Bridgeway Construction Ltd v Tolent Construction Ltd [2000] 04/11

J U D G M E N T (Revised) **JUDGE MACKAY:** TCC Liverpool District Registry : 11th April 2000.

1. This case concerns the provision of the Housing Grants, Reconstruction and Regeneration Act 1996, which sets up a system of adjudication to protect parties to construction contracts who may be caught up in the web of large contractors making allegations, pursuing large counterclaims, not being paid themselves, and therefore depriving, sometimes rightly and sometimes wrongly, the subcontractor of their rightful monies on an immediacy basis to enable the subcontractor to continue working. We are all familiar with the old situation where a main contractor would string along a subcontractor until he went bust.

2. So the 1996 Act provided for a system of adjudication during the contract works whereby persons who were the contracting parties, either the main contractor or the subcontractor, could go along and get decisions and statements of monies owing at any particular time within a very short period.

3. Accordingly, because of the need to have expedition, the element of costs was not in the forefront of the eyes of the makers of this legislation, and it is quite clear that Parliament did not consider the question of costs, although the question of costs was considered by other reporting parties and experts who gave their opinions and recommendations, some of which was to the various bodies which gave rise to the Housing Grants Act.

4. Because of the need for expedition, it is plainly the policy of the courts to minimise the question of costs and to let the decisions of adjudicators stand on their own two feet, even if they are wrong, because they can be later on, if necessary, swept up in later arbitration and court dispute proceedings.

5. Main contractors and subcontractors contract on contracts, and here we have claimants who acted pursuant to a contract made with the main contractors. The contractors and subcontractors, in their contract incorporated the Act and the powers of the Act, and dealt with those posers. They also incorporated the CIC Model Adjudication Procedure. A scheme of procedure was set out in the contract.

6. In this particular case, the claimants, the subcontractors, made an application to the adjudicator which the adjudicator acted upon, and the adjudicator awarded them a sum of money. In that referral to the adjudicator, the claimants also asked for their costs.

7. The adjudicator rejected this request for costs because of the terms of the contract. The contract and the relevant page thereto is set out at page 35 of the small bundle of documents which is the exhibit to the witness statement of David Robert Michael Oram, and the relevant clauses are 13.1.6 and, to a certain extent, 13.1.7.

8. 13.1.6 is the vital clause, and it amends the CIC Model Adjudication Procedure, which relates to the question of costs and has entries thereto. It says, in clause 28:
"The parties shall bear their own costs and expenses incurred in the adjudication."

9. In clause 29, it says:
"The parties shall be joint and severally liable for the adjudicator's fees and expenses."

10. This particular contract deletes those two terms and puts two more terms in. The new clause 28 is: "The party serving the Notice to Adjudicate shall bear all of the costs and expenses incurred by both parties in relation to the adjudication, including but not limited to all legal and experts fees."

11. Clause 29:
"The party serving the Notice to Adjudicate shall be liable for the adjudicator's fees and expenses."

12. So there is a difference between the CIC Procedure and this particular contract.

13. It is not surprising that the adjudicator came to decide the way he did, because he was bound by the terms of the contract and in the adjudication he was merely adjudicating pursuant to those terms.

14. The claimants are not satisfied by all this, because there has been deducted from the contract sum which is liable to be paid by the main contractors, the defendants to the claimants, the sum which is represented to be the legal costs, etc, pursuant to the new clause 28. They take umbrage with the

amount involved and they dispute the amount involved, but there is very little they can do about it unless they attack the contract itself, because everything stems from the contract.

15. So the claimants have come to court to ask for a declaration that the contractual terms which I have read out, have, by their very nature, an effect of inhibiting people from pursuing their remedies under the 1996 Act and therefore these terms are void.

16. If they are void, then certain consequences follow, namely that the adjudicator should not have acted upon them and also, certain steps can now be taken to deal with the situation if they are declared to be void.

17. The essential submissions of the claimants in this particular case are that these two contractual terms, clauses 13.1.6 and 13.1.7, are void. If they are void, if the adjudicator's decision is that the claimants must pay all of the unsuccessful party's costs and fees, is this in excess of jurisdiction? If it is not void, was the adjudicator entitled to decide that the defendants were to recover all their costs and expenses and charges without referring it to the claimants, without giving the claimants the chance of arguing the point, and are all the costs in excess of jurisdiction?

18. The claimants' fourth point is: did the parties, by their submissions, give the adjudicator power to determine these relevant cost provisions?

19. The essential nature of the claimants' case before me is that these clauses are void, as I have said, because they tend to inhibit the contracting parties from pursuing their lawful remedies.

20. Comfort is taken from a perusal of the case of **Johnson v Moreton [1980]** AC 37, a House of Lords case. That dealt with the Agricultural Holdings Act 1948 and a lease which prohibited a tenant from acting under that Act in taking the benefit of that Act.

21. The House of Lords held that such a term was void in that it purported to avoid, get round, eliminate, the difficulties caused to the landlord by the operation in law of that Act.

22. What the claimants say in this particular case is that similar considerations apply and in as much as this clause, 13.1.6, inhibited a party from pursuing the remedies provided by the adjudication procedure, then that clause is void.

23. The claimants also say that if the adjudication procedure is void under these terms, then all the points that the claimants argue can be achieved.

24. The claimants have a list of claims following such a declaration.

25. The defendants take the point that the clause is not void. They say it is not unfair and also, it applies to both parties. But their main contention before me is that it is not void because it is part and parcel of a scheme adopting the procedure, adopting the Act.

26. The reference to the Agricultural Holdings Act is, the defendants say, irrelevant to this issue because that was a lease which invalidated the operation of the Act, whereas this is merely a clause which deals with costs, something upon which the Act itself, the Regeneration Act of 1996, is silent. Therefore, if I were to throw out these clauses, I would be interfering with the procedure set out in the contract and agreed to by the parties.

27. They also say, as a subsidiary point, that the adjudicator himself dealt with these matters and decided that the claimants' arguments on costs were unsatisfactory having regard to the contract, and in as much as adjudications are -- and I use the word in this context -- sacrosanct, then the claimants are caught by that adjudication and therefore their claim must be dismissed.

28. I have come to the view that there should be no interference with this contract. I do not consider that the terms are either void or -- and it was not used in this particular case but I say so to resolve any doubt -- voidable.

29. It seems to me that main contractors and subcontractors are entitled to develop contracts to implement Acts of Parliament. There are good grounds for saying that a system for costs is important and relevant. The mere fact that in this particular case the claimants are disgruntled, perhaps

understandably so, about their costs situation, does not entitle me to say, "Well, these clauses are a bit unfair. Let's change them."

30. Also, it seems to me that the case in the House of Lords, the Agricultural Holdings Act and **Johnson v Moreton,** is not relevant to the issue which I have to decide. In that particular case there was a deliberate attempt -- and it would have been a successful attempt had it not been for the intervention of the courts to take away an Act of Parliament and its right from the very people for whom this Act of Parliament was designed to help and to provide comfort and security.

31. In this particular case we are concerned only with costs relating to adjudication, which is not the subject matter of any Act of Parliament, and in fact the alterations to sections 28 and 29 are not alterations to any Act of Parliament but merely to the CIC Model Procedure.

32. It seems to me that contracting parties can contract how they like and it is unsatisfactory legally, if, at the end of the day, a disappointed party can come along and say, *"Well, the contract was entirely wrong."*

33. Therefore, I find that the terms are not void and that the application to remove them and to alter the parties' position as a consequence is unsuccessful.

34. Also, I take the view that as the claimants have argued matters before the adjudicator not on pounds, shillings and pence but on principle as to who should pay or who should not pay with regard to the contractual matters the subject matter of the adjudication, they are bound by the adjudication. They gave the adjudicator the right to determine such issues and they are bound by his determination.

35. Therefore, it seems to me that the issues put forward by the claimants are decided in this way, namely that there was no voidness in the contractual terms; that the mere fact. that the claimants must pay the costs of the other side in the adjudication is not in excess of jurisdiction; that with regard to the costs, expenses and charges, the adjudicator was entitled to find as he did. The mere fact that the parties did not argue how much should be the costs does not invalidate the activities of the adjudicator. In their submissions, the parties dealt with the matter fully enough for the adjudicator to give his findings, which he did.

36. Therefore, unless the parties are prepared to have some examination of the sum which was deducted by the defendants' solicitors, or the claimants can mount some legal action which can be the basis of such an examination, the claimants are left in the position that they are having to pay this sum of money by way of defendants' legal and other costs pursuant to the contract.

[Proceedings continue in separate volume]

Ms Dumsaresq appeared on behalf of the Claimants.
Mr Akenhead appeared on behalf of the Defendants.