

JUDGMENT : Mr Recorder Lane QC : Gloucester County Court : 8th August 2001

1. This is an appeal from a decision of Deputy District Judge Guest on the 28th of November last year, ordering the Defendant, who is now the Appellant in this appeal, to pay the Claimant, who is now the Respondent, the capital sum of £1,175 together with interest, fees and costs.

The Parties :

2. The Appellant is a firm of architects acting at all material times by one of its partners, Mr Christopher Smart, and the Respondent is a limited company and is a building contractor based in the North Devon area and is represented by Mr Tolley of that firm today.

Background :

3. The Respondent entered into two separate JCT agreements for minor building works with the Torrridge District Council. Article 6, Clause 8.1 and supplemental condition D of those agreements provided for adjudication between the parties in the event of a dispute. Disputes did arise between the Respondent and the Council on both agreements. Those disputes were referred to adjudication and Mr Smart of the appellant firm was appointed the adjudicator in respect of both those agreements. It was the Respondent's solicitor, in fact, who proposed him. So there then came into being an adjudication agreement between the Respondent, the Torrridge District Council, and the Appellant. The adjudication agreement was signed by the parties on or about the 30th of May of last year, and provided for the adjudicator to be remunerated in accordance with paragraph three at pages 48 and 49 of the trial bundle, and in accordance with Schedule D6.1 and D6.2 at page 51 of the bundle.
4. Between the 1st of June and the 1st of July Mr Smart investigated the two disputes and delivered two written decisions on or about the 1st of July. He also enclosed as part of his decisions his fees, and I refer to the bundle at pages 37 and 43 in respect of each contract, where he claimed his fees in the sum of £1,561.50 plus VAT.
5. On or about the 19th of July the Respondent paid the Appellant's fees in full but, and I quote from their claim at page 11 of the bundle, "under duress," alleging by implication and subsequently that the hours performed by Mr Smart were unreasonably excessive.
6. On the 26th of July the Respondent issued a claim to recover the alleged overpayment. On the 30th of September there was an order made by District Judge Rutherford, "that the Claimant" who is now the Respondent "clarify its case by filing and serving by the 14th of November any report from an independent architect upon which it intends to rely as showing that the time spent by the Defendant was unreasonable." The Respondent did not file such a report at any time, either for the hearing below or for this appeal.
7. On the 28th of November Deputy District Judge Guest heard the claim in the small claims court at Bath. Mr Smart and Mr Tolley appeared for their respective firms, and made their representations. The Deputy District Judge found in favour of the Respondent on two grounds. First that an adjudicator does not as a matter of law enjoy an immunity from a claim that his hours and remuneration are unreasonable (see Schedule D8 of the agreement at page 51) and second, that Mr Smart's hours were, in fact excessive. Accordingly, he ordered the Appellant to repay to the Respondent the sum of £1,395 by the 11th of December.
8. By letter of the 7th of December the Appellant repaid that amount, but reserved its rights in respect of an appeal. Notice of Appeal was subsequently issued on the 12th of December and on the 1st of March of this year leave to appeal was granted.
9. I refer now to each of the two grounds of this appeal. First immunity, and second excessive hours.

First : Immunity :

10. Schedule D5 to the agreement is entitled "Immunity" and it says this: "The adjudicator shall not be liable for anything done or omitted in the discharge or purported discharge of his function as adjudicator unless the act or omission is in bad faith. And this protection from liability shall similarly extend to any employee or agent of adjudicator.

11. In my judgment these words, in the absence of any ease law to the contrary, must be given their ordinary and natural meaning. The Appellant's fees, in my judgment, do form an integral part of the adjudication agreement. I have already referred to pages 47, 48 and 49 of the bundle, and to clause D6 at page 51. Accordingly, in my judgment, the adjudicator's fees do fall within the words "anything done or omitted in the discharge or purported discharge of his functions as adjudicator." These fees may be challenged if, and only if, the adjudicator has acted in bad faith.
12. There is no suggestion or evidence that Mr Smart has done so. Mr Tolley accepts that Mr Smart did the hours claimed. I am fortified in coming to this conclusion by the analogous position of arbitrator's fees (and I underline the word arbitrator) prior to the enactment of The Housing Grants Construction and Regeneration Act of 1996.1 have been referred to Mustill and Boyd on Commercial Arbitration, from paragraphs 239 to 240. In the then absence of a statutory regime, the arbitrator's fees could only be challenged in very limited circumstances. I refer in particular to page 240 of Mustill and Boyd. I quote, "If the situation is one in which a review under section 19 of The Arbitration Act is not feasible, the complainant must find a way to nullify the taxation in the award, so he can either resist a claim by the arbitrator or, if he is paid in advance, bring an action to recover the excess. For this purpose he must attack the award itself, alleging that the charges are so excessive that the arbitrator commits misconduct by insisting upon them and he must then induce the court either to set the award aside wholly or in part, or remit the award to the arbitrator for reconsideration. There is no doubt the court has jurisdiction to make an order on these lines since the discretion under section 18 of the Act is one which must be judicially exercised in good faith. Thus, if the court is satisfied from the size of the sum awarded or from other evidence that the arbitrator has either put his own interests before those of the parties or has misconceived the basis on which he should carry out the taxation, there is misconduct which justifies the remission or setting aside of the award. Consideration of this issue is not the same as retaxation under section 19. The court does not substitute its own view for that of the arbitrator. In order to make good an allegation of misconduct very clear evidence is required and it is not enough to show that the amount demanded is more than the court would have considered appropriate if it had been approaching the matter afresh."
13. Here there is no statutory regime to re-examine the adjudicator's fees, and I am satisfied in the absence of such a statutory regime the principles of those common law authorities as set out in Mustill and Boyd apply and, indeed, have in spirit been expressed in what is now Schedule D paragraph eight.
14. It follows, therefore, that I accept in their entirety the submissions of the Appellant on this ground.

Second : Excessive Hours :

15. The second ground is the allegation of excessive hours. The Respondent, as I have already indicated, had leave to call expert evidence from an architect/arbitrator to indicate that the Appellant's hours were unreasonable. The Respondent, however, did not do so, and Mr Tolley, of the Respondent firm, has in my judgment simply relied on his own opinion that the hours were excessive. In the absence of such expert evidence, the Deputy District Judge applied the criterion of the reasonably competent solicitor. In other words, how long would it take such a solicitor to read the files in this case and write his decision.
16. I regret to say that in applying that criterion the Deputy District Judge fell into grave error. First, he was not comparing like with like. I accept Mr Stead's submissions. The role of an adjudicator is wholly different from that of a solicitor who is preparing a client's case for trial. The solicitor prepares a one-sided case for argument in court. The adjudicator, on the other hand, had to read the files - in this case a total of 834 pages - interview the parties, visit the sites, and then prepare his decisions. He was acting in the role of both investigator and Judge.
17. Second, if comparative evidence was relevant and admissible then it should have been in the form of an expert architect/adjudicator; as the court had earlier made provision for, and no doubt by implication wished to hear from.

18. Thirdly, a court must be very slow indeed to substitute its own view of what constitutes reasonable hours. I quote again from Mustill and Boyd, at page 240, "The court does not substitute its own view for that of the arbitrator. In order to make good an allegation of misconduct, very clear evidence is required and it is not enough to show that the amount demanded is more than the court would have considered appropriate if it had been approaching the matter afresh."
19. For these reasons I reject the allegation that the hours, which were in fact truly done by Mr Smart, were excessive, and that the second ground of this appeal likewise fails. It follows, therefore, that the appeal succeeds.

Mr Stead: *Your Honour said that the second ground of the appeal fails. I think.....*

Recorder: *I'm sorry, the... I meant...*

Mr Stead: *The second ground succeeds, probably...*

Recorder: *The second ground succeeds, yes.*

Mr Stead: *In those circumstances, may I ask for an order that the appeal be allowed, the order of the Deputy District Judge be set aside?*

Recorder: *Yes.*

Mr Stead: *Secondly, that the claim be dismissed with the Claimant being ordered to repay to the Defendant the sum of £1,395 which has been paid.*

Recorder: *Right.*

Mr Stead appeared on behalf of the Appellant

Mr Tolley appeared in person