Neutral Citation Number: [2022] EWHC 53 (TCC)

Case No: HT-2021-000393

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

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

Date: 14 January 2022

Before :

Jason Coppel QC
(sitting as a Deputy High Court Judge)

- -

Between :

BILTON & JOHNSON (BUILDING) CO LIMITED **Claimant**

- and -

THREE RIVERS PROPERTY INVESTMENTS LIMITED

Defendant

- -

Helen Dennis (instructed by **MJD Solicitors**) for the **Claimant**
Rachael O'Hagan (instructed by **Clyde & Co**) for the **Defendant**

Hearing date: 2 December 2021

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 14 January 2022 at 10.30am.

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JASON COPPEL QC
(sitting as a Deputy Judge of the High Court)

Jason Coppel QC:

Background

1. The Claimant applies for summary judgment on its claim to enforce against the Defendant the decision of an adjudicator, Mr Nigel Davies ("**the Adjudicator**"), dated 2 September 2021 ("**the decision**"). The Adjudicator decided that the Claimant was entitled to an extension of time, to 14 November 2019, for works which it had contracted to perform for the Defendant and that the Defendant should pay to the Claimant the sum of £228,273.48, which it had previously deducted from the contractual payments due to the Claimant by way of liquidated damages. The Adjudicator also ordered the Defendant to pay interest and the costs of his engagement.

2. The findings of the Adjudicator which are essential to understanding his decision, and the dispute before me, are as follows:

   i) On 10 August 2018, the Claimant submitted a formal tender in the sum of £1,902,633.30 to carry out works consisting of the refurbishment of an industrial estate owned by the Defendant at Jefferson Way, Thame, Oxfordshire ("**the Works**").

   ii) The Employer's Requirements for the Works included that the Works would be carried out in four sections, corresponding to three groups of units in the industrial estate and site works. Among the Contract Particulars to be included in the contract – which would be the JCT Design and Build Contract 2016 – was that there would be completion dates for each section of the Works and a rate of liquidated damages for delay in completing each section of £2500 per week (§28).

   iii) The Form of Tender drafted by the Defendant's agent, Brown & Lee surveyors ("**B&L**"), after referring to the JCT Design and Build Contract 2016, stated that: "*We agree that unless and until this formal agreement is prepared and executed this Tender, together with your written acceptance thereof, shall constitute a binding contract between us*". On 15 August 2018, B&L communicated by letter to the Claimant that written acceptance and a contract between them came into being (§30). This contract was referred to by the Adjudicator as "the Original Contract" (§31).

   iv) The Works commenced on 17 September 2018.

   v) As anticipated in the Form of Tender, on 12 October 2018 B&L issued the Claimant with a formal JCT Design and Build Contract 2016 to sign and return. This contract was dated 15 August 2018. It was signed and returned by the Claimant on 9 January 2019. This contract was referred to by the Adjudicator as "the Signed Contract" (§32). The Signed Contract was found by him to have superseded the Original Contract (§163).

   vi) The Contract Particulars of the Signed Contract specified a single date of completion of the Works as 26 April 2019, in contrast to the Contract Particulars in the Original Contract, which had contemplated different completion dates for the different sections of the Works. Relatedly, and in

further contrast to the Contract Particulars in the Original Contract, liquidated damages were stated to be £2500 per week (as opposed to £2500 per section per week) (§34).

vii) Subsequently, in June 2019, B&L noticed these and other discrepancies between the Signed Contract and the Contract Particulars as originally issued and issued an amended contract for the Claimant to sign. The Claimant did not sign or otherwise consent to these amendments and the Signed Contract was not amended (§204).

viii) Consequently, the contractual rate of liquidated damages for delay was £2500 per week, which was capable of being apportioned between various units and sections of the Works in the event that some were completed before others.

ix) In the course of the Works, the Claimant sought and was granted certain extensions of time but only in respect of the individual section of the Works which had been affected by the relevant delay. This was incorrect: the contract did not provide for a completion date for each section and any relevant delay which affected the timing of the Works as a whole should have given rise to an extension for completion of the Works (§167).

x) The Claimant achieved Practical Completion of the Works on 13 December 2019 (§305). However, the Defendant had taken partial possession of certain aspects of the Works in August and December 2019.

xi) The Defendant withheld £234,641.56 in purported application of the contractual provisions on liquidated damages. That figure was founded upon a damages rate of £2500 per section per week of delay and did not take account of the fact that the Defendant had taken certain parts of the Works into possession at an earlier date than other parts (§179).

xii) There had been a number of delays to the Works (§306) which had not been the responsibility of the Claimant and which together entitled the Claimant to an extension of time to the Date for Completion of the Works from 26 April 2019 to 14 November 2019 (§329).

xiii) The Defendant was entitled to liquidated damages for delay in completing the Works. Having regard to (a) the contractual rate of £2500 per week and (b) apportionment of damages between the units/sections completed on the date of Practical Completion and those completed prior to 14 November 2019, the Defendant had been entitled to withhold £6368.08 (§331).

xiv) The Adjudicator did not accept the Defendant's argument that the defence of rectification had entitled it to proceed on the basis that the liquidated damages provisions of the Signed Contract entitled it to £2500 per section per week, as per the Original Contract (§§209-217).

xv) Since the Defendant had deducted £234,641.56 in respect of liquidated damages, the Defendant was required to pay £228,273.48 to the Claimant (§332). The Defendant was also required to pay £25,387.82 in interest (§337) and the Adjudicator's fees and expenses (§339).

3. The Defendant did not make the payments directed by the Adjudicator (save for paying half of the Adjudicator's fees and expenses). The Claimant therefore, on 12 October 2021, issued the current claim to enforce the Adjudicator's decision. On 21 October 2021, O'Farrell J gave permission for the Claimant to immediately serve an application for summary judgment and made provision for the hearing which took place before me.

4. At the hearing, the Defendant resisted the claim, and the application for summary judgment, on two grounds. First, it was argued that the Adjudicator's findings as to the applicable contractual terms were made in breach of natural justice because they were based on arguments that were not advanced by either of the parties and which were not canvassed with the parties. Second, it was argued that in refusing to accept the defence of rectification regarding the contractual rate for liquidated damages, the Adjudicator took a restrictive view of his jurisdiction which he did not canvass with the parties, thereby breaching natural justice and failing to exhaust his jurisdiction.

The relevant law

5. As O'Farrell J recently stated in *Global Switch Estates 1 Ltd v Sudlows Ltd* [2020] EWHC 3314 (TCC), §44: "*It is important to emphasise that the courts take a robust approach to adjudication enforcement*". She cited the well-known summary of the relevant legal principles given by Jackson J in *Carillion v Devonport Royal Dockyard* [2005] EWHC 778 (TCC), who had stated (§80, with citations omitted):

> "1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish)";
>
> 2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law;
>
> 3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision.
>
> 4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the [Housing Grants, Construction and Regeneration Act 1996]. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice."

6. The Court of Appeal in *Carillion* endorsed the summary of Jackson J and added, materially (§§85, 87):

> "The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless 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. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator...
>
> In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's

decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense …"

7. The principles of natural justice require that the parties to an adjudication are confronted with, and given a fair opportunity to respond to, the main points which are relevant to the dispute and the decision: *Balfour Beatty Construction Ltd v London Borough of Lambeth* [2002] EWHC 597 (TCC), §33. In that case, the adjudicator had acted unfairly by adopting a methodology for delay analysis which had not been put forward by either party without informing the parties of the methodology which he intended to adopt or seeking observations as to the manner in which that or any other methodology might be applied in the circumstances of the case before him. HHJ Humphrey Lloyd QC stated (§33):

"If an adjudicator intends to use a method which was not agreed and has not been put forward as appropriate by either party he ought to inform the parties and to obtain their views as it is his choice of how the dispute might be decided. An adjudicator is of course entitled to use the powers available him but he may not of his own volition use them to make good fundamental deficiencies in the material presented by one party without first giving the other party a proper opportunity of dealing both with that intention and with the results. The principles of natural justice applied to an adjudication may not require a party to be aware of "the case that it has to meet" in the fullest sense since adjudication may be "inquisitorial" or investigative rather than "adversarial". That does not however mean that each party need not be confronted with the main points relevant to the dispute and to the decision."

8. This principle was helpfully summarised by Coulson J (as he then was) in *Primus Build Ltd v Pompey Centre Ltd* [2009] EWHC 1487 (TCC), §40, as follows:

"An adjudicator cannot, and is not required to, consult the parties on every element of his thinking leading up to a decision, even if some elements of his reasoning may be derived from, rather than expressly set out in, the parties' submissions. But where, as here, an adjudicator considers that the referring party's claims as made cannot be sustained, yet he himself identifies a possible alternative way in which a claim of some sort could be advanced, he will normally be obliged to raise that point with the parties in advance of his decision".

9. In *Corebuild Ltd v Cleaver* [2019] EWHC 2170 (TCC), there was a breach of natural justice of this nature where the adjudicator "*determined the question of repudiation decisively against the Defendants, not on the basis advanced by the Claimants, but on the basis of a factual finding which had not been argued for, which there was no evidence or submission in support of, and upon which the Defendants had had no opportunity to comment or adduce evidence*" (§29(iv)).

10. Failure of an Adjudicator to consider part of a defence to a claim may also render his decision unenforceable. In *Pilon v Breyer Group Ltd* [2010] BLR 452, Coulson J stated this principle as follows (§§22.1-22.4, with citations omitted):

> "The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub-issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable.
>
> If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice.
>
> However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable.
>
> It goes without saying that any such failure must also be material. In other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication."

11. As this is an application for summary judgment, the question for me is whether the Defendant has any real prospect of successfully defending the claim for enforcement of the Adjudicator's decision (CPR 24.2).

Ground 1: breach of natural justice in identifying the relevant contractual terms

12. The core of the dispute which had been referred to the Adjudicator was how much the Defendant had been entitled to withhold from what was otherwise due to the Claimant by way of liquidated damages for delay beyond the contractual completion date. Given the differences in respect of the completion date and the rate of liquidated damages between the Contract Particulars which had been provided to the Claimant when it was invited to tender for the Works, and those which had been sent to the Claimant by B&L on 12 October 2018, it was essential for the Adjudicator to determine which of those versions of the Contract Particulars was applicable (and indeed whether any relevant contractual amendments had been made pursuant to the amended terms issued by B&L in June 2019). That necessity was reflected both in the Notice of Adjudication which highlighted (in §§4.3-4.4) the parties' disagreement as to the applicable contractual terms and the Notice of Referral to the Adjudicator, which contained similar material (§§6.3-6.4).

13. The Claimant's position before the Adjudicator was that no contract had been formed on 15 August 2018 and that the only contract agreed was that returned to the Defendant on 9 January 2019. But that even if a contract had been formed on the earlier date, it lacked the terms which were essential to the dispute (regarding sections, dates for possession and completion and liquidated damages), terms which were only included in the 9 January 2019 contract (Reply, §§13-16). By contrast, the Defendant's position before the Adjudicator was that the contract between the parties was formed on 15 August 2018 and that no further contractual documents came into existence after that date (Response, §5.25).

14. Having considered these competing arguments, the Adjudicator decided that the parties had initially entered into the Original Contract on 15 August 2018; and that

the Original Contract was superseded by the Signed Contract on 9 January 2019. The Defendant complains that the Adjudicator acted in breach of natural justice by reaching a decision on a basis which had not been advanced by either party and on which it had had no opportunity to make representations.

15. I do not accept that submission. The Adjudicator agreed with the Claimant that the governing contractual terms were those of the Signed Contract and rejected the Defendant's position that the governing terms were those of the Original Contract. That the Adjudicator's precise reasoning – that the parties had entered into the Original Contract first and then the Signed Contract - does not appear to have been put forward by either party does not come close to establishing that there was a breach of natural justice. The Defendant had had a full opportunity to make submissions as to which contractual terms applied and why, and did not suffer any unfairness. Applying the helpful distinction drawn by Coulson J in *Primus* (see §8 above), this was plainly a case where the Adjudicator's reasoning in this regard was derived from, rather than expressly set out in, the parties' submissions (and so did not have to be put to the parties in advance of his decision) and not a case where the Adjudicator had derived a new and different basis for the Claimant's claims and had not put that new case to the Defendant.

16. The Defendant argues that the Adjudicator had been required to canvass his views with the parties, thereby giving the Defendant the opportunity to address him on his proposed reasoning. The Defendant says that if that had been done it would have led evidence on (in particular) the absence of any contractual intention to replace the contract of 15 August 2018 with the contract returned by the Claimant on 9 January 2019. That submission serves only to demonstrate that there was no unfairness in the Adjudicator's approach. If it were true, it was or should have been an important part of the Defendant's case before the Adjudicator as to the continuing effect of the Original Contract that the parties had not intended to replace that contract at any later stage. If and to the extent that the Defendant failed to lead evidence on absence of contractual intention to replace the Original Contract, that was its own doing; it was not taken by surprise and prevented from this course by the approach adopted by the Adjudicator.

17. I would in any event have rejected the Defendant's first ground of challenge to the Adjudicator's decision because the unfairness of which it complains could not have been material to his key finding, in agreement with the Claimant, that the relevant contractual terms were those of the Signed Contract. That the Adjudicator reached that conclusion via the route of the parties first agreeing the Original Contract which was superseded by the Signed Contract, rather than by either of the routes advocated by the Claimant, does not, in my judgment, undermine the validity of the conclusion, in respect of which there was no unfairness.

Ground 2: failure to address rectification

18. In the alternative to its argument that the only contract agreed by the parties contained provision for liquidated damages at £2500 per section per week, the Defendant submitted to the Adjudicator that it had been entitled to deduct liquidated damages at that rate because the provision of the Signed Contract whereby damages were at the total rate of £2500 per week had been included by mistake and fell to be rectified (see §208 of the Decision). The Defendant complains that the Adjudicator failed to

determine this rectification defence, thereby taking a restrictive view of his jurisdiction which he did not canvass with the parties, breaching natural justice and failing to exhaust his jurisdiction.

19. This complaint proceeds from the unpromising starting point that the Adjudicator's decision contains a section entitled "*Rectification*" which spans 21 paragraphs and more than four pages in total. His conclusions were as follows:

"209. The dispute to be decided therefore included whether the Signed Contract should be rectified so that it provided for liquidated damages at the rate of £2,500 per week for each of the four sections (notwithstanding being grotesquely out of all proportion to the legitimate interest that TRP had for late completion as the innocent party) rather than the £2,500 per week actually provided in the Contract. ..

210. TRP could only have legitimately deducted liquidated damages on the basis of £2,500 per week for each of the four sections if it was entitled to have the Contract rectified, that such rectification and the remaining contract as drafted facilitated such deduction and, equally importantly, was TRP entitled to deduct liquidated damages in advance of the deed being rectified, notwithstanding being grotesquely out of all proportion to the legitimate interest that TRP had sought to protect against as the innocent party, as a consequence of late completion by BJB and therefore unenforceable.

211. Accordingly, I am to decide whether any deduction could be made on the basis of a possible entitlement to rectification prior to that rectification occurring and, if so, whether TRP had made out such an entitlement to rectification by the court. It is only in this sense that I am concerned with the remedy of rectification since it was not necessary for myself to rectify the Contract to decide the dispute referred to me.

212. Whilst I have not been provided with evidence to demonstrate that TRP has brought proceedings seeking rectification TRP has nevertheless raised it as a defence. Since this point is fundamental to TRP's right to deduct the liquidated damages it has claimed I consider that it is necessarily connected with the dispute.

213. In this dispute the situation is that it is TRP who had the Contract prepared on its behalf by the Employer's Agent, for execution as a Deed by BJB, which now seeks rectification on the grounds that its own draft was in error. The situation is rendered more complicated because I have decided that the liquidated damages that TRP wishes to apply are grotesquely out of all proportion to the legitimate interest that TRP had sought to protect against as the innocent party as a consequence of late completion by BJB and therefore unenforceable.

214. Notwithstanding my decision as to the proportionality and enforceability of the liquidated damages upon which TRP wishes to rely as expressed within the Employer's Requirements and/or my decision that such is a penalty in any event, I decide that the contemporaneous evidence, including the BJB's Formal Tender dated 10 August 2018, the Original Contract and the Employer's Requirements, the last of which was common to the Original Contract and the Signed Contract, clearly demonstrates that the Employer's Agent made a mistake in the preparation of the Signed Contract and that objectively viewed BJB was aware that a mistake had been made by the Employer's Agent. However, as I have already decided had the

Employer's Agent not made such a mistake in the preparation of the Signed Contract, the liquidated damages the Employer's Agent had intended to insert would have been extravagantly disproportionate and therefore a penalty and thus unenforceable.

215. In my opinion it is arguable that rectification may be ordered on the facts of the case so that the applicable liquidated damages rate might possibly be corrected to £2,500 per week for each of the four sections, but such would be grotesquely out of all proportion to the legitimate interest that TRP had sought to protect against, as the innocent party, as a consequence of late completion by BJB and/or a penalty and thus unenforceable.

216. The second question therefore is whether a prima facie possible entitlement to rectification provides TRP with an entitlement to deduct liquidated damages at the rate of £2,500 per week for each of the four sections in the meantime. I decide that it does not because TRP has not relieved itself of the burden of proof in regard to such claim, legal authority for doing so has not been cited and I have already decided that such would be extravagantly disproportionate and therefore a penalty and thus unenforceable.

217. Lest there be doubt, in any event I do not consider that I am empowered to order rectification of the Contract in the absence of either the Parties' agreement or cited legal authority for me to do so as an Adjudicator."

20. The finding recorded in §§210, 214, 215 and 216 that a rate of £2500 per section per week was a penalty and unenforceable refers back to the Adjudicator's conclusion in §195 that that rate was "*grotesquely out of all proportion to the legitimate interest that [the Defendant] had sought to protect against as the innocent party as a consequence of late completion by BJB, i.e. lost rent*". Hence, the liquidated damages provisions contained in the Employer's Requirements originally issued to the Claimant "*were a penalty*". §217 of the Decision appears in a text box, which was the Adjudicator's method of denoting a summary conclusion at the end of a passage of reasoning.

21. I would summarise the Adjudicator's reasoning on the Defendant's rectification defence as follows:

    i) Whether or not the Defendant had been entitled to withhold liquidated damages at the higher rate of £2500 per section per week on the basis that the Signed Contract fell to be rectified was part of the dispute before him (§§209, 212).

    ii) It was arguable that the Defendant was entitled to rectification on account of there having been a mistake made in the preparation of the Signed Contract of which the Claimant was aware (§§214-215).

    iii) But that *prima facie* possible entitlement to rectification did not entitle the Defendant to withhold liquidated damages at the higher rate at a time when the Signed Contract had not been rectified and in fact provided for liquidated damages at the rate of £2500 per week (§216). The Defendant had not cited authority to establish that entitlement and, further, the higher rate of liquidated damages was a penalty and unenforceable.

iv) Since the key question was whether the Defendant had been entitled to withhold liquidated damages at a time when the Signed Contract had not been rectified, it was not necessary for the Adjudicator himself to decide whether to rectify the contract (§211).

v) If it had been necessary for the Adjudicator to decide whether to order rectification of the contract, he did not consider that he had the power to do so (§217).

22. Against that background, it is not arguable that the Adjudicator failed to address the rectification defence or did so in a manner which was unfair to the Defendant. The Adjudicator directed himself that he should consider and rule upon that defence and proceeded to do so. The basis for his rejection of the Defendant's defence was not that he had no jurisdiction to rectify the Signed Contract but that the Defendant had not been entitled to withhold liquidated damages at the higher rate in advance of the contract being rectified, and where the higher rate amounted to an unenforceable penalty. He also decided – further and in any event – that he would not himself have been able to rectify the Signed Contract even if that question had arisen (which it had not).

23. Whether or not the Adjudicator's reasoning in rejecting the rectification defence was correct as a matter of law is not material to whether his Decision should be enforced. Only a deliberate failure on the Adjudicator's part to address the rectification defence could avail the Defendant (see *Pilon*, cited in §10 above); manifestly there was no such failure. Nor did the Adjudicator act unfairly by failing to alert the parties to his reasoning on the rectification defence before it was finalised and giving them an opportunity to comment. The Defendant raised the defence, briefly, and had a fair opportunity to put forward full evidence, authority and submissions in support of the defence. The Adjudicator dutifully considered and rejected the arguments which the Defendant had considered it appropriate to put forward.

Conclusion

24. In my judgment, the grounds of defence to the Claim relied upon by the Defendant are ill-founded and do not disclose any realistic prospect of successfully defending the claim. I therefore grant the application for summary judgment on the Claim.