Jamil Mohammed v Dr Michael Bowles [2003] Adj.L.R. 03/14

JUDGMENT REGISTRAR DEREK : High Court of Justice in Bankruptcy. 14th March 2003

Introduction

1. This is an application to set aside a statutory demand dated 12th September 2002. The demand is served under Section 268(1) (a) Insolvency Act 1986 and relies upon the decision of an adjudicator dated 10th May 2002 which determined that Mr Jamil Mohammed (the applicant) should pay Dr Michael Bowles (the respondent) the sum of £26,495.54. No payment has been made.

2. An application to set aside the statutory demand dated 30th September 2002 was filed on 1st October 2002. The application is made under Rule 6.4(1) of the Insolvency Rules 1986 and relies upon two of the grounds set out in Rule 6.5(4) of the Insolvency Rules 1986 which provides that the court may grant the application if (b) the debt is disputed on grounds that appear to the court to be substantial and (d) the court is satisfied on other grounds that the demand ought to be set aside.

3. The matter came before the court on 31st October 2002 when directions were given for the filing of evidence by both parties and for the lodging of certificates of readiness. The matter came hack before the court on I I December 2002 when a hearing date was fixed and it is that hearing which comes before me today.

4. Counsel Mr J Smith represented the applicant and Counsel MS J Lemon represented the respondent.

Evidence

5. I have before me written evidence in the form of four witness statements as listed below:

    1. First witness statement of the applicant with exhibit JM1 dated 1st October 2002.

    2. Second witness statement of the applicant with exhibit JM2 dated 28th October 2002.

    3. First witness statement of the respondent with exhibit MBI dated 15th November 2002

    4. Third witness statement of the applicant dated 27th November 2002.

Background

6. The background to this matter is set out in some detail in (he witness statements of the parties, The essential facts are that the applicant, a building contractor, entered into a contract with the respondent to perform building works at the respondent's home, The contract did not proceed in accordance with the agreed timetable and it seems that the duality of the work undertaken left much to be desired.

7. By October 2001 the respondent, who had by then paid all sums due under the contract, was concerned about the solvency of the applicant. The applicant acknowledged that he had financial difficulties. As a result of a meeting on about 5th October 2001 arrangements were put in place to enable the applicant to finish the contract as evidenced by an exchange of letters dated 6th and 10th October 2001 From the respondent to the architect and the architect to the respondent respectively.

8. Progress was not satisfactory and the respondent eventually invoked the dispute procedure under Article 6 of the contract and referred the dispute to adjudication. A notice of adjudication was sent on or about 18th March 2002. An adjudicator was appointed and her decision was finalised on 10th May 2002. From the outset the applicant disputed the jurisdiction of the adjudicator. The reasons for doing so are set out in a letter from the applicant's solicitors to the adjudicator dated 3rd April 2002

    The adjudicator considered these matters in her adjudication, determined that she had jurisdiction and made the award in favour of the respondent. The applicant has refused to pay the sum awarded but as yet has not taken any steps to set aside or vary the adjudicator's decision nor sought a declaration on jurisdiction.

The Insolvency Principles

9. Rule 6.5(4) of the Insolvency Rules 1986 sets out the grounds on which the court may grant an application to set aside a statutory demand, and provide:

    The court may grant an application if: -
    (a) the debtor appears to have a counterclaim, set-off or cross demand which equals or exceeds the amount of the debt or debts specified in the demand: or

(b) the debt is disputed on grounds which appear to the court to be substantial; or (c) it appears that the creditor holds some security in respect of the debt claimed by the demand, and either Rule 6.1(5) is not complied with in respect of it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or

(d) the court is satisfied on other grounds, that the demand ought to be set aside.

10. Paragraph 12 of the Practice Direction relating to Insolvency Proceedings provides:

12. SETTING ASIDE A STATUTORY DEMAND

12.3 Where the statutory demand is based upon a judgment or order, the court will not at this stage go behind the judgment or order and inquire into the validity of the debt nor, as a general rule, will it adjourn the application to await the result of an application to set aside the judgment or order,

12.4 Where the debtor (a) claims to have a counterclaim, set-off or cross demand (whether or not he could have raised it in the action in which the judgment or order was obtained) which equals or exceed the amount of the debt or debts specified in the statutory demand or (b) disputed the debt (not being a debt subject to a judgment or order) the court will normally set aside the statutory demand if; in its opinion there is a genuine triable issue.

The Adiudication Regime

11. Section 108 of the Housing Grants Construction and Regeneration Act 1996 ("the 1996 Act") introduced a mandatory dispute resolution procedure for construction contracts. Accordingly, a party to a construction contract which falls within the definition contained in section 104 of the 1996 Act has the right to refer a dispute to adjudication. If the contract does not comply with the requirements of subsections (1) to (4) of section 108 of the 1996 Act then the adjudication provisions of the Scheme for Construction Contracts will be implied into it. The adjudication provisions, in section 108 of the 1996 Act only apply if the provisions of sectionl07 are also satisfied which essentially require the agreement to be in writing.

12. In **Macob Civil Engineering Limited v Morrison Construction Ltd [**1999] BLR 93, 97 Dyson J said of the provisions of section 108 of the 1996 Act:

"The intention of Parliament in enacting the Act was plain. It was to introduce a speedy, mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement. "

Issue

13. The issues to be determined are whether the adjudicator's decision creates a debt that can form the basis of a statutory demand and if so, the nature of that debt.

The Applicant's Case

14. The applicant agrees that the adjudication regime was introduced as a means of speedy interim dispute resolution for non-residential construction contracts. The applicant emphasises the interim nature of the remedy saying that the decision of an adjudicator does bind the parties but is not of itself an enforceable obligation to pay and that it is necessary to institute court proceedings to create an enforceable obligation. In support of this proposition I am referred to the judgment of HHJ Bowsher QC in **Austin Hall Building Ltd v Buckland Securities Ltd [2001]** BLR 272 at paragraph 35:

"*.... I do not regard an adjudicator* under *the 1996 Act as a person before whom legal proceedings may be brought. Legal proceedings result* in *a judgment or order that in itself can be enforced. If the decision at the end of legal proceedings is that money should be paid, a judgment is drawn up that can be put in the hand of the Sheriff or Bailiff and enforced. That is not the case with an adjudicator. The language of the 1996 Act throughout is that the adjudicator makes a decision. He does not make a judgment. Nor does he make an "**award**" as an arbitrator does though he can order that his decision be complied with. Proceedings before an arbitrator are closer to court proceedings because an award of an arbitrator can in some circumstances be registered and enforced without a judgment of the court. But the decision of an adjudicator, like the decision of a certifier, is not enforceable of itself. Those decisions, like the decisions of a certifier, can be relied on as the basis for an application to the court for judgment, but they are not in themselves enforceable"*

The judge continues at paragraph 36:

"36. The 1996 Act makes a distinction between the decision of an adjudicator and legal proceedings. -Section 108(3) provides that: The contract shall provide that the decision of the adjudicator is binding until the dispute is determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

There, Parliament clearly is not regarding the decision of the adjudicator as having been reached as a result of "legal proceedings ".

15. The applicant further submits, that an adjudicator cannot determine whether he/she has jurisdiction in respect of a dispute and if the adjudicator purports to rule on jurisdiction the decision is void and of no effect between the parties or if a party challenges jurisdiction any decision of the adjudicator will not he binding on that party. I was taken to the decision of Dyson J in **The Project Consultancy Group v Trustees of Gray Trust** [1999] BLR 377.

16. The applicant challenged the adjudicator's decision from the outset and points to his solicitor's letter dated 3rd April 2002. He also argues that the fact that he signed the Adjudication Agreement does not amount to a submission to jurisdiction as he had already clearly reserved his rights. Thus he says the adjudicator's decision that she had jurisdiction is a nullity and not binding on him.

His arguments on the point of jurisdiction are:

1. The 1996 Act is expressly stated not to apply to construction contracts with a residential occupier (section 106).
2. The original construction contract (containing an adjudication clause) was superseded by a later contract (which did not contain such a clause)

17. He further submits that even had the adjudicator's award been a binding one, the applicant can demonstrate strong arguments as to why the adjudicator's award was wrong and/or unfair and would not be replicated by an arbitrator. By way of example, I am told that: (a) the applicant was not granted sufficient time to appoint a surveyor to assist him in meeting the respondent's contentions; and (b) the respondent's claims for monies could not succeed in the absence of a Notice of Non- Completion issued under the JCT contract by the architect.

18. In these circumstances he argues that the statutory demand is an abuse of process. This is on the basis that the applicant has no obligation immediately to pay a liquidated sum of money to the respondent. There is clear jurisprudence to the effect that the issue of court proceedings is the appropriate way to enforce the decision of an adjudicator. The adjudicator's award is not binding on the applicant by reason of the jurisdictional challenge. Bankruptcy is a remedy of such profound, lasting effect that it is entirely inimical to the philosophy underpinning the adjudication regime, namely that it provides an interim remedy. The applicant disputes the adjudicator's award on substantial grounds.

The Respondent's Case

19. The respondent relies upon the decision of HHJ Bogis in the case of **George Parke v The Fenton Gretton Partnership.,.** (2002) CILL 1712 were he held;

(a) An adjudication creates a debt which may form the basis of a Statutory Demand: and

(b) For the purposes of paragraph 12.3 and 12.4 of the Practice Direction, the adjudication falls to be treated in the same way as a judgment or order and the Court will not go behind it at this stage.

20. The respondent submits that as a result the applicant can only rely on a genuine triable issue as to whether he has a counterclaim, set off or cross demand in order to set aside the demand (Rule 6.5 (4)(a)).

21. The respondent also refers to the decision in the case of **Oakley v Airclear Environmental Ltd (**2002) CILL 1824 which also concerned an application to set aside a statutory demand based on an adjudicator's decision. HH Judge Chambers refused to set aside the statutory demand on grounds that whilst there may not have been a written contract between the parties, the appellants there estopped by convention from denying the existence of such a contract and thus denying the jurisdiction of the adjudicator. The respondent submits that the decision went beyond Rule 6.5(4)(a) namely whether there was a genuine counterclaim, set off or cross demand. Etherton J overturned the decision on

estoppel on appeal. However he did not consider whether an adjudicator's decision is equivalent to a judgment or order for the purposes of paragraph 12.3 of the practice direction on insolvency proceedings. The respondent submits that in other words he did not address whether these arguments could have been run in the first place.

22. The respondent submits that the judge on appeal in the **George Parke** case specifically addressed his mind to this point and should be preferred. Thus the application to set aside which relies on a substantial dispute (Rule 6.5(4) (b)) or other grounds (Rule 6.5(4)(d)) cannot succeed.

23. The respondent concedes that if this submission is not accepted then it is for the applicant to establish that either a dispute which is substantial, one which demonstrates that there is a genuine triable issue, or a substantial comparable reason.

24. As to the adjudication regime the respondent argues that although the 1996 Act introduced for the first time a mandatory dispute resolution procedure it does not of itself render void a non-compliant contractual procedure and a party to such a contract could adjudicate under that express contractual arrangement. The respondent also relies upon the judgment of Dyson J in the leading decision of **Macob Civil Engineering Ltd v Morrison Construction Ltd** for the philosophy of the Act, continuing the quotation set out above to include as the final sentence the following: *"But Parliament has not abolished arbitration and litigation of construction disputes.It has merely introduced an intervening provisional stage in the dispute resolution: process. Crucially, it has made it clear that decisions of adjudicators are binding and to be complied with until the dispute is finally resolved.*

    The respondent submits that these principles should apply equally to a contractual a well as a statutory adjudication.

25. On the question of jurisdiction the respondent submits that the applicant in his skeleton argument has failed to provide an accurate summary of paragraph 16.109 of Keating on Building Contracts (7th edition)) which states:
    "As a matter of practice where the adjudicator's jurisdiction is contested the appropriate approach is for the adjudicator to enquire into his jurisdiction and insofar as he finds an arguable case that he has jurisdiction he should continue with the adjudication unless and until the court orders otherwise. Where the party sends written submissions to the adjudicator in relation to the issue of jurisdiction inviting the adjudicator to decide on this issue, any decision of the adjudicator would be binding upon that party. Where a party reserves its position with regard to jurisdiction, it does not thereby submit to that jurisdiction, and any decision by the adjudicator as to his jurisdiction is not binding on that party, To the extent that the court decided that there was no jurisdiction, any decision of the adjudicator would be a nullity. "

26. The respondent accepts that the applicant has reserved his position to challenge the adjudicator's decision and so he was and is entitled to start proceedings in the court seeking a declaration that the adjudicator had no jurisdiction. The adjudicator's decision only becomes a nullity if the court decides that she had no jurisdiction.

27. The respondent submits that this is not the appropriate hearing to investigate jurisdiction. It could only be right to do so where the applicant is applying to set aside due to the debt being disputed on substantial grounds (Rule 6.5(4) (b)) or the court is satisfied on other grounds that the demand should be set aside. (Rule 6.5 (4) (d)). Further the only ground for setting aside an adjudicator's decision is where there is a triaible issue as to the existence of a counterclaim, set off or cross demand (Rule6.5 (4)(a)).

28. The respondent submits that if the court holds that it can set aside under Rules 6.5 (4) (b) or (d) that court should still dismiss the application as it is strenuously denied that the applicant has strong arguments on jurisdiction as alleged. The respondent points to the fact that the applicant accepts that the contract provided for adjudication and argues that there is no evidence that the original contract was superseded by exchange of letters in October 2001. The letter of the 10th October upon which the applicant relies from the architect refers to the earlier contract and its terms suggest that the original contract was still in place. The respondent submits that the suggestion that there is a substantive dispute lacks substance and that the specific issues raised do not fall within any of the grounds for

setting aside a statutory demand. The arguments on both jurisdiction and substantive issues are said to be without merit and are an attempt by the applicant to avoid paying sums properly due to the respondent.

Conclusion

29. On the basis of the evidence before me I am satisfied that the parties entered into a contract for residential construction works that included a form of dispute resolution which adopted the framework of the dispute resolution procedure contained in the 1996 Act. For present purposes I do not have to consider whether the exchange of letters in October 2001 created a new contract, one which replaced the existing contractual arrangements, although I comment that it seems doubtful to me that they did. The adjudicator has already determined this issue and it is not for this court to look behind the adjudicator's decision. If the applicant is unhappy with the adjudicator's determination upon the question of jurisdiction then his remedy is to apply to the court to have that decision set aside on the basis that he disputes the adjudicator's jurisdiction and/or to seek a declaration on the question of jurisdiction. I note that to date he has not chosen to adopt that course.

30. 1 do not accept that the respondent is required to take further action, he may be prepared to accept the adjudicator's decision as the final determination of the dispute. I should state that the respondent has not in terms said that this is the case.

31. By the process of adjudication it has been determined that the applicant owes the respondent the sum of £26,495.54. This is a liquidated sum and is a debt, a debt that is capable of forming the basis of a statutory demand. I accept that in order for there to be a final judgment a further step has to he taken in the form of either legal proceedings or arbitration but that does not stop the adjudicator's decision being enforced as a debt.

32. I have been encouraged by the applicant to treat the adjudicator's decision as if it were an interim stage in the dispute which should be placed on hold until the court gives a judgment or an arbitrator reaches a final determination. The applicant argues that the respondent must first obtain summary judgment before a statutory demand may be served. I do not accept that. From the judgment of Dyson J in the leading decision of **Macob Civil Engineering Morrison Construction Ltd** it is clear that Parliament intended the statutory regime to provide a quick interim method of resolving commercial building disputes and that the decision of the adjudicator is to be regarded as binding and to be complied with until the dispute is finally resolved. To that extent the decision should be treated as if it were a judgment as HHJ Boggis stated in the **George Park** decision. I do not consider that this conflicts with the judgment of Bowsher J in the **Austin Hall** case. I accept that to become a legally binding judgment a further step is required. It does, not appear to me that the onus is on the respondent herein to take a further step. From the cases to which I have been referred it is apparent that parties who would be the equivalent of the applicant herein have taken the next step because they were unhappy with the adjudicator's decision.

33. In the case before me the applicant has the remedy in his own hands: if he objects to the adjudicator's decision he should make an application to the court it cannot be right that by simply raising this point he can then ignore the adjudicator's decision and sit back to wait for the respondent to take the next step. Contractually he committed himself to the adjudication process and unless and until he takes some further step in the form of legal process to continue his dispute he is obliged to pay the debt which he owes to the respondent.

34. The applicant's counsel invited me to consider the following four questions, questions which I will also answer below:

    1. **Is the adjudicator's decision a debt sufficient to form the basis of a statutory demand?**
       The simple answer is "yes".

    2. **If yes, what is the nature of the debt?**
       The nature of the debt is that it is a binding contractual obligation on the applicant to pay the sum quantified by the adjudicator's decision unless and until that decision is varied by further process either by way of arbitration or legal proceedings.

3. Does the applicant dispute the debt on substantial grounds?

In my judgment "no". He has already put his arguments on jurisdiction to the adjudicator who has rejected them. If he is unhappy with that decision his remedy is to go to court but in the absence of any such application it is not for this court to consider those arguments, although in my view they do not show an arguable case. On the substantive issues raised by the applicant whereby he seeks to argue procedural unfairness and a technical contractual point again on the evidence before me I do not consider that they are sufficient to argue that the debt is disputed on substantial grounds.

4. Are there any other grounds on which the statutory demand should be set aside?

The applicant's counsel submitted that without taking a further step and obtaining summary judgment the respondent cannot seek to enforce the decision of the adjudicator. For the reasons set out above I reject that argument.

35. I therefore dismiss this application to set aside the statutory demand, the respondent may petition forthwith and the applicant is to pay the respondent's costs.