Paul Boardwell t/a Boardwell Construction v k3D Property Partnership Ltd [2006] Adj.C.S. 04/21

Before HHJ Raynor QC. TCC. Salford : 21st April 2006.

On the 21st April 2006, HHJ Raynor QC, sitting in the Technology and Construction Court in Salford, gave judgment in ***Paul Boardwell t/a Boardwell Construction v k3D Property Partnership Ltd***[1] (unreported). It was one of the small number of cases where the Court refused to uphold an adjudicator's decision in the claimant's favour.

The defendant was a development company based in Carlisle. The claimant was a small local contractor. The defendant wanted to refurbish and carry out alterations to premises situated in the centre of Carlisle to create residential accommodation. In October 2004 the Defendant and the Claimant entered into a contract based on the JCT Agreement for Minor Building Works 1998 Edition (with Amendments 1 – 5 inclusive) in the sum of £276,223-20. The contract period was to be the 1st November 2004 – 29th July 2005. The Agreement was subject to adjudication with the RIBA the inserted nominating body to appoint an adjudicator.

The claimant came to conclude during the currency of the works that he had been subject to considerable variations, the works were more complex than he had anticipated, there were delays for which the defendant was responsible, the defendant had failed to pay as required and the claimant had generally incurred additional costs. Matters came to a head with the claimant purporting to determine his own employment under the Agreement on or about the 16th September 2005, following a prior notice of alleged default. The defendant in turn purported to determine the contractor's employment by letter dated the 3rd October 2005, following a default notice dated the 29th October 2005.

Matters remained in abeyance until the early part of 2006. On the 27th January 2006 the claimant issued an adjudication notice. The claimant sought various remedies, viz.

- An extension of time;
- A declaration that the claimant rightfully determined his employment;
- Money allegedly due under the Agreement (measured work, variations and loss and expense);
- Interest;
- Other appropriate relief; and
- The adjudicator's costs

A major bone of contention between the parties, once the adjudication started, was the adjudicator's remit. The defendant formed the view the referral was defective being made up of a number of discrete parts. He wrote to the adjudicator in these terms - "Would you consider limiting the referring party purely to the issue of who determined the contract and why?" Following representations from the parties, the adjudicator concluded – "My view is that I have no authority to influence or limit Boardman's [the adjudicator's error of transcription] claim and that my jurisdiction encompasses all matters referred within the Notice of Adjudication." Having accepted that he could not go behind the notice of adjudication the adjudicator recast the claimant's principal requests into four questions, set out in his letter of the 1st March 2006 - (a) Did the claimant have the right to an extension of time; (b) was the determination of the claimant's employment lawful; (c) what was the value of the variation orders and (d) what was the value of the loss and expense to which the claimant was potentially entitled. The adjudicator made some alterations in his letter to the parties of the 2nd March 2006 but the questions which he set himself to answer remained the same.

In response to the referral the defendant sought to raise a counterclaim for various items including loss and damage as a result of the employer's determination - *"The quantum of [which could not] be suitably addressed until the contracted works have been completed"* and sought the adjudicator's advice as to *"which of these heads he may award to the Respondent within this adjudication."* The defendant also relied upon his own alleged determination of the Agreement as a defence to the claim in the adjudication, relying upon the provisions of clause 7.2.3 of the Agreement –

> "*…the Employer shall not be bound to make any further payment to the Contractor that may be due under this Agreement until after completion of the Works and the making good of any defects therein*."

After further written submissions from the parties the adjudicator issued a reasoned decision on the 16th March 2006 in the claimant's favour. The adjudicator noted that certain counterclaims had been made and

[1] The author appeared as counsel for the defendant in the enforcement proceedings but played no part in the original adjudication

concluded that, as the items had not been referred to in the notice of adjudication and as no agreement from the claimant had been given to these claims being adjudicated upon, he had "no jurisdiction to consider these counterclaims within this Adjudication." He ordered the defendant to pay the claimant the sum of £57,931-96 (subject to any VAT) by the 23rd March 2006 but also concluded that "I do not consider that the determination of employment by Boardwell was rightfully made." The adjudicator expressly stated at paragraph 41.0 of his decision that "I have not recorded all of the parties' submissions within this document, but I have considered them all."

The defendant resisted enforcement. In those proceedings the defendant argued –

Multiple Disputes

The notice of adjudication required consideration of a range of unconnected disputes.

Breach of Natural Justice

The adjudicator breached natural justice in that he disregarded a substantial and integral part of the defence; viz. the claimant had committed a repudiatory breach of the Agreement. The adjudicator had failed to realise that what he saw as the defendant's counterclaim could equally function as a defence.

Solvency

There must be doubts over the claimant's solvency.

HHJ Judge Raynor QC limited oral argument to 'breach of natural justice', having noted his reading of the skeleton arguments on the other two points.

On the 'multiple referral' point both counsel had referred to ***Chamberlain Carpentry and Joinery Ltd v Alfred McAlpine Construction Ltd*** [2002] EWHC 514 (TCC) (see paragraph 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 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 was a correct understanding of the comments of H.H. Judge Thornton Q.C.* [Fastrack Contractors Ltd –v- Morrison Construction Ltd [2000] BLR 176] *that he was contemplating that it was up to a referring party in his notice of adjudication to characterise as a 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.*"

There is also the recent telling judgment of HHJ Coulson QC in ***Michael John Construction Ltd v Richard Henry Golledge & Others*** [2006] EWHC 71 (see especially section C of his judgment – paragraphs 26 – 28) –

> "*Indeed, as far as I am aware, there is no reported case in which the decision of an Adjudicator has not been enforced because the Judge has been persuaded that the original notice to refer encompassed more than one dispute.*" (para. 28)

Similarly counsel were in agreement that to resist enforcement on the ground of suspect solvency depended on the existence of the "special circumstances" necessary to justify a stay of enforcement (RSC 47.1) and that HHJ Coulson QC had in ***Wimbledon Construction Company 2000 Limited v. Vago*** (20 May 2005) (in particular paragraph 26) set out the applicable principles.

Breach of Natural Justice

Counsel agreed that the adjudicator was obliged to avoid any material breach of natural justice. Where they chose to differ was in their interpretation of the adjudicator's actions. The claimant relied on ***Discain Project Services Ltd v Opecprime Development Ltd*** [2001] BLR 285, where at paragraph 68 HHJ Bowsher QC said -

> *"I also repeat the words of Judge Humphrey Lloyd QC "It is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit." The qualification in the latter part of that sentence is important."*

The claimant also relied upon the decision of HHJ Wilcox in ***Try Construction Ltd v Eton Town House Group Ltd*** 28 January 2003 at paragraphs 48 and 50. The defendant identified the decision in ***Carillion Construction Ltd v Devonport Royal Dockyard Ltd*** [2005] EWCA Civ. 1358 see especially paragraphs 85 – 87, as being key. Chadwick LJ identified two possible methods to challenge an adjudicator's decision – see paragraph 85 of the judgment "[if] *it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair*." In oral argument the claimant refined his argument to encompass the ***Bouygues*** principle, i.e. the adjudicator is not answerable for an error of law and disregard of the counterclaim's role as a defence was non actionable as founded in the second proposition of Jackson J in ***Carillion Construction*** at first instance. The defendant argued that disregard of the defence was such a crucial part of the decision as to be a matter that had to be addressed as a potential breach of justice. The decision was distorted – if the defence had been properly considered there was a substantial possibility that no money would have flowed to the claimant because of the wording of the Agreement. The defendant relied upon paragraph 49 of ***Quietfield Ltd v Vascroft Contractors Ltd*** [2006] EWHC 174 (TCC) and more particularly paragraph 51 –

> "*…the adjudicator ought to have considered Vascroft's substantive defence, but he failed to do so. In those circumstances, as Quietfield have fairly conceded, the adjudicator's decision cannot be enforced because he failed to abide by the rules of natural justice*."

The defendant also relied upon ***Kier Regional Ltd t/a Wallis –v- City & General (Holborn) Ltd*** [2006] EWHC 848 (TCC) especially paragraphs 36, 37, 41 and 42.

HHJ Raynor QC was satisfied that the adjudicator had committed a breach of natural justice, which was on the critical path of the decision and to omit erroneously to consider the defence could not be disregarded. He did not accept the argument of counsel for the claimant that use of a general words' formula that the adjudicator had considered all the submissions could protect the adjudicator where in a reasoned decision it was not discernible that he had considered the counterclaim in its guise as a defence. Although not part of the claimant's original skeleton argument, during the hearing the claimant argued that the defendant was estopped from challenging jurisdiction because the defendant had, on the true interpretation of certain correspondence, acquiesced in the continuation of the adjudication once the adjudicator identified the issues. HHJ Raynor QC refused to accede to this argument.