

7. Mr. Erie Mouzer was appointed adjudicator following the writing by Chamberlain of the letter dated 11 January 2002 from which 1 have quoted in the preceding paragraph. Mr. Mouzer produced a decision which, as corrected and re-issued, was dated 13 February 2002. By that decision ("the Decision") Mr. Mouzer determined that McAlpine should pay Chamberlain within 7 days the sum of £47,519.13 plus Value Added Tax, if applicable. That amount of Value Added Tax amounted to £8,315.85, making a total of £55,834.98. McAlpine did not pay that sum and in this action Chamberlain seeks enforcement of the decision of Mr. Mouzer.

The matters in issue

8. By way of defence to the claim for enforcement of the decision of Mr. Mouzer two points were taken on behalf of McAlpine by Mr. James Cross. The first was that on proper construction of the letter dated 11 January 2002 what Chamberlain sought to refer to adjudication was not "a dispute" but a number of disputes. The submission was that each of the matters set out in the letter dated 11 January 2002 at a) to i) in the passage from the letter which 1 have quoted constituted a separate dispute. It was further submitted that consequently the notice of adjudication which the letter dated 11 January 2002 purported to be was invalid and Mr. Mouzer, whose jurisdiction depended upon the terms of the notice of adjudication, therefore had had no jurisdiction. As a refinement of his basic submission Mr. Cross submitted, at paragraph 3.9 of his written submissions that:

   "Even if one accepts that the dispute could be fairly characterised as a dispute as to what amounts were due and owing to the Claimant under the Sub-Contract, sub-paragraph h) is nothing to do with any dispute as to sums due and owing under the Sub-Contract. "

9. The second point taken on behalf of McAlpine was, as it was put in the witness statement of Mr. David Weare on behalf of McAlpine dated 18 March 2001:

   "12. The Adjudicator's decision requires the Defendant to pay sums arising out of the Claimant's application for payment N02001986 dated 3 August 2001 ("Valuation 5").

   13. The Claimant's Notice of Adjudication does not seek relief in respect of Valuation 5 and there is no correlation between the items listed (a) to (i) in the Notice of Adjudication and Valuation 5 ...

   15. The Claimant did not refer any dispute as to its entitlement to payment to adjudication, in its Notice of Adjudication or in its Referral Notice."

   Mr. Cross elaborated upon those points in his written submissions as follows:

   "4.1 There are 2 aspects to this which are referred to in the Witness Statement of David Weare. The first is that the Notice of Adjudication failed to identify the dispute; the second is that the Notice of Adjudication did not refer a claim for payment to adjudication.

   4.2 The second aspect will not be further pursued at the hearing. It can be noted that it was not a point taken before the Adjudicator either.

   4.3 So far as the first aspect is concerned, the starting point is that the Adjudicator's jurisdiction is not derived from the further documents which come into existence following the notice of adjudication: ***KNS Industrial Services v Sindall*** *[2000] CILL 1652 ....*

   4.6 The short point is that it should not have been left to the Adjudicator to try to make sense of the Notice of Adjudication and to address the issues raised in the Notice of Adjudication by reference only to Application/Valuation No. 5. The Notice of Adjudication should have defined the dispute and made the ambit of the dispute clear."

   In his oral submissions Mr. Cross explained that the point which he was seeking to advance was really that the letter dated 11 January 2002 did not identify with sufficient precision any dispute fit to be determined. In other words, nothing was referred to Mr. Mouzer for adjudication, so he had no jurisdiction to decide anything.

10. Thus the issues in the present case seem to depend upon the proper construction of the letter dated 11 January 2002 and, in particular, upon the questions:

   (i) did the letter indicate with sufficient clarity to comply with the requirements of Rule 2(3) of the Rules a dispute fit to be determined by adjudication?

   (ii) if so, what was the dispute or what were the disputes which were the subject of the letter?

The proper approach to construction of the letter dated 11 January 2002

11. Both of the issues identified in the preceding paragraph give rise to the need to consider how to approach the proper construction of the letter dated 11 January 2002.

12. My attention was drawn by Mr. Benjamin Pilling, on behalf of Chamberlain, to some observations of H.H. Judge Anthony Thornton Q.C. in **Fastrack Contractors Ltd. v.Morrison Construction Ltd**. [20001 BLR 168 at page 176:

"It is to be noted that the HGCRA refers to a Dispute " and not to Disputes". Thus, at any one time, a referring party must refer a single dispute, albeit that the Scheme allows the disputing parties to agree, thereafter, to extend the reference to cover "more than one dispute under the same contract " and "related disputes under different contracts ". During the course of a construction contract, many claims, heads of claim, issues, contentions and causes of action will arise. Many of these will be, collectively or individually, disputed. When a dispute arises, it may cover one, several or many of one, some or all of these matters. At any particular moment in time, it will be a question of fact what is in dispute. Thus, the "dispute " which may be referred to adjudication is all or part of whatever is in dispute at the moment that the referring party first intimates an adjudication reference. In other words, the Dispute " is whatever claims, heads of claim, issues, contentions or causes of action that are then in dispute which the referring party has chosen to crystallise into an adjudication reference."

Mr. Pilling invited me to approach the case before me in what he submitted was the manner indicated by H.H. Judge Thornton Q.C. in the passage which 1 have set out. I think that Mr. Pilling came close to submitting that what H.H. Judge Thornton had said amounted to a Dispute " in the context of adjudication was whatever the referring party chose to identify in a notice of adjudication.

13. Mr. Cross submitted that 1 should not follow the approach of H.H. Judge Thomton Q.C., at least if I were persuaded that H.H. Judge Thornton meant what Mr. Pilling submitted he had meant. Mr. Cross drew to my attention a comment of Lord Macfadyen on the approach of H.H. Judge Thornton Q.C. in Barr Ltd. v. Law Mining Ltd., an unreported case: "There is in my view, someforce in Mr. Currie's criticism of His Honour Judge Thornton's analysis in Fastrack Contractors Ltd of what constitutes a dispute. If everything currently in dispute between the parties forms a single dispute, paragraph 8(1) is severely restricted in scope or perhaps even deprived of content. "

14. In my judgment what, in any given case, constitutes a “dispute" fit to be referred to adjudication as a single dispute is a question of fact. It is possible to contemplate both a substantial dispute with a number of different elements, which is nonetheless properly characterised as but one “dispute", and a situation in which parties are in difference simultaneously about a number of matters, but by no stretch of the imagination would any reasonable man say that there was only one “dispute". The correct analysis in any particular case depends upon the facts of that case. I do not consider that it is a correct understanding of the comments of H.H.Judge Thornton QC that he was contemplating that it was up to a referring party in his notice of adjudication to characterise as single “dispute” whatever he chose. Obviously the referring party has the ability to describe as he wishes what he wants to refer to adjudication, but it would be wrong, in my judgment, to permit the referring party to be the sole judge of whether what is referred is in truth a single “dispute". It is only against the background of the matter or matters in issue between parties at the time a notice of adjudication is given that it is possible to address the questions what, if anything, has been referred to adjudication, and is it a single “dispute". Those questions, it seems to me, fall to be addressed objectively in any case in which they arise.

15. Subject to the attention drawn to the observations of H.H. Judge Thornton Q.C. and the comments of Lord Macfadyen, it was common ground between Mr. Pilling and Mr. Cross that the proper approach to construction of a document such as the letter dated 11 January 2002 written by Chamberlain to McAlpine was that indicated by Lord Hoffinan in I**nvestors Compensation Scheme Ltd. v. West Bromwich Building Society** [1998] 1 WLR 896 at pages 912H to 913F: *"The principles may be summarised as follows..*

    (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the lime of the contract.

    (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that

it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) *The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.*

(4) *The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars: the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see* ***Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd****. [1997] AC 749.*

(5) *The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in* ***Antaios Compania Naviera SA v Salen Rederierna*** *AB [1985] AC 191,201:*

> *"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."*

Consideration and conclusion

16. Applying the principles enunciated by Lord Hoffman to the construction of the letter dated 11 January 2002 it seems to me that it is plain that what Chamberlain referred to adjudication by the letter was a dispute as to how much it should be paid by McAlpine. That was what was meant, it seems to me, by the recitation that "no agreement has been reached as to the value of our works on site" before the passage in which the eight particular matters set out at a) to i) were listed, and the claiming of "The Adjudicator's decision as to the amount owing and due to us of the amounts wrongfully withheld. " and " An order by the Adjudicator that his decision as to 1) above be complied with peremptorily "as the relief sought. Further, at i) in the list to which 1 have referred what Chamberlain identified in terms as an aspect of the dispute was "release of monies incorrectly withheld by Alfred McAlpine Special Projects". On no sensible interpretation was Chamberlain merely seeking declaratory relief. What it wanted was payment of a sum to be calculated having regard to the particular matters set out at a) to i) in the letter dated 11 January 2002. The dispute which was the subject of the letter dated 11 January 2002 was, in my judgment, a single dispute as to what sum should be paid by McAlpine to Chamberlain. The fact that in order to reach a conclusion on that matter it would be necessary to consider a number of elements which Chamberlain contended were relevant to the overall calculation of what should be paid does not seem to me to mean that a dispute as to what was payable was in reality a series of disputes as to what was payable under a number of different heads.

17. I reach the conclusions expressed in the preceding paragraph without having regard to the contents of the Referral Notice which was sent under cover of the letter dated 11 January 2002. I was urged by Mr. Pilling to have regard to that Referral Notice in construing the letter. I do not consider that it would be right to do so. A valid notice of adjudication obviously may incorporate by reference other documents. If it does, it must be construed together with those incorporated documents. Difficulty may arise if documents are incorporated by reference into a notice of adjudication which are intended to determine or influence that which is the "dispute" which is referred to adjudication. There is obvious scope for confusion as to exactly what has been referred if the definition of the "dispute" is said to be found in more than one document. However, it is not enough to incorporate a document

into another document by reference that the first document is merely sent with the second. Nothing in the letter dated 11 January 2002 indicated that the description of the “dispute" given in it was intended to be supplemented by anything in the Referral Notice. In my judgment the letter dated 11 January 2002 was free-standing as a notice of adjudication. That was the description given on the letter itself.

18. The fact that included within the items listed in the letter dated 11 January 2002 was "h) The ascertainment of fair and reasonable costs incurred by the Responding Party reference Clause 26.1 of the AMSP Adjudication Rules", did not, in the circumstances, mean that there was a "dispute" separate from the “dispute" as to how much Chamberlain was entitled to be paid by McAlpine. The necessity to address the question of McAlpine's costs arose because of the reference to adjudication of the “dispute" as to Chamberlain's entitlement and the requirement under Rule 26 of the Rules that Chamberlain as the referring party pay all of both sides' costs of the adjudication. There was no dispute about that matter before the letter dated 11 January 2002 was written, and, depending on how much McAlpine sought as costs, there might never be a dispute about it. However, fixing the costs to be paid by Chamberlain was an aspect of any dispute to which McAlpine was a party and in relation to which the adjudication was governed by the Rules. The reference to the fixing of the costs in the letter dated 11 January 2002 did not, in my judgment, mean, as Mr. Cross submitted in his alternative argument on the "multiple disputes" point, that on any view what was referred to in the letter dated 11 January 2002 was (i) a dispute as to the entitlement of Chamberlain as to payment for the Sub-Contract Works and (ii) a dispute as to the costs which Chamberlain had to pay to McAlpine as a result of referring the first dispute to adjudication. The second was but an aspect of the first.

19. There being, as it seems to me, a dispute as to how much, if anything, McAlpine should pay to Chamberlain, and that dispute being, in my judgment, properly referred to the adjudication of Mr. Mouzer, a remaining issue is whether it is a valid objection to Mr. Mouzer's decision that he answered the dispute referred to him by reference to Chamberlain's latest application for payment which had fallen due prior to his determination, and not that which was later in time, but which had not fallen due. I cannot see that it is. Mr. Cross raised this point in the context of his submission that no “dispute" identified with sufficient clarity was referred to adjudication by the letter dated 11 January 2002. He said that Mr. Mouzer had had to go hunting through the material presented to him to find what he, Mr. Mouzer, considered was an application which should form the basis of his consideration of what was due to Chamberlain. That is as may be. However, it does not seem to me to be relevant to Mr. Mouzer's jurisdiction to decide the dispute referred to him. In my judgment, what that dispute was clearly indicated in the letter dated 11 January 2002 and Mr. Mouzer correctly understood what he was being asked to decide.

20. In the result Chamberlain is entitled to judgment in the sum of £55,834.98 plus interest, as to which I will hear Counsel.

Benjamin Pilling (instructed by Beale & Co. for the Claimant)
James Cross (instructed by Davies Arnold Cooper for the Defendant)