Neutral Citation Number: [2019] EWHC 136 (TCC)

Case No: HT-2018-000285

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

The Rolls Building
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 January 2019
Handed down at the Civil Justice Centre Manchester

Before:

His Honour Judge Bird sitting as a Judge of this Court pursuant to section 9(1) of the Senior Courts Act 1981

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Between:

BARRY M COSMETICS LIMITED	**Claimant**
- and -	
MERIT HOLDINGS LIMITED	**Defendant**

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Mr William Webb (instructed by **Birketts LLP**) for the **Claimant**
Mr Justin Mort QC (instructed by **Mills & Co Solicitors**) for the **Defendant**

Hearing Date: 11 December 2018

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I direct that pursuant to CPR PD 39Apara.6.1 no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic

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His Honour Judge Bird:

1. This is an adjudication enforcement application by way of summary judgment. Enforcement is resisted on two grounds. First it is said that there was no "dispute" to refer to adjudication and secondly that the adjudicator acted in breach of the principles of natural justice. A third, short point arises about the nature of the hearing.

2. The Claimant was the employer and Merit the contractor. Merit presented its final account on 20 December 2017 some 9 months after practical completion. The adjudication was conducted in accordance with the Scheme for Construction Contracts Regulations 1998.

3. The Claimant referred the dispute to adjudication on 27 July 2018, notice of intention to refer having been given on 20 July 2018. The "dispute" was identified as the correct value of the Defendant's final account. The referral comprised 13 sections set out over 101 pages. Sections 6, 7 and 8 dealt with variations, extensions of time and loss and expense and omissions. The final account had raised a claim for £810,375.16 in addition to the contract sum for variations, and £317,569.87 in respect of loss and expense arising out of an extension of time of 35.5 weeks. The Claimant asserted that Merit had failed to adjust the contract sum to take account of omissions and took issue with the final account. No delay report was provided.

4. On 1 August 2018. The adjudicator awarded various extensions of time to the parties so that the Response would be due on 14 August and the Reply on 24 August 2018 with his final award to be published on 7 September 2018.

5. Merit responded on 14 August 2018. The Response itself was 33 pages long but referred to 9 lever arch files, one of which contained a delay analysis comprising some 792 pages prepared by Mr Niall McGuinness, to demonstrate that its costs were in fact £568,356.39 and so in excess of the actual sum claimed by Merit in their final account.

6. The Claimant served its Reply on 28 August 2018. Mr McGuinness' report was described in the Reply as:

   "the first time [the Claimant] have had sight of any real explanation from Merit in relation to their extension of time claims".

7. The Claimant served its own delay report, prepared by John Fagan of Arcadis, in response. The Claimant raised certain criticisms of Mr McGuinness' report noting for example that he had "seemingly ignored what actually happened on site at the time" and had chosen to base his report on "theoretical events". Mr Fagan on the other hand had conducted a "retrospective analysis, looking back at what actually happened and what actually delayed the completion of the works". The Claimant referred to the additional documentation provided by Merit in the Response and noted that it was:

   "completely unfair and unjust for [the Claimant] to have to review and value an entirely different submission, in a limited timeframe, to that submitted with Merit's final statement".

8. On 29 August 2018 the adjudicator wrote to both parties noting that in respect of variations the Reply contains "explanations which [Merit] will not have previously seen." The adjudicator went on to say that he did not consider that to be an issue because each party has put forward its own basis of valuation. The adjudicator noted that no response was required; he reminded the parties that he was an experienced chartered QS and did not require either party to explain where it felt the other had gone wrong.

9. On the same day Merit expressed a wish to serve a rejoinder to respond to 6 specific points including the delay analysis and pointing out that the Claimant had tried to "fudge" certain concessions. Merit requested that it be given the opportunity to draw those instances to the attention of the adjudicator.

10. The Claimant responded to Merit's request on 30 August 2018, pointing out that Merit's Response (as had been made clear in the Reply) was "an entirely new and different submission to the presented [in the final account]". It dealt with each of the 6 specific reasons relied on by Merit to justify the rejoinder, resisting in each case the need for a rejoinder. In respect of the delay report it noted:

"Merit forget that they provided a 792-page expert delay report as part of their Response. [The Claimant] obtained the delay analysis in reply to this. Merit have put forward their position, [the Claimant has] replied to this. It is therefore not necessary for Merit to make a further submission on this point".

The submission to the adjudicator ends in this way:

"we consider that both parties have been afforded the opportunity to put forward detailed submissions as to the basis of their calculations. You have all the information required to enable you to reach a decision by 7 September 2018. [The Claimant does] not consider it necessary for endless rounds of further submissions…".

11. On 30 August 2018 the adjudicator allowed Merit the opportunity to serve a rejoinder but limited to 12 pages and to dealing with the concessions they felt that the Claimant had tried to "fudge". On the same day Merit objected to the adjudicator's direction that the rejoinder be limited. Merit complained that there was much ground to cover in the rejoinder:

"there are new cases to be addressed, a new delay analysis and a new witness statement quite apart from arguments relating to variations and loss and expense".

The adjudicator responded, noting that he had directed that the rejoinder be limited to the "fudged concession" issue. Merit responded asserting that the adjudicator's stance was in effect a refusal to allow a rebuttal of the Claimant's points made in the Reply, was unfair and "in breach of the principles of natural justice".

12. The adjudicator responded. He pointed out that all of the points raised in the Reply (he had made the same point, going so far as to express his view that it was "pleasing to note" in his letter of 29 August)

"were in direct reply to [Merit's] Response….. Party submissions cannot go on indefinitely. I understand each Party's position and it is unnecessary for the Parties to continue to inform me that they disagree….the principles of natural justice are always in my mind…I note that in accusing me of unfairness, [Merit have] not referred to the fact that I have invited a short rejoinder despite having been urged by [the Claimant] to deny that opportunity… I have a duty to manage and conclude these proceedings without unnecessary expense, and the directions I have given are appropriate to that

purpose".

13. Albeit under clear (and loud) protest, Merit served its "limited rejoinder" on 31 August. It is clear that the rejoinder does not comply with the adjudicator's direction that it be limited to the "fudged concessions" but in fact, as Merit had forecast on 30 August, it dealt with the Claimant's delay analysis. There is an attempt to justify references to the delay report by reference to "concessions" apparently made in that report. In dealing with the delay report, the rejoinder:

    a. Deals with the difference in approach to delay adopted by Mr McGuinness and Mr Fagan at paragraphs 5.16 to 5.18 concluding that Mr McGuinness' approach was better and in accordance with authority.
    b. Makes other criticisms of Mr Fagan's approach (and his criticism of Mr McGuinness) by reference to the various delay windows at paragraphs 5.19 to 5.30
    c. Deals with variations (paragraph 7); loss and expenses (paragraph 6); fundamental problems with the referral (paragraph 4); extensions of time; omissions (at paragraph 8) and deductions (paragraphs 9 and 10).

14. A brief surrejoinder was served in accordance with directions by the adjudicator on 3 September 2018. It describes Merit's rejoinder as "an unsolicited response, ignoring the adjudicator's strict orders". The Claimant then went on (after dealing with points of clarification raised by the adjudicator) to reply to only those points that the adjudicator had permitted to be raised in the rejoinder.

15. The adjudicator's decision was published on 7 September 2018, on time. In the final award, the adjudicator:

    a. Noted at paragraphs 18 and 19 that he had received a rejoinder and a surrejoinder and at paragraph 22 that he had considered all submissions and information provided by the parties.
    b. At paragraph 94 he refers to the fact that the parties have each provided a delay report and at paragraph 95 the adjudicator records his preference for Mr Fagan's report. Issues of delay are dealt with at paragraphs 96 to 107.

16. Against this background, I turn to consider the questions that arise on the enforcement application.

Was there a dispute?

17. Merit's position is that there was no dispute capable of being referred to the adjudicator because there was no entitlement to payment.

18. Paragraph 1 of the Scheme for Construction Contracts set out in the 1998 Regulations of the same name provides that "any party to a construction contract (the "referring party") may give written notice (the "notice of adjudication") at any time of his intention to refer any dispute arising under the contract, to adjudication".

19. In *Working Environments Limited v Greencoat Construction Limited* [2012] EWHC 1039 (TCC), Akenhead said:

> "It is illogical to say that there can not be a dispute about an interim valuation of work unless, until and after the valuation falls due for payment; there is a dispute about the interim valuation and that is referable to adjudication. There is some practical advantage in seeking adjudication before the due date for payment so that the dispute can be resolved in time before payment is due or shortly thereafter."

20. There is nothing in the language of the scheme which suggests that a dispute may only be referred to adjudication once an entitlement to payment has arisen. In my judgment the *Working Environments* decision is determinative of the issue. There was a clear dispute between the parties as to the correct value of the final account and it was entirely appropriate to refer the matter to adjudication.

Natural Justice

21. Parties to a construction adjudication are entitled to a fair hearing. The concept of "fair hearing" is not fixed, but varies according to the nature of the process. It follows that what amounts to a fair hearing must be judged in the context of adjudication. If a party wishes to avoid enforcement because his entitlement to a fair hearing has not been vindicated, he must show not a mere technical breach, but that the breach had a significant effect on the outcome of the adjudication (see Coulson on Construction

Adjudication, 3rd Edition 2015, at paragraph 13.03).

22. The context of adjudication (the backdrop against which fairness is to be assessed) can be stated shortly by reference to the authorities:

    a. Adjudication takes place within a strict and limited timeframe and is intended to be conducted "in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept" (see *Macob Civil Engineering v Morrison Construction* [1999] BLR 93 a decision of Dyson J as then was, at page 97).

    b. "the majority of adjudicators are not chosen for their expertise as lawyers…the task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is to operate are proof of that…The need to have the "right" answer has been subordinated to the need to have an answer quickly…a challenge [on natural justice grounds] must be plain, clear and relatively comprehensible" (see *Cantillon v Urvasco* [2008] BLR 250 at paragraph 52 referring to *Carillion v Devonport Royal Dockyard* [2006] BLR 15)

23. An obvious and important element of natural justice is the right of a party to comment on any material which the adjudicator is to consider, but which has not been generated by either party. This is the effect of the decision of HHJ Seymour QC in *RSL v Stansell* [2003] EWHC 1390 (TCC) (see also paragraph 57(e) of *Cantillon*).

24. If the adjudicator has all the arguments before him he will not generally be required to permit further rounds of submission. There is no right to respond to every submission made by the other party (see for example *Amec v Thames Water* [2010] EWHC 419 (TCC) para.65, a decision of Coulson J as he then was).

25. Mr Mort QC, who appeared for Merit, submitted that the adjudicator's failure in the present case to allow an unfettered response to Mr Fagan's report was akin to the situation where the adjudicator (as in *RSL*) obtained an expert report and failed to allow the parties to comment on it.

Decision

26. In my judgment Mr Mort's submission is misplaced. As the judge made clear in ***RSL***, the breach of natural justice in that case was a breach of the principle that every party has a right to know the case against him and have an opportunity to meet it. That rule has been written into the scheme (see paragraph 17).

27. The need to afford each party an opportunity to meet the case made against him is not an unlimited right. Taken literally it might be understood to afford a right to endless rounds of pleadings. Such a literal interpretation is clearly misplaced as is clear from ***Amec***. Properly understood, the rule simply ensures that the adjudicator has both sides of the argument.

28. In my judgment the adjudicator perfectly understood the point. So much is clear from his letter quoted at paragraph 11 above. He understood the position of each party and did not need further rounds or submission by way of refinement.

29. In my judgment the adjudicator's direction that the rejoinder should be limited was perfectly fair and proper. Whilst the point is not before me, it seems to me that any award he made based on a limited rejoinder would have been made in accordance with the principles of natural justice as applicable in adjudication. The fact of the matter is that Merit ignored the direction (at least insofar as content was concerned) and advanced submissions dealing with the Claimant's delay report which the adjudicator went on to consider when giving his final decision.

30. I can see no basis upon which it can properly be said that the adjudicator's decision was reached otherwise than in accordance with the principles of natural justice. It follows that summary judgment must be granted to the Claimant.

The nature of the hearing

31. No issues of fact requiring determination were brought to my attention and there was no real suggestion that the issue before (whether the decision was arrived at contrary to the requirements of natural justice) could only be determined at a trial.

32. Whilst I accept that the application is one governed by CPR 24, the nature of an enforcement application is such that it is unlikely that the court will conclude that the

issues raised cannot be determined in a summary fashion.

33. In my judgment there is no answer to the claim and it is entirely appropriate to grant summary judgment.