Neutral Citation Number: [2024] EWHC 1929 (TCC)

Case No: HT-2024-000182

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 25/07/2024

Before :

MR JONATHAN ACTON DAVIS KC
(sitting as a Deputy High Court Judge)

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Between:

BELL BUILDING LIMITED	**Claimant**
- and -	
TCLARKE CONTRACTING LIMITED	**Defendant**

- -
- -

Mr Thomas Lazur (instructed by **Fladgate LLP**) for the **Claimant**
Mr Andrew Singer KC (instructed by **Howard Kennedy LLP**) for the **Defendant**

Hearing date: 12th July 2024

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JUDGMENT

The Deputy Judge:

1. These adjudication enforcement proceedings concern a project to supply and install the substructure and superstructure for a Data Centre at Greenwich Point, London.

2. The subcontractor, Bell Build Limited ("Bell") seeks to enforce an Adjudicator's Decision dated 13th September 2023 that required the Main Contractor TClarke Contracting Limited ("TCL") to pay:-

   (i) The sum of £2,129,672.69 plus VAT as a debt due under Payment Application No. 18 in the absence of a valid Pay Less Notice;

   (ii) Contractual interest on that sum to the date of the Decision of £37,487.84 plus £437.60 per day thereafter which at the date of the Hearing was £170,080.64 in total;

   (iii) The Adjudicator's costs in the sum of £21, 000.00 plus VAT.

3. TCL's solicitor commenced Part 8 proceedings for declarations that it had, contrary to the Adjudicator's Decision, issued a valid Pay Less Notice. On 26th February 2023 Pepperall J ordered that the claim should proceed as a Part 7 claim for the reasons given in a Judgment handed down on 29th April 2024.

4. Following a three month stay which failed to result in settlement:-

   (i) Bell issued the instant enforcement proceedings on 24th May 2024;

   (ii) TCL acknowledged service indicating that it intended to defend these proceedings on 5th June 2024;

   (iii) TCL served a statement from John Lewis (TCL's Divisional Commercial Manager) in response to Bell's application for summary judgment on 19th June 2024;

   (iv) In the parallel Part 7 proceedings:-

      (a) TCL filed and served its Particulars of Claim on 7th June 2024; and

      (b) Bell filed and served its Defence and Counterclaim in the Part 7 proceedings on 5th July 2024. The final timetable to a trial of the issues in the Part 7 proceedings is yet to be determined.

5. In essence, on this application for summary judgment, TCL argue that the Adjudicator's Decision should not be enforced due to lack of jurisdiction and/or a breach of natural justice. In particular it is said, the Adjudicator took it upon himself to value the work done in Interim Application 18 and to award a sum higher than that sought in the Referral. His jurisdiction did not extend to doing either of those tasks and/or in so doing he failed to act fairly and in accordance with natural justice and that failure has caused material prejudice to TCL.

Background Facts

6. The Parties entered into a Sub-Contract incorporating the JCT Design and Build Sub-contract Conditions 2016 with a Schedule of Modifications by a Deed dated 4th November 2021 ("the Sub-Contract"). Pursuant to the Sub-Contract Bell was to carry out Sub-Contract Works for the construction of a Data Centre at LCY-Ten (Echelon), Greenwich Point, London.

7. The Sub-Contract Works consisted of the supply and installation of the new substructure and superstructure consisting of the frame including enhancements, floor, roof, stairs, external walls, windows and external doors, internal walls and partitions, internal doors, internal finishes, walls, floors and ceilings, all builder's work in connection to the lifts installation and all builder's works including demolition and fire-stopping, all as further described within the Sub-Contract document. The Sub-Contract Sum was £20,013,088.00.

8. On 20th April 2023 Bell issued their Interim Application No. 18 in the gross sum of £20,915,777.43 less retention of £627,473.36.

9. The Due Date for payment of that application is agreed as being 9th May 2023 and the Final Date for Payment as 19th June 2023.

10. TCL issued a document entitled Pay Less Notice 18 on 6th June 2023 which gave a notified sum of £710,120.61.

11. There were emails between the Parties on 6th June 2023 and 16th June 2023 when Bell questioned the status of the Pay Less Notice and TCL confirmed their reliance on the Pay Less Notice sent on 6th June 2023.

12. On 21st June 2023 TCL paid the Notified Sum of £710,120.61 to Bell who accepted the same.

13. Thereafter a dispute arose between the Parties in respect of Payment Application No. 18. Bell contended that the Pay Less Notice was invalid and referred the dispute to adjudication.

14. In its Notice of Adjudication Bell stated at paragraph 4.7 :

> **"It is common ground that [TCL] has paid Bell the sum of £710,120.62 received on 21st June 2023 and £685,591.18 received on 17th July 2023. It is also common ground that amounts totalling £18,084,322.36 (excluding VAT and inclusive of the two amounts separately described) have been received as at the date of this Notice."**

Paragraph 5.2 states:

> **"For the avoidance of doubt, Bell does not give the Adjudicator jurisdiction to decide the "true value" of the Payment Claim and reserves the right to bring such a claim in any subsequent adjudication."**

Paragraph 6.1 under the heading "Remedy and Redress sought by Bell" provided at sub-paragraph 6.14:

> **"[TCL] should pay Bell the Payment Claim in the outstanding sum of £1,443,981.51 plus applicable VAT as a debt"**

15. In their Referral Bell stated at paragraphs 5.49 to 5.51:

> **"5.49 Bell is therefore entitled to be paid the outstanding sum of £1,443,981.51 (excluding VAT) as a result of (TCL's) breach of the sub-contract payment provisions.**
>
> **5.50 For the avoidance of doubt, Bell does not give the Adjudicator jurisdiction to decide the "true value" of the Payment Claim and reserves the right to bring such a claim in any subsequent adjudication.**

5.51 For the avoidance of doubt, Bell does not give the Adjudicator jurisdiction to decide the value, true or otherwise in respect of any other Payment Claim and reserves the right to bring such a claim in any subsequent adjudication."

Paragraph 7.14 under the heading "Remedy and Redress Sought by Bell" provides "(TCL) should pay Bell the Payment Claim in the sum of £1,443,981.51 plus applicable VAT as a debt."

16. In his Decision at paragraph 90, the Adjudicator said:

> **"This is a technical adjudication concerning an Application for a Payment and the associated service of any Pay Less Notice leading to the payment of any Notified Sum colloquially known as a "smash and grab" adjudication and does not concern the true value of the works at the relevant time."**

He decided at paragraph 189 that "the document issued by email by the Respondent on 6th June 2023 is not considered a valid Pay Less Notice and has no standing".

He decided "the Respondent should pay the Payment Claim in the sum of £1443,981.51 plus applicable VAT as a debt". He said at paragraphs 228 and 229:

> **"228. The Respondent has challenged the Claimant's calculation of the amount to be paid on the basis that it includes the Respondent's payment regarding Application No. 19. I understand this challenge to mean that I am only dealing with the Claimant's Application No. 18 in this adjudication. It is the Respondent 's position that I cannot take into account a payment made under Application No. 19 as that will be outside my jurisdiction.**
>
> **229. Following this logic taking into account the payment made by the Respondent to the Claimant in relation to Application No. 18 the outstanding amount remaining to be paid is in the sum of £2,839,793.31 less £710,120.62 being the amount of £2,129,672.69."**

The decision at paragraph 262 is that:

> **"The Respondent shall pay the Claimant the Payment Claim in the sum of £2,129,672.69 plus applicable VAT as a debt"**

17. Against that background, Mr Singer KC for the Defendant argues that the Reference was a true smash and grab adjudication where the sum payable was due because of an invalid Pay Less Notice, not because of any accurate valuation by TCL. The Adjudicator understood that to be the dispute referred (see his paragraph 90). However the Adjudicator purported to award more than the sum claimed. He considered the "calculation" of the claim (paragraph 216 of the Decision) which was outside his jurisdiction. He carried out a valuation exercise which was likewise outside his jurisdiction and purported to award more than the sum claimed. There was no prior suggestion from the Adjudicator that he was minded to award more than the sum claimed in the Notice/Referral. That amounts to a breach of natural justice which was material since he relied upon it in reaching his decision in addition to his acting in excess of jurisdiction. Thus the Decision is unenforceable.

18. I was taken to the emails between the Parties and the Adjudicator in which the developments which led to the Decision unfolded. In summary:

(i) The Adjudicator noted that Application No. 18 was for a payment of £1,058, 248.92 and not £1,443,981.51 as claimed. He asked for an explanation of the difference;

(ii) Bell explained that it was because the sum applied for under Application No. 18 reflected the increase in value of the completed work since the last application. It did not take into account the sums previously due as interim payments and/or sums paid by TCL to date;

(iii) In contrast, Bell's claim in the adjudication was based on its contractual entitlement to the value of the completed work less sums previously due as interim payments, sums paid to date and retention;

(iv) Bell's figure of £1,443,981.51 plus VAT claimed in the adjudication was therefore the result of deducting the sums paid by TCL at the date of the Referral from Bells's gross valuation under Application No. 18, less 3% retention;

(v) However, as recorded in the Decision at paragraphs 211 - 216, TCL challenged Bell's calculation on the basis that it included payments made by TCL under Application No. 18 and Application No. 19. At paragraph 228 of the Decision, the Adjudicator accepted TCL's submissions and concluded that he had no jurisdiction to consider payments made under Application No. 19;

(vi) He therefore concluded that his assessment of the sum due under Application No. 18 in the absence of a valid Pay Less Notice should exclude the sum of £679.592.78 that Bell claimed it had received under Application No. 19. This increased the sum due under Application No.18 from the sum claimed of £1,443,981.51 to £2,129,672.69 plus VAT. That is the sum he ordered was due as a debt (paragraphs 229 - 230 of the Decision).

19. As to jurisdiction, the relevant legal principles are set out in the Judgment of Akenhead J in **Cantillon Limited v. Urvasco Limited** [2008] EWHC 282 (TCC) at paragraph 55:

> **"There has been substantial authority based in arbitration and in adjudication about what the meaning of the expression "dispute is" and what disputes or differences may arise on the facts of any given case… I draw from such cases as those the following proposition:**
>
> **(a) Courts (and indeed Adjudicators and Arbitrators) should not adopt an over legalistic analysis of what the dispute between the parties is;**
>
> **(b) One does need to determine in broad terms what the disputed claim or assertion (being referred to adjudication or arbitration as the case may be) is;**
>
> **(c) One cannot say that the disputed claim or assertion is necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication or arbitration;**
>
> **(d) The ambit of the reference to arbitration or adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration."**

20. Mr Lazur for the Claimant pointed out that although the dispute referred to the Adjudicator concerned the sum due under Application No. 18, Bell's claim also included the common caveat giving Adjudicator license to grant "such other relief as is necessary, just and equitable to resolve the dispute" (paragraph 7.1.8 of the Referral).

21. As to breach of natural justice, the test was defined by Akenhead J in **Cantillon Limited v. Urvasco Limited** [2008] EWHC 282 (TCC) at paragraph 57:

> **(a) "It must first be established that the Adjudicator failed to apply the rules of natural justice;**
>
> **(b) Any breach of the rules must be more than peripheral; there must be material breaches;**
>
> **(c) Breaches of the rules will be material in cases where the Adjudicator has failed to bring to the attention of the Parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant;**
>
> **(d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any Judge in a case such as this;**
>
> **(e) It is only if the Adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of Balfour Beatty Construction Company Limited v. The Camden Borough of Lambeth was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point there is no breach of the rules of natural justice in relation thereto".**

22. I was also referred to **Primus Build Limited v. Pompey Centre Limited and Another** [2009] EWHC 1487 (in particular to paragraphs 35 – 40) and to **Stellite Construction Limited v. Vascroft Contractors Limited** [2016] EWHC 792 (at paragraphs 80 – 87).

23. I have reminded myself of the detailed commentary on this aspect of natural justice in Coulson on Construction Arbitration 4th Edition at paragraphs 13.30 to 13.37 and 13.62 to 13.75 including reference to the cases.

24. In **Roe Brickwork Limited v. Wates Construction Limited** [2013] EWHC 3417 (TCC) Edwards-Stuart J said at paragraphs 23 and 24:

> **"23. If an Adjudicator has it in mind to determine a point wholly or partly on the basis of material that has not been put before him by the parties, he must give them an opportunity to make submissions on it. For example, he should not arrive at a rate for particular work using a pricing guide to which no reference has been made during the course of the referral without giving the parties an opportunity to comment on it.**
>
> **25. By contrast there is no rule that a Judge, Arbitrator or Adjudicator must decide a case only by accepting the submissions at one party or the other. An Adjudicator can reach a decision on a point of importance on the material before on a basis for which neither party has contended, provided that the parties were aware of the relevant material and the issues to which it gave rise had been fairly canvassed before the Adjudicator. It is not unknown for a party to avoid raising an argument on one aspect of its case if that would involve making an assertion or a concession that could be very damaging to another aspect of its case."**

Natural Justice

25. The material relied upon by the Adjudicator to justify the sum which he decided to order was put in by Bell in answer to a question from the Adjudicator. It simply cannot be said that this Adjudicator went off on a frolic of his own, deciding a case upon a factual or legal basis which had not been argued or put forward by either side. In my view, the guidance of Edwards-Stuart J is apt. Both parties were aware of the relevant material, the issues were canvassed before the Adjudicator in correspondence. He was not in breach of natural justice in reaching a decision on a point of importance on the material before him on a basis for which neither party had contended. His Decision was a product of responding to and accepting the case advanced by TCL. Contrary to what is argued by Mr Singer QC, he did not carry out a valuation: he corrected the arithmetic.

Jurisdiction

26.As described by the Adjudicator at paragraphs 211 – 216 of the Decision, TCL presented a series of defences to the quantum of Bell's claims. As confirmed at paragraph 228 of the Decision the Adjudicator reached the conclusion that he had been invited by TCL to ignore payments made under Application No. 19. TCL's submissions therefore opened up the possibility of a different, greater assessment of the sum due than claimed (see paragraph 55(d) of Cantillon). The Adjudicator was therefore acting within his jurisdiction to determine the sum due as he saw fit in response to the submissions made by TCL.

27. For the reasons set out, there is no arguable defence to the enforcement of the Decision. Bell is entitled to summary judgment. I invite Counsel to prepare a draft order. As to costs, I hope that they can be agreed. In default of agreement I will assess them summarily as a paper exercise.