OUTER HOUSE, COURT OF SESSION

[2022] CSOH 30

CA127/21

OPINION OF LORD BRAID

in the cause

VAN OORD UK LIMITED

Pursuer

against

DRAGADOS UK LIMITED

Defender

Pursuer: Moynihan QC; Burness Paull LLP
Defender: G Walker QC, M Steel; CMS Cameron McKenna LLP, Nabarro LLP and Olswang LLP

7 April 2022

Introduction

The issue

[1] The issue in this action is whether the adjudicator in a construction dispute reached his decision on a basis not canvassed with the parties, and, if so, whether there was a material breach of the principles of natural justice such that the decision cannot stand.

Background

[2] On or about 16 March 2018 the parties entered into a sub-contract agreement, whereby the pursuer was to provide the dredging of silts, sands, gravel and glacial till for the Aberdeen Harbour Expansion Project, for which the defender was the main contractor.

On 6 March 2020 the defender gave the pursuer notice of termination of the sub-contract. Various disputes have arisen following termination. Seven adjudications have taken place, of which the present was the sixth. In it, the pursuer claimed that it was entitled to an extension of time (EOT) and prolongation costs in respect of four compensation events, the material ones for present purposes being CEN 048 – Delayed Access to Open Quay Work; and CEN 055 – Late Delivery of Remaining Caissons. The pursuer also claimed method-related charges, and that it was entitled to equipment costs for various weather events, the latter being dubbed the "weather compensation events".

[3] On 14 September 2021 the adjudicator issued a corrected decision in the pursuer's favour, awarding it an EOT and prolongation costs for CEN 048 but not CEN 055 (or the two other compensation events). He also awarded the pursuer the weather compensation events and the method related charges.

[4] The pursuer originally sought enforcement of the adjudicator's decision in its entirety. The defender resisted enforcement, contending (a) that the decision in relation to CEN 048 was vitiated by a breach of natural justice; (b) that the decision in relation to the weather compensation events was vitiated by a failure to address all of the defender's submissions; and (c) that the decision was not severable. Both parties' positions have evolved during the course of the action. The pursuer now accepts that the part of the decision which relates to weather compensation events cannot be supported, and must be reduced. The defender accepts that the decision is severable, and that, in principle, the remainder of the decision would not require to be reduced if reached in accordance with natural justice.

[5] Consequently, the action called before me for a debate on the sole remaining question, namely, whether the adjudicator's decision in respect of CEN 048 is enforceable, or whether it too falls to be reduced.

The adjudication

The parties' respective positions

[6] Although voluminous papers were lodged for the adjudication, the essential facts are straightforward. The pursuer's claim in the adjudication was that it was denied access to carry out the open quay excavation works by reason of the defender's lack of progress in carrying out piling works, and that this had caused critical delay, from 2 August 2019, to the subcontract completion date of 31 July 2019. The genesis of the pursuer's claim was a notice, CEN 048, issued on 20 September 2019. (In that notice, the pursuer asserted that the date of the compensation event was 10 September 2019 but the defender came to accept that it was nonetheless open to the pursuer to argue, and the adjudicator to find, that the event had occurred on an earlier date.) In support of its claim the pursuer founded upon two reports by its expert, Mr Wilsoncroft, in whose opinion CEN 048 had caused critical delay from 2 August 2019 to 11 October 2019. He also expressed the view (a) that from 11 October 2019 CEN 048 was superseded as the cause of delay by CEN 055, but (b) that if CEN 055 was held not to be a cause of critical delay, CEN 048 was a continuing cause of critical delay beyond that date.

[7] The defender disputed that the cause of the delayed access was its piling works and maintained instead that the cause was the pursuer's failure to commence, and thereafter to complete, revetment works. It relied on two reports from its own expert, Mr Zucconi, in support of this position, and in support of its assertion that there had been no critical delay

caused by any failure by the defender to carry out piling works, the event said to give rise to CEN 048.

[8] It was not in dispute that in order to assess critical delay it was first necessary to establish a baseline programme against which to assess it. That process was complicated in the present case by the fact that there was no agreed baseline programme, although numerous programmes had been prepared during the course of the sub-contract. The experts disagreed as to which of those should be used as the baseline. Mr Wilsoncroft favoured one from October 2018, whereas Mr Zucconi selected the 15 April 2019 programme as his baseline. Both had considered, but rejected, a programme prepared on 15 March 2019. Having selected their respective baselines, both experts then conducted a windows analysis of critical delay. Mr Wilsoncroft's window 3 showed the critical delay caused by CEN 048, taking 2 August 2019 as the critical date. Since Mr Zucconi had formed a different view on the facts as to the event which had caused delay, his critical dates were different: 15 June to 15 July 2019 (his window 4) and 15 July to 15 August 2019 (his window 5). Neither of those showed the impact of CEN 048 since on his approach, as it was not a compensation event, it did not cause any critical delay. His analysis attributed the delay to the revetments.

The adjudicator's approach

[9] In the event, the adjudicator did not accept the views of either expert in their entirety. He selected the March 2019 programme as the baseline. Thereafter, having considered the evidence, he found that it was the defender's failure to progress the piling works, rather than any failure by the pursuer to complete the revetments, which had prevented the pursuer from accessing the open quay works, and which had caused critical delay. To that extent, he preferred Mr Wilsoncroft's approach to Mr Zucconi's. However,

he accepted Mr Zucconi's windows analysis and delay periods in preference to those of Mr Wilsoncroft. Consequential upon his attributing the delay to the piling and not the revetments, he then necessarily had to change Mr Zucconi's allocation of liability for windows 4 to 7. The outcome of this exercise was that, for reasons which are not entirely clear, the adjudicator found that the critical date of CEN 048 was 31 July 2019 (and, further, that it extended beyond 11 October 2019, the claim for CEN 055 having been refused).

[10] In short, the adjudicator selected as a baseline a programme which not only was not contended for by either expert, but which both experts had given reasons for rejecting; and he made an award to the pursuer based upon a critical date – 31 July 2019 – which was two days earlier than the date of 2 August 2019 proposed by the pursuer for CEN 048. Neither the date of 31 July 2019, nor the consequences of selecting it as the critical date, was canvassed with the parties. It is this which has given rise to the present controversy between the parties.

The defender's case

[11] The defender's case is that the adjudicator was not entitled to adopt the course he did without first intimating to the parties an indication of what he had in contemplation, giving them an opportunity to address him further. Had he done so, the defender asserts that it would have advanced a time bar argument based upon clause 61.3 of the subcontract, CEN 048 having been issued more than 7 weeks after the critical date of 31 July 2019.

[12] Clause 61.3 is in the following terms:

> "The Subcontractor notifies the Contractor of an event which has happened or which he expects to happen as a compensation event if
>
> - the Subcontractor believes that the event is a compensation event and
> - the Contractor has not notified the event to the Subcontractor.

> If the Subcontractor does not notify a compensation event within seven weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Subcontract Completion Date or a Key Date unless the event arises from the Contractor giving an instruction, issuing a certificate, changing an earlier decision or correcting an assumption."

[13] The defender argues that since it had no inkling that the adjudicator had in contemplation a critical date of 2 August 2019, it was deprived of the opportunity of arguing that clause 61.3 provided a complete defence to the CEN 048 claim. It is this which is said to constitute a breach of natural justice.

The pursuer's response

[14] The pursuer's response is that the adjudicator was entitled to adopt the course he took, which was to do no more than adopt an intermediate position between the parties' respective cases. The defender had been aware during the adjudication process that the pursuer contended that the delay caused by the defender's failure to complete the piling works had occurred before 2 August 2019. Not only had it been open to it to advance a time bar argument, it had in fact done so (as senior counsel for the defender acknowledged) at paragraph 9.9 of its rejoinder, where it had argued that the pursuer having become aware of delays to the piling works in April 2019, clause 61.3 had the effect of defeating the claim. The defender had therefore been aware of the issue. It mattered not that it had advanced the wrong argument, or wished that it had advanced a different one.

The law

[15] The underlying legal principles are not in dispute. As a starting point, the courts will in general summarily enforce decisions of adjudicators: *Carrillion Construction Ltd* v *Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358 at 84-87. As it was put in that case at

paragraph 86, the need to have the "right" answer is subordinated to the need to have an answer quickly. Having regard to that statutory objective, it was said that challenges to an adjudicator's decision on the ground of breach of natural justice were likely to succeed only in the plainest of cases.

[16] Nonetheless, where an adjudicator is found to have acted contrary to the interests of natural justice, enforcement will be refused: G*illies Ramsay Diamond* v *PJW Enterprises Limited* 2004 SC 430, per the Lord Justice Clerk (Gill) at 25.

[17] The application of the principles of natural justice to the process of adjudication, and the extent to which an adjudicator may fairly decide a case other than by accepting the submissions of one or other party, has been the subject of much judicial discussion. Lord Drummond Young considered the interaction of natural justice and adjudication in *Costain Limited* v *Strathclyde Builders Limited* 2004 SLT 102, in particular at paragraph [20]; and the following cases were also referred to in submissions: *Roe Brickwork Ltd* v *Wates Construction Ltd* [2013] EWHC 3417; *Balfour Beatty Engineering Services (HY) Ltd* v *Shepherd Construction Ltd* [2009] EWHC 2218; and *Miller Construction (UK) Ltd* v *Building Design Partnership Ltd* [2014] CSOH 80.

[18] These cases give rise to the following propositions, which to some extent overlap, but none of which is controversial:

(i) Each party must be given a fair opportunity to present its case: *Costain*.

(ii) If the adjudicator makes investigations and inquiries of his own, or proposes to use his own knowledge and experience to advance significant propositions of fact or law which have not been canvassed by the parties, it will normally be appropriate to canvas those propositions with the parties before a decision is made: *Costain*.

(iii) The adjudicator should not decide a point on a factual or legal basis that has not been argued or put forward before him: *Roe Brickwork*, per Edwards-Stuart J at paragraph 22.

(iv) However, an adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party has contended provided that the parties were aware of the relevant material and that the issues to which it gave rise had been fairly canvassed: *Roe Brickwork* at 24.

(v) For a breach of natural justice to vitiate a decision, it must be a material breach. A breach is likely to be material where the adjudicator has failed to bring to the attention of parties a point or issue which they ought to have been given the opportunity to comment on, if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute: *Balfour Beatty Engineering Services* at paragraph 41 (quoting from *Cantillon Ltd* v *Urvasco Ltd* [2008] BLR 250 at paragraph 57). The question comes to be whether, in deciding the case, the adjudicator went off on a frolic of his own.

(vi) An adjudicator is afforded considerable leeway and is entitled to adopt an intermediate position not contended for by either party without giving notice of his intention to do so: *Miller Construction (UK) Ltd* v *Building Design Partnership Ltd* [2014] CSOH 80, Lord Malcolm at paragraph 17.

[19] In applying these principles, and asking whether there has been a breach of natural justice, the words of Lord President Clyde in *Barrs* v *British Wool Marketing Board* 1957 SC 72 at 82 must be borne in mind:

> "The test is not 'Has an unjust result been reached? but 'Was there an opportunity afforded for injustice to be done?' If there was such an opportunity, the decision cannot stand."

Defender's submissions

[20] Senior counsel for the defender submitted that the adjudicator had gone off on a frolic of his own. It was not open to him to adopt the March 2019 programme which had been disavowed by both experts, without putting that to parties and asking what the consequences might be. Nor was it open to him to take the critical date for CEN 048 as 31 July 2019, when that had not been contended for by the pursuer. One of the purposes of putting a novel hypothesis to parties was to afford them the opportunity of pointing out difficulties in the proposed approach. Had that been done here, and had the defender been aware that the adjudicator was considering adopting 31 July as the critical date, it could and would have argued that the entire claim was time barred by virtue of clause 61.3. Parties could not be expected to raise in submissions every point which might hypothetically arise. The defender did not require to show that its time bar argument would have succeeded, simply that it was tenable. There had been an opportunity for injustice. The resultant breach of natural justice was material. The adjudicator could not be said to have adopted an intermediate course where, as here, he had gone beyond the position argued for by the pursuer.

Pursuer's submissions

[21] Senior counsel for the pursuer submitted that it had been open to the adjudicator to adopt the March 2019 programme as the baseline. As paragraph 9.19 of his report made clear, he had in fact given the experts the opportunity to comment on it at an adjudication meeting held on 6 September 2021. [That paragraph reads: "At the adjudication meeting held on 6 September 2021 I questioned the Delay Experts on what should be considered the

baseline programme for the works going forward from 15 April 2019". The adjudicator does not record in that paragraph what the experts' responses were.] He had explained why he had used the March programme. In any event the narrative of Mr Zucconi's approach was largely founded upon the March 2019 programme. As for the critical date, it was wrong to suggest that only two dates – 10 September 2019 (the date in the CEN 048 notice) and 2 August 2019 had been in play. It was clear from the evidence before the adjudicator that the pursuer had first been aware of the delay which gave rise to CEN 048 in April 2019. An early warning notice (EWN) had been issued on 19 June 2019. The defender had been aware of the time bar issue. The issue had not been when the delay had occurred, or when the pursuer had been aware of it, but when it had become critical. The adjudicator had been entitled to select Mr Zucconi's windows, but Mr Wilsoncroft's apportionment of blame, as he had done as described above, without giving the parties the opportunity to make further representations. The adjudicator had significant leeway and was entitled to adopt an intermediate position.

Decision

[22] As noted above, there is no dispute between the parties as to the applicable legal principles. Rather, they disagree as to how those principles fall to be applied in this case.

[23] The line between an adjudicator going off on a frolic of their own, on the one hand, and, on the other, making legitimate use of their experience to analyse material which has been lodged, and commented on by parties, before reaching a decision not contended for by either party, is not always an easy one to draw, particularly when it is remembered that an adjudication decision reached by an adjudicator who has embarked upon the latter exercise will be enforced by the courts even if wrong.

[24] So, it is of no benefit to ask whether the adjudicator was wrong to take 31 July 2019 as the critical date. Since neither party had argued for that date, and since on the pursuer's own expert evidence, the date did not occur before 2 August 2019, it seems likely that he was, although his reasoning, as both parties acknowledged, was at times opaque. However, it does not follow that the decision was reached by unfair means.

[25] Nor is this a case where the adjudicator has based his decision on information gleaned by him as a result of his own inquiries. All of the material taken into account by him had been lodged by the parties, who had an equal opportunity to make submissions about it. The question is whether they had a fair opportunity to do so.

[26] The common theme running through the propositions outlined in paragraph [18] is that the procedure adopted by the adjudicator must be fair. That is the acid test: where an adjudicator has departed from the four corners of the submissions made by parties, was it fair not to seek further submissions? If the issues have been fairly canvassed, or if the adjudicator has simply adopted an intermediate position, fairness will not require that the parties be given an opportunity to make further submissions. Conversely, if the adjudicator proposes a novel approach on a significant issue which has not been canvassed, fairness will point in the opposite direction.

[27] At the core of the controversy is whether the adjudicator can be said to have adopted an intermediate position, as the pursuer argues he did. In this regard it is instructive to consider the facts in *Miller Construction (UK) Ltd*, above. There, the dispute revolved around the installation of a ventilation system which failed to meet the required contractual standard. The defenders, who were responsible for the design of the system, had specified that one type of ventilation unit be used, whereas the pursuer, who were the contractors, used a different (cheaper) type. Each party asserted that the other was wholly responsible

for the failure. The pursuers argued in the adjudication that the defenders, as lead design consultants, should take full responsibility; the defenders, that the pursuers were to blame for instructing a cost-saving measure. While rejecting the pursuer's argument that the defenders had been professionally negligent, as they had argued, the adjudicator nonetheless ruled that neither party could place all of the responsibility for the selection of the different system on the other and found that each was 50% to blame. Before Lord Malcolm, the defenders argued that by deciding the matter on the basis of which party bore responsibility, the adjudicator had not decided the issue which had been remitted for determination. The defenders should have been given an opportunity to address that approach.

[28] In rejecting that argument, Lord Malcolm held (at paragraph [14]) that the defenders had taken too narrow a view of the issue remitted to the adjudicator, and further that the defenders had recognised in their rejoinder to one of the submissions to the adjudicator that they fully appreciated that the pursuer's case was not dependent on proof of negligence. It was in that context that he went on to say, at paragraph [17], that the adjudicator was not required to adopt one or other of the parties' submissions but could adopt an intermediate position without giving notice of his intention to do so. There had been no "frolic", and no unfairness by not giving the defenders an opportunity to comment further.

[29] The circumstances in the present case are very different. An analogy with *Miller Construction* might more readily have been drawn if the adjudicator had found, say, that both the piling works, and the revetments, had caused concurrent critical delay. For that matter, if the sole complaint made by the defender had been that the adjudicator had adopted the March 2019 programme as the baseline, I might have been persuaded that

viewed in isolation, and in the absence of any change to the critical date, that was a course which he was entitled to take.

[30] However, the adoption of a critical date which was not only different from, but earlier than, that argued for by the pursuer, takes the case into a different sphere. Accordingly, it cannot truly be said in the circumstances here that the adjudicator adopted an intermediate course in the sense that the adjudicator did in *Miller Construction*, where he was found to have decided the very issue remitted to him. The case is closer on its facts to *Inland Revenue Commissioners* v *Barrs* 1961 SC (HL) 22 (referred to by Lord Drummond Young at paragraph [11] of *Costain*) where a tribunal had issued loss certificates in amounts greater than contended for by the taxpayer without giving the Crown the opportunity to state objections, which was held to be a breach of natural justice. It is in this context that the adoption of the March 2019 programme as the baseline comes into play, since it appears that the adjudicator used that programme as the basis for his finding that the critical date was 31 July 2019. Having decided that it was the appropriate baseline (something which could not have been foreseen by the parties), and having formed the view that the critical date was earlier than that contended for by the pursuer, fairness did demand that he give the parties a further opportunity to address him on those issues. That this is so is underlined by the fact that the adjudicator did not address the time bar argument which was advanced, in a slightly different context, by the defender. It cannot be known whether he simply overlooked that argument; overlooked the significance of finding that the critical event arose more than 7 weeks before the date of CEN 048; or considered, and rejected, the argument. One reason for giving parties an opportunity to comment on novel matters not canvassed by them is so that they might point out any unforeseen problems in the proposed approach. Submissions by the defender might have had the effect of causing the adjudicator to depart

from his approach, either by selecting a different critical date or by dismissing the entire claim; or he may have carried on with his proposed course of action regardless. But, as senior counsel for the defender submitted, the defender does not require to show that the time bar argument would have succeeded, simply that the defender was deprived of the opportunity of making it.

[31] In these circumstances, I do not consider that the adjudicator gave parties a fair opportunity to comment on his proposed adoption of the March 2019 programme as the baseline, and the consequences he considered that had for the critical date. Reverting to the words of Lord President Clyde, and the question posed by him, quoted above, an opportunity was afforded for injustice to be done. The decision in relation to CEN 048 is therefore vitiated by a breach of the principles of natural justice, and it cannot stand.

Disposal

[32] For the foregoing reasons, I will sustain the defender's second and third pleas in law, reduce the adjudicator's decision in its entirety, and grant decree of absolvitor, reserving all questions of expenses.