All In One Building & Refurbishments Ltd v Makers UK Ltd [2005] Adj.L.R. 12/19

JUDGMENT : His Honour Judge Wilcox : TCC. 19th December 2005.

1. All In One Building & Refurbishments Limited (AIO) are building contractors. They were engaged under a sub-contract dated 22 November 2004 by Makers Ltd (Makers) to refurbish flats in a development at Northampton. AIO were incorporated on 19th May 2004. They used agency labour and hired in necessary plant. The interim payment provisions it seems were operated satisfactorily during the early part of the contract.

2. It is evident from the correspondence between the parties in July 2005 that there were issues as to the provision of labour to the project by AIO. On 26 July 2005 Makers proposed that in relation to 28 flats other sub-contractors should undertake AIO's work and prepared an agreement to that effect.

5. On 27 July a counter proposal was put forward by AIO that they would leave the site completely allowing other sub-contractors of Makers' choice to complete the works subject to payment of a reasonable financial sum from Makers for AIO to depart the site.

6. On 27 July 2005 Makers noted AIO's letter characterising it as an acceptance of the need to sub-let their works and confirming that in relation to a proposed financial package such a settlement should be based upon the value of the works to date: *"… as such it is not in our financial interests to allow All In One to void their contractual obligation …"*

7. On 29 July Makers issued a notice under Clause 14 of the sub-contract notifying an intention to determine the sub-contract alleging default under Clause 14.2.1.1 for having no supervision or labour on site to carry out the works, and, as they were obliged to do, giving AIO five days in which to remedy the situation.

8. On 29 July 2005 AIO issued a written Confirmation of Verbal Instruction (CVI) given by Makers Ltd dated 29 July 2005, it said: *"… as per Makers Ltd verbal instruction all of our labour has been asked to leave site at 9.30 am …"*

9. It bore the signature of Maker's quantity surveyor, Mr Steve Bullen, and was countersigned on behalf of AIO.

10. On 12 August 2005 AIO wrote to Makers: *"We formally put on record that on Thursday 28 July 2005, Makers UK Ltd engaged third parties to undertake our works and on Friday 29 July 2005 Makers instructed our site management and operatives to vacate the site at 09.30 hours. This instruction has been recorded on Confirmation of Verbal Instruction No.1/204141 and is signed by an authorised agent of our Makers. As a result, All In One Building & Refurbishments Ltd are excluded from the project's premises and therefore no longer have possession of the site.*

    Your company's action is a repudiatory breach of contract and as such, we are no longer bound by the sub-contract and hereby terminate our employment under the sub-contract.

    We shall be forwarding our account shortly, which will include our claim for damages flowing from your breach.

    A dispute now exists under the sub-contract."

11. On 15 August AIO sent a draft assessment of account and claim up to the date of their determination of employment under the contract.

12. It amounted to £547,411.05. It was made up of five items. Four of those items were supported by eleven spreadsheets with detailed information. Those items comprised: a contract schedule of works £239,855.88; instructions £118,097.59; flooring package £4,810.24; materials on site £14,811.95 and loss and expense matters £9,922.80.

13. The fifth item amounted to £159,912.59, it was for "*claim for loss of overheads and profit on element of incomplete works arising out of the repudiatory breach by Makers UK Ltd"*. The only detail vouchsafed then or later was that this was 21.10%. No breakdown was given and it was not a figure that was implicit in the build up of figures provided.

14. On 15 August AIO served a notice of referral invoking the adjudication procedure under the Housing Grants Construction & Regeneration Act 1996.

15. It was drafted by their solicitors. The requirement for such a notice is to give the receiving party notice of the dispute to be referred, to give the appointing body precise details of the dispute to avoid appointing an adjudicator who may have conflicting interests, and to enable the adjudicator to be able to consider the acceptance of an appointment to resolve such a dispute within a very tight timescale.

16. The referral notice states: *"The nature of the dispute is non payment by Makers of AIO's Interim Application dated 15 August 2005 in the gross sum of £547,411.05 in respect of which £309,866.90 is outstanding together with VAT.*

    2. No notices to withhold have been given by Makers with respect to this application.

    Further AIO will say that Makers is in repudiatory breach of contract in that on 29 July Makers informed AIO that it was to leave site and thereby deny AIO possession of the site in question.

    AIO will ask the adjudicator to:
    (1) make a decision as to whether or not Makers acted in repudiatory breach of contract by ordering them to leave site on 29 July 2005;
    (2) direct that Makers do pay to AIO the outstanding sum of £309,866.90 or such other sum as the adjudicator shall direct."

17. This was followed by a claim for interest and payment of fees.

18. Miss Franklin contends that the notice defines the extent of the adjudicator's jurisdiction and that at the time of the referral there were no disputes between the parties at all. Mr Lamont submits that the notice of referral should be read together with AIO's letter of 12 August which clearly identified the claims for money owed and for a declaration that Makers had wrongfully repudiated the contract and for damages for breach.

19. It was clear that disputes had arisen. It is a matter of fact whether a dispute has arisen. Denial of a claim gives rise to a dispute.

20. A denial of a claim may be express or by conduct. In ***Collins Ltd v Baltic Quay Management (1994) Ltd*** [2005] 1 BLR p.63 the Court of Appeal approved the approach of Jackson J as to some relevant considerations for a court ascertaining whether or not a dispute had arisen in ***Amec Civil Engineering Ltd v Secretary of State for Transport***, October 2004, unreported.

21. Relevant to the present case are the propositions 4, 5 and 7 in paragraph 68 of that judgment:

    "4. The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted. The respondent may prevaricate, thus giving rise to the inference that he does not admit the claim. The respondent may simply remain silent for a period of time, thus giving rise to the same inference.

    5. The period of time for which a respondent may remain silent before a dispute is to be inferred depends heavily upon the facts of the case and the contractual structure. Where the gist of the claim is well known and it is obviously controversial, a very short period of silence may suffice to give rise to this inference. Where the claim is notified to some agent of the respondent who has a legal duty to consider the claim independently and then give a considered response, a longer period of time may be required before it can be inferred that mere silence gives rise to a dispute.

    7. If the claim as presented by the claimant is so nebulous and ill-defined that the respondent cannot sensibly respond to it, neither silence by the respondent nor even an express non-admission is likely to give rise to a dispute for the purposes of arbitration or adjudication."

22. Miss Franklin relies upon the oft cited passages as to what constitutes a dispute in ***Fast Track Contractors v Morris*** [2000] 1 BLR 171 at p.176 and **in** ***KNS Industrial Services (Birmingham) Ltd v Sindall Ltd*** [2000] Con LJ 170 at p.179. These early helpful analyses with others were considered in ***Amec v Baltic Quay*** (supra).

23. It is evident that the proper approach is to adopt a rigorous and common sense approach, bearing in mind that these issues arise in a comparatively modest construction dispute and there is no warrant

for being legalistic and overly technical when considering what labels are used when identifying whether and what dispute has arisen.

24. The court must look to the substance of the claims identified and denied and not to the descriptive labels variously attached by lay persons and professionals.

25. Thus, in this case, I do not accept Miss Franklin's argument that since the original demand for payment was described in terms of an interim application that the claim could not be considered as a dispute until the 30 days contractually allowed for interim payments had lapsed.

26. From the very outset, and by 13 August it was clear that both parties accepted that the contract had wrongfully been brought to an end although each party blamed the other for being the contract breaker, Makers later going as far as saying that the CVI was not signed by their quantity surveyor. It was also evident that Makers were not going to pay what was claimed by AIO for the alleged financial consequences of the breach. By the time of the notice of referral issue was joined as to the claims.

27. Miss Franklin's fallback argument that the assessed figures were akin to a draft final account, and that because under the contract two months was allowed for payment of a final account a dispute would not crystallise until the expiration of that period I also reject. The contractual date for payment is prescribed in the contract depending upon whether it is characterised as an interim payment or a final payment, but a distinction must be drawn between the date for payment and an entitlement to payment. It was the entitlement to payment that was being denied in relation to these claims. The contract may prescribe a time when payment becomes due and that may be a material factor amongst many others in arriving at the conclusion as to whether a claim is denied or not. It is not determinative as to whether a dispute has arisen.

28. It is apparent that the claim submitted by AIO as to the first four items was in a form that could readily and swiftly have been accepted by Makers professional employees in detail. It was a claim that had been foreshadowed. The fifth item falls within a different category in that there was not provided the evidential detail to back up the claim there and then. However the entitlement to such a claim was something that in principle could be accepted or rejected. It was in fact rejected because it was a claimed consequence of the repudiatory breach that Makers said from the outset was the responsibility of AIO. Whatever the level of supporting evidence that might have been furnished it was clear that Makers would not entertain such a claim.

29. The adjudicator found difficulty with this head of claim. At paragraph 6(iii) of his award he spoke of: *"The substantial inherent risk in issuing a Decision on a £159,912 claim that had neither been properly evidenced nor tested."*

30. It is a matter of some surprise that he contemplated such a decision. If it was not proved he should have dismissed that aspect of the claim. It is for the referring party to pursue and prove his claim. However the adjudicator went on to conclude: *"That it was appropriate to request from AIO particularisation and evidence of its damages claim. AIO provided the information on 18 October, as an attachment to an email of that date. By letter dated 20 October, I expressed the preference to allow Makers the opportunity of making a full response to the information provided with email, and I made the request for an extension to the deadline for my Decision. AIO consented to the request. I was then able to allow Makers* ***the time that it said it required*** *to respond to the particulars provided by AIO and I set the service deadline of Monday 24 October 2005."* (Emphasis provided by the adjudicator.)

31. In my judgment at the time of the notice of referral there was a dispute as to the issue of interest and overhead. I do not accept that it was a nebulous or vague claim as submitted by Miss Franklin. As to this element of the notice of referral I am satisfied the adjudicator had jurisdiction as to that claim and AIO accepted his belated invitation to pursue this aspect of the claim by providing the appropriate detail in evidence rendering it evidentially viable and Makers sought further time to respond to the late particularised claim.

32. Maker's secondary case is that the decision of the adjudicator to deal with the issue of repudiation damages, ie the profit and overhead claim offended against the rules of natural justice. Miss Franklin

contends that the adjudicator carried out an independent exercise which had not been contended for by either party, namely to fix a figure of 8.6% as appropriate for lost profit and overheads.

33. Mr Smalley is an experienced quantity surveyor and doubtless such assessments are meat and drink within his expertise and in part justify why someone of his discipline was nominated as adjudicator. He used material put before him by AIO and some documentation which originally had emanated from Makers showing that as at 25 July 2005 a figure of 8.6% had been canvassed by Makers as an appropriate mark-up in relation to the 28 flats.

34. Makers sought time to deal with this issue, they were able to make their submissions in their letter of 24 October 2005 and the adjudicator came to a judgment on the evidence before him within his professional and legal competence.

35. There is no basis for concluding that there is any procedural unfairness causing prejudice to the Defendant.

36. Miss Franklin further attacks the adjudicator's award upon the basis that the vital issues of fact underlying the disputes were resolved in an unfair way, thus prejudicing Makers and offending against the rules of natural justice: *"It is easy enough to make challenges of breach of natural justice against an adjudicator. The purpose of the scheme of the 1996 Act is now well known. It provides a speedy mechanism for setting disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending final determination of disputes by arbitration, litigation or agreement. The intention of Parliament to achieve this purpose will be undermined if allegations of breach of natural justice are not examined critically when they are raised by parties who are seeking to avoid complying with adjudicator's decisions. It is only where the Defendants advance a properly arguable objection based on apparent bias that he should be permitted to resist summary enforcement of the adjudicator's award on that ground."* (Dyson LJ in ***Amec Payments Ltd v White Friars City Estates Ltd*** [2005] 1 BLR p.1 at paragraph 22.)

37. Central to the resolution of who was the contract breaker was whether Makers' quantity surveyor had in fact instructed AIO off the site on 29 July 2005 and confirmed that instruction in the written CVI.

38. The QS who signed the CVI, Mr Bullen, gave a sworn statement dated 6 September that he had not signed the Confirmation of Verbal Instruction on 29 July 2005 and that AIO were not in fact on site at that date and further that no instruction was given by him removing them from site or debarring them from the site.

39. An issue that the adjudicator may have had to decide was whether the signature was in fact a forgery and by implication who was a party to it.

40. The adjudicator was clearly exercised as to how best fairly and economically he could resolve the issue. On 27 September the adjudicator by letter made known that he would require the attendance of Mr Bullen. That letter is not in the bundle of agreed documents before me. The reference to the letter is in the award of the adjudicator. It would clearly be a sensible consideration for the adjudicator who would be called to resolve issues of fact based upon the credit of significant witnesses. On 6 October 2005 the adjudicator wrote to the parties solicitors addressing the need for direct evidence from the other party to Mr Bullen's instruction, namely Mr Barlow the Managing Director of AIO. He asked that the statement should include the precise words used by Mr Bullen when he asked AIO to leave the site and the reasons he gave for the request, and the precise words used by Mr Barlow in his response, and the precise time and location and date when the instruction was signed.

41. On 10 October 2005 he asked the parties to ensure their availability for a meeting if necessary to resolve the issue as to the termination of AIO's employment on 29 July.

42. On 11 October Maker's solicitor informed the adjudicator that Mr Bullen's whereabouts were not known and steps had been taken to trace him should his attendance at the meeting be required.

43. On 11 October AIO's solicitors made it clear that they would not be able to attend the meeting provisionally arranged for the afternoon of 12 October.

44. On 12 October the Adjudicator wrote to the parties saying: *"At 11 am this morning I will advise the parties of my decision on the meeting. It is likely to be the case that after that time, I will be unable to embrace in*

my Decision any further written submissions from the parties – whether in the form of statements or new documents."

45. The adjudicator wrote a third letter on that date confirming that he would reach his decision without a meeting: *"I am now completing my review of all the party's submissions and proceeding towards my decision. If I require any further information from the parties I will ask for it."*

46. Maker's solicitors wrote on 12 October noting closure of submissions and evidence but informing the adjudicator that they had received from AIO a purported retraction by Mr Bullen of his sworn statement.

47. Thus the adjudicator's difficulties were further compounded when he received the unsigned statement purporting to be from Mr Bullen which was proffered in evidence by AIO in which he withdrew the assertions made in the sworn statement and went on to allege that he had been forced to make the statement by his employers (Makers) with the threat of his being made redundant by them.

48. On 12 October 2005 Maker's solicitors wrote that they had received a fax from Nelsons timed at 11.04 am and that the contents of the fax caused them some considerable concern: *"We feel we must deal with it despite the fact that the adjudicator has determined that submissions are closed.*

Our clients inform us that Mr Bullen was dismissed by them at the end of his three month probationary period and left their employment four weeks ago. He was paid for four weeks notice but not required to attend work during the course of his notice period. He was also required to return mobile phones and all company equipment Though technically it is the case that Mr Bullen's employment with our client ends this week, to all practical purposes it ended four weeks ago. Our clients have endeavoured to contact him but without any success.

We do not know the motivation or reasons behind Mr Bullen seeking to go behind his affidavit. The circumstances under which it came to be signed are that the company's managing director having received the correspondence from AIO referring to this CVI gave instructions that if Mr Bullen was denying that he was a signatory to it that it was a matter which should be confirmed by affidavit as it was a matter of considerable importance. We do not know at this point in time whether the statement was typed by Mr Bullen himself or by someone on his behalf though our clients believe the likelihood is that he typed it himself. They are however satisfied that he chose the solicitor where he went to swear it and as far as our clients are aware went to these solicitors unaccompanied and then returned the affidavit to his manager …"

49. Nelsons for AIO wrote explaining to the adjudicator that Mr Bullen wished to withdraw his sworn statement and that he had asked them to put something in writing and that they had done this. They informed the adjudicator that they had spoken with Mr Bullen and that his statement although in an approved format could not be signed because he was at the DHSS.

50. Maker's reaction was to get in touch with the adjudicator submitting: *"… We have not heard from you as to whether you are accepting that statement as evidence in the adjudication and taking notice of it. If you are then we would make the following submission.*

It is suggested by Nelsons that Mr Bullen swore an affidavit under duress with the threat of redundancy. He had only been employed for a few months by our clients on a probationary period. He was given notice of dismissal a few days after swearing the affidavit. Insofar as it was an attempt to stave off a dismissal it was clearly unsuccessful. We are not aware of any attempt by Mr Bullen to retract what he had previously said and where he was prepared to swear on oath.

The affidavit confirms entirely our client's understanding of what occurred. We would suggest that the attempt by either Mr Bullen or by AIO to go behind his sworn evidence should be ignored."

51. It was evident that by 12 October Mr Bullen was contactable and it may have proved possible for him to have been invited at a convenient time to give evidence as to the vital matters that could be tested if in fact the retraction emanated from him.

52. Neither the referring party or the adjudicator canvassed this possibility. Makers were content to let the matters rest on their submission contained in the letter of 14 October.

53. The adjudicator, despite having indicated that the time for submissions had passed, nonetheless on 14 October sought further information – not as to the allegations of fraud and forgery, but to substantiate the claim of AIO as to the loss and profit.

54. Miss Franklin contends that the adjudicator never made it clear whether he intended to take account of the so called retraction evidence until he gave his decision, it is right that he did not do so. However it is evident from the written submissions made in the various letters from Makers what stance they took in relation to that evidence were it to be admitted and if it were not to be admitted. The adjudicator made it clear that he was able to come to a conclusion without receiving the retraction evidence and on the papers as was contemplated by both of the parties.

55. Miss Franklin submits that since the adjudicator rightly recognised that the repudiation issue involved allegations of fraud it is extraordinary that he proceeded to a decision without giving either party an opportunity to adduce this essential evidence or to see what Mr Bullen actually had to say for himself.

56. It is a striking feature of this case that neither of the parties, nor the adjudicator, contemplated adjusting the timetable to enable Mr Bullen to give evidence if he consented. There is no question of denying any party the opportunity to adduce the oral evidence of Mr Bullen. The manner in which the adjudicator should treat the evidence of Mr Bullen was the subject of submission by both parties.

57. The manner in which the issue was factually resolved compared with the strict litigation approach was not satisfactory, but Miss Franklin has failed to demonstrate that there was breach of any rule of natural justice in relation to the resolution of the issue of repudiation in this adjudication procedure. It is not for this court to analyse the reasoning of the adjudicator as to how he arrived at his primary factual position and then applied the law to those facts. This was a decision within the competence of the adjudicator within the scheme. Criticisms as to how the adjudicator dealt with apparent contradictions by Mr Bullen and the like are not a matter for this court.

CONCLUSION

58. There will be summary judgment for the Claimant as claimed.

59. Makers seek a stay of execution in relation to summary judgment pursuant to RSC Order 47(1)(a). Miss Franklin contends that the probable inability of AIO to repay any judgment sum is a *"special circumstance"* within the meaning of Order 41(1)(a).

60. AIO was incorporated in May of 2004 and ceased trading in about October 2005. No company accounts are available at the present time and thus a company search would yield nothing of value. Mr Barlow, one of AIO's key personnel, has had to take up employment as a long distance lorry driver and indeed has sold his lorry in order to pay fees relative to this application.

61. AIO no longer has any trading premises and it appears that they have no other work in progress or other work on the books.

62. A recruitment group, Aspire Recruitment Group Ltd, have obtained a judgment against AIO for £27,000 for labour costs. AIO's solicitors have confirmed to Aspire's solicitors that any proceeds from the adjudication will be paid to Nelsons who will discharge the judgment debt.

63. Mr Lamont submits that there is nothing particularly unusual in this situation. Building companies, particularly those set up for a particular project, often have no fixed assets and rely upon agency labour and hired in plant. The status of the company was either known or could have been readily ascertained at the time that the sub-contract was let by Makers (UK) Ltd.

64. The fact that the Claimant may intend to pay off a lawful trade debt so far as the Defendant is concerned is neither here nor there, the Claimant is entitled to do what it wishes with its money and if it is to reduce a business debt that may be considered responsible and readily foreseeable.

65. Mr Lamont further submits that the inference is warranted, that the impecuniosity of the Claimant was in all probability brought about by the failure of the Defendant to satisfy, at least in large part, this claim.

66. There is no direct evidence from AIO either from an accountant or a company officer that this is the case.

67. It is evident to me that the profile and substance of the company that Makers chose to deal with when they let the contract is essentially the same as confronts them now. This was not a company that had vast assets which they have dissipated in order to frustrate the Defendant should they succeed in litigation or in arbitration. The considerations to be taken into account are helpfully collected in the judgment of HH Judge Coulson QC in ***Wimbledon Construction Company (2000) Ltd v Vago*** EWHC at page 1086. Mr Christopher Over supplied a witness statement exhibited to which was a credit decision following a report which recorded that the ICC score has been suspended due to a presentation of a petition for compulsory wind-up. That petition has been withdrawn but the picture painted in Mr Over's statement is of an impecunious company. There is no evidence that on receipt of the monies that the company would not continue to trade.

1. The life blood of small construction companies is cash flow. Once that is interrupted or brought to an end the viability of such a company may be put to risk and thus the ability to repay. That too is part of the commercial risk that is taken on board by those who trade with such a company. On the brief information before me I come to the following conclusions:

    i) That in all probability the Claimant company is insolvent.

    ii) Its present ability to repay is doubtful.

    iii) If it is able to return to trading there is no evidence that it will or will not be able to repay the debt should it be called upon to do so.

    iv) There is no evidence as to when, if at all, the Claimants might be called upon to repay. No proceedings or arbitration has been embarked upon.

    v) The financial status of the company now is not dissimilar to that that presented itself at the outset.

    vi) The inference is warranted with one project company such as this, that its impecuniosity derives from non payment by the Defendant.

    vii) Were it to have been demonstrated that the company was in insolvent liquidation then it would have been appropriate to refuse summary judgment, see ***Bouygues (UK) Ltd v Dahl-Jenson (UK) Ltd*** [2000] BLR p.522 Court of Appeal, in the judgment of Chadwick LJ para 29-36.

67. It seems to me in all the circumstances that I should exercise my discretion in this case by refusing a stay.

Calum Lamont (instructed by Nelsons) for the Claimant
Kim Franklin (instructed by Over Taylor Biggs) for the Defendant