SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 16

CA66/17

JUDGMENT OF SHERIFF N A ROSS

In the cause

PENTLAND INVESTMENTS LIMITED

Pursuer

Against

AITKEN TURNBULL ARCHITECTS LIMITED

Defender

Pursuer: Walker QC; Brodies LLP
Defender: McKenzie; Clyde & Co

Edinburgh, 19 March 2018: The Sheriff, having resumed consideration of the cause, sustains the defender's second plea-in-law to the extent of granting decree of absolvitor; finds the pursuer liable to the defender in the expenses of process as taxed; remits the cause to the auditor to fix a diet of taxation and to report; certifies the cause as suitable for the employment of junior counsel.

Note:-

[1] Adjudication is available where parties to a construction contract require speedy, interim resolution of a construction dispute. It is available subject to the various requirements and definitions set out in the Housing Grants, Construction and Regeneration Act 1996 (the "1996 Act"). Unless the parties agree otherwise, an adjudication will be subject

to the regulations in the Scheme for Construction Contracts (Scotland) Regulations 1998 (SI 1998/687) (the "Scheme").

[2] This action is for enforcement of an adjudicator's award. It is a Scheme case. The defender claims that the adjudicator was in breach of the rules under which he was appointed, and therefore had no jurisdiction. It founds on the fact that that the adjudicator heard another, related dispute at the same time as the parties' dispute. That is said to breach regulation 8(2) of the Scheme, which reads:

> "The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on related disputes under different contracts, whether or not one or more of those parties is a party to those disputes."

[3] The defender, on learning that the adjudicator intended to act in a related dispute, immediately refused consent to his acting in the parties' dispute. He dismissed their position and proceeded to hear both adjudications at the same time. The defender participated under reservation of its position, and refuses to pay the award.

The facts

[4] This action called for debate on the legal issue, so no evidence was led, although some was agreed. The pleadings and agreed documents disclose the following:

[5] The pursuer is the owner of the Raeburn Hotel, Edinburgh which required substantial remedial works. In November 2011 the pursuer assembled a team to design and oversee the proposed works. The defender was appointed project architect and McColl Associates ("MA") were appointed structural engineer. The pursuer also appointed a quantity surveyor, consulting services engineer and, in due course, the main contractor. The

defender's appointment was by an exchange of letters. The works were substantially completed around March 2014.

[6] In September 2016 the pursuer noticed defects with the kitchen floor which required emergency repairs. Further problems with basement tanking were discovered. Other issues arose. The pursuer claimed payment from the defender, which disputed liability. In August 2017 the pursuer served a notice of referral and approached RICS to appoint an adjudicator. Mr Hunter, a construction contract consultant, was appointed.

[7] Mr Hunter wrote to the parties by emailed letter on 1 September 2017. He confirmed his nomination and willingness to act. The letter also intimated:

> "I am obliged to advise the Respondents that the Referring Party, in addition to this adjudication, has referred to me one other adjudication against another party involved in the project on a different dispute and I will be adjudicating on both disputes separately but in the same time period."

[8] The 'another party' was MA, the consulting engineer on the project. The defender's agents responded by email of same date:

> "On behalf of the Responding Party we acknowledge your letter dated 1 September…. We note within this letter you refer to being appointed another [sic] adjudication arising from the same project. This does not have the consent of the Respondents. We respectfully invite you to resign as adjudicator in respect of this referral…"

[9] Mr Hunter acknowledged the letter and emailed the pursuer's agents for comment. They submitted that he need not resign as they were separate adjudications. Mr Hunter replied to the defender's agents that:

> "I disclosed the fact that I am adjudicating simultaneously on the other matter simply to make the Responding Party aware of the situation. As the other adjudication is quite separate I do not require the consent of the Respondent in this adjudication will [sic] therefore not resign."

[10] The defender's agents responded maintaining their objection and refusal of consent, and participated in the adjudication under reservation of their position. Mr Hunter issued his decision on 8 November 2017. His decision comments on jurisdiction as follows:

> "The Respondent raised a jurisdictional point…I should resign…The defence to this challenge is that the adjudications are between different parties, arise out of another contract for different design services and therefore there is no impediment to me progressing with both adjudications at the same time…My finding is that there is no provision that prevents me adjudicating on two disputes on the same construction project at the same time."

[11] The detail of the dispute and his findings need not be explored further at this stage, save to note that on several heads of a defects claim he required to allocate liability between MA and the defender. The defender's defence attributed liability, in certain respects, to MA.

The parties' submissions

[12] The dispute turns on the wording and effect of regulation 8(2) of the Scheme, discussed below. The pursuer maintains that the adjudicator did not require consent to hear this dispute. The defender maintains he did. The defender also raises a subsidiary natural justice point.

[13] Mr Walker QC for the pursuer adopted the position that reg 8(2) is permissive in tone, and designed to allow an adjudicator to decide multiple disputes in the same adjudication, a power he would not otherwise have, and which the parties could opt to confer on him. It does not prevent Mr Hunter doing what he did, namely to deal simultaneously with two separate adjudications, even if they were related disputes.

[14] He submitted that the defender's position, that reg 8(2) operated as a prohibition on dealing with related disputes at the same time, was incorrect. Properly read, reg 8(2) allowed an adjudicator to hear more than one dispute simultaneously in a single

adjudication. It was drafted to mitigate the effect of sec 108 of the 1996 Act, which referred to disputes in the singular and not the plural. Were it not for reg 8(2), sec 108 would prohibit the adjudicator from hearing more than one related dispute at the same time. Sec 108 did allow a dispute to be referred 'at any time', and therefore did not prevent multiple adjudications at the same time, and which reg 8(2) did not operate to prevent.

[15] On the defender's natural justice point, he submitted that the defender had failed to identify that the adjudicator had relied to any extent on the supporting expert opinion, and their position was speculative. A court should assume regularity of procedure. In any event, any such breach was not relevant or material.

[16] Mr McKenzie for the defender identified that the dispute focuses on the meaning of 'at the same time'. He submitted that reg 8(2) prevented an adjudicator from hearing different disputes without consent, whether they were within a single adjudication process or in more than one. Parties agree that reg 8 disallows adjudication on multiple disputes arising under a single contract, and multiple disputes between parties to multiple contracts in a single adjudication, without consent. The present issue was, in effect, whether 'at the same time' means 'in a single adjudication process'. The defender's position is that these words were wide enough to apply to related disputes under different contracts being decided in separate adjudications at the same time. One can identify a potential risk (and therefore the likely principle behind that regulation) that an adjudicator might cross-apply information between processes without parties' knowledge. He placed particular reliance on *Pring* and *Deluxe Art* (see below).

[17] As a secondary position, Mr Mackenzie submitted that there had been a breach of natural justice, based on the particular findings in the case. This was a somewhat narrow point: during the adjudication Mr Hunter stated that he relied on an expert report about

consequential loss, which had led to an award of £29,913.30. That expert report had made express, but undetailed, reference to a second expert report which was produced in the MA adjudication, but had not been produced to the defender. The defender had not been given an opportunity to comment on this supportive evidence.

Discussion

[18] In essence, the pursuer's position is that reg 8(2) allows the parties to agree to adding a second dispute to an existing dispute, and hearing both disputes at the same time in the same adjudication. Mr Hunter did not do that. He heard separate adjudications at the same time, with which reg 8(2) is not concerned and which it does not prevent.

[19] The defender's position is that reg 8(2) requires the parties' agreement before the adjudicator may hear a second, related dispute in a separate adjudication, at the same time. Mr Hunter heard a separate adjudication at the same time and did not have the parties' consent. Whatever the effect on that other adjudication, he exceeded his jurisdiction in this one. His decision is therefore invalid and unenforceable.

[20] Parties referred me to the following cases, amongst others: *Grovedeck Limited* v *Capital Demolition Limited* [2000] BLR 181; *Fastrack* v *Morrison Construction Limited and another* [2000] BLR 168; *Pring & St Hill Limited* v *CJ Hafner t/a Southern Erectors* [2002] EWHC 1775 (TCC); *Barr Limited* v *Law Mining Limited* 2003 SLT 488; *Bothma* v *Mayhaven Healthcare Limited* [2006] EWHC 2601 and on appeal at [2007] EWCA Civ 527; *Atholl Developments (Slackbuie) Limited, Petitioner* (2010) CSOH 94; *Witney Town Council* v *Beam Construction (Cheltenham) Limited* [2011] BLR 707; *Carillion Utility Services Limited* v *SP Power Systems Limited* 2012 SLT 119; *Highland and Islands Airports Limited* v *Shetland Islands Council* [2012] CSOH 12; *Wilmott Dixon*

Housing Ltd v *Newlon Housing Trust* [2013] EWHC 798; and *Deluxe Art & Theme Limited* v *Beck Interiors Limited* [2016] EWHC 238 (TCC).

[21] The pursuer's counsel submitted that most of these are English authorities at first instance, which are not binding on this decision. That submission is correct. However, it is proper to give due regard to the developing jurisprudence under a UK statute (and a virtually identical scheme to the English and Welsh equivalent), and in some decisions the specialist nature of the courts involved, and I have done so.

Did the adjudicator have jurisdiction?

[22] In my view, the submissions of the defender are clearly to be preferred. I would summarise some of the main principles as follows.

[23] The essence of the procedure introduced by sec 108 is practicality. A dispute referred to an adjudicator must be prepared, heard and decided within 28 days, which is likely to be a demanding timescale.

[24] Each dispute requires a separate adjudication (*Fastrack*, para 22; *Witney Town Council*, para 31; *Bothma*, para 26). The parties may not refer multiple disputes to a single adjudicator under a single adjudication, because under sec 108 the adjudicator will lack jurisdiction. If another dispute arises between the same parties, or if one party has a different dispute under a different related contract, then a separate adjudication must be raised. If reg 8 allowed more than one dispute in a single adjudication, it would contravene sec 108.

[25] Sec 108 does not directly regulate the relationship of one adjudication with another. It does not impose any restriction on when another related dispute may be referred for adjudication, or by whom it may be decided, or in what order. It allows a party to give notice at any time of their intention to refer a dispute to adjudication.

[26] The rules to apply in any adjudication are left substantially within the power of the parties to regulate. Certain minimum requirements apply (sec 108(2)). If the parties' construction contract does not contain these minimum requirements, or if there is no prior agreement, than a statutory scheme of rules, the Scheme, will apply. The parties are free to regulate such matters as the identity or method of appointment of the adjudicator and the adjudicator's powers.

[27] There is no rule of natural justice preventing a single adjudicator acting in more than one related disputes (adjudications) at once (*Wilmott Dickson*, para [69]). A party can refer more than one related disputes to more than one adjudicator at the same time. A party can refer more than one related disputes to a single adjudicator to be heard consecutively. Neither of these is struck at by sec 108 or reg 8.

[28] Such matters are left to the parties' agreement. For example the parties may, possibly unwisely, word their construction contract so as to avoid the application of the Scheme and to provide for the referral to a single adjudicator, without need for consent, of more than one dispute (in separate adjudications) or more than one contract (*Grovedeck*, para [35]).

[29] The Scheme is a "sensible and practical series of rules governing the way in which that right [to adjudication] can be exercised" (*Deluxe Art*, para [30]). Amongst other things, the Scheme expressly regulates the situation where an adjudicator is appointed to hear related disputes at the same time. Reg 8(2) deals with where those related disputes arise under different contracts.

[30] In the present action, the pursuer states: "The question in the present case is: Is there anything in the legislation that prevents a referring party simultaneously referring multiple related disputes, in multiple referrals, to a single adjudicator. The pursuer submits the

answer is no". That is a correct statement. However, it entirely overlooks the wording of reg 8(2).

[31] Reg 8(2) allows an adjudicator to hear multiple adjudications at the same time. This does not derogate from, or contradict, sec 108. The adjudicator may not do so, however, unless he has the consent of all the parties (*Pring*, at para [18]; *Deluxe Art*, para [28]). Any party has the absolute right not to consent (*Pring*, para [18]). Mr Hunter did not request or receive that consent. His proceeding to hear and decide this adjudication at the same time as another adjudication of a related dispute, without the defender's consent, was ultra vires. That decision cannot stand.

[32] Some further discussion of the particular circumstances of this dispute is required.

[33] The adjudicator's reasoning was that he did not require the parties' consent because the MA adjudication was an 'entirely separate adjudication'. That was an argument supplied by the pursuer's agents. Of course, both Mr Hunter and those agents knew the details of the MA adjudication. The defenders did not. They could not know whether the MA adjudication was "entirely separate". Mr Hunter considered his duty was "simply to make the Responding Party aware of the situation". He explained in his decision that:

> "the adjudications are between different parties, arise out of another contract for different design services and therefore there is no impediment to me progressing with both adjudications at the same time".

[34] That reasoning is flawed. Reg 8(2) expressly contemplates adjudications under different contracts, and amongst different parties, so these two factors do not satisfy or avoid the operation of reg 8(2). If the adjudicator intended to say that the two adjudications were on unrelated disputes, he was wrong. Parties accept that these were related disputes. The adjudicator accepts that they were heard at the same time.

[35] The defender submitted that sec 108 should be seen as preventing the mischief of use of prior knowledge, in the form of undisclosed information, gained by the adjudicator and used in a subsequent adjudication. The Scheme provided an exception to this, if consent was obtained. The pursuer submitted that this was illogical, because the Scheme did not prevent consecutive adjudications but prevented (at least without permission) simultaneous adjudications. The defender sought to meet this point by drawing a distinction between consecutive and simultaneous adjudications. The former would start from a fixed award in a previous adjudication, whereas the latter would not. I do not view that as a useful distinction, because undisclosed evidence is not affected by the existence of a previous fixed award.

[36] In my view, this argument assists neither party, but I should comment upon it. It may appear illogical not to restrict consecutive hearings but to restrict simultaneous hearings, but that is what the Scheme does. One reason for prohibiting several adjudications at once might be to make sure that each one is done properly. It is a very swift process. It has been repeatedly referred to as rough justice or necessarily crude (*Carillion Utility*, para [18]). An adjudicator's incorrect, but intra vires, decision is very difficult to challenge. It might be entirely reasonable to restrict an adjudicator to a single adjudication at a time (*Witney Town Council*, para [31]). Accordingly, I would be slow to conclude such part-provision must be illogical. In my view, without analysis of the legislative process, there is no reason to assume that the Scheme was intended to be an all-encompassing or seamless regime, or that it is illogical. It is what it is. If parties don't like it, they can contract out of it.

[37] In any event, this argument is no more than a distraction. In my view, neither sec 108 nor reg 8(2) are primarily concerned with regulating principles of fairness. They do not require to. The rules of natural justice will always apply. Sec 108(2)(e) augments this by

setting out the adjudicator's basic duty to act impartially. However the primary purpose of sec 108 is to create the adjudication procedure and set out a few basic features which must apply. It is concerned primarily with procedure. It says nothing about other, related adjudications. How the procedure works, and the (other) principles which should apply, are substantially left to the parties to decide by agreement. The Scheme provides a default option in the event that they fail to do so adequately. The Scheme allows the parties a number of further options. One of these options is to decide whether their adjudicator should be permitted to participate in another, related, adjudication at the same time. It is for the parties to decide for themselves what they are prepared to accept. To the extent that any further principles require to be introduced, the Scheme does so expressly, for example fleshing out the duties of the adjudicator (reg 12), and requiring him to make available any information considered in reaching his decision (reg 17).

[38] Even setting aside underlying purposes, I consider that an ordinary construction of the plain wording of sec 108 and of reg 8(2) would lead to the same conclusion, namely that consent was required to hearing two related adjudications at one time. Further, I do not accept the pursuer's proposition that reg 8(2), applied by sec 108(5) of the 1996 Act, can be read so as to contradict sec 108(1). If an act is not competent under principal legislation, it cannot be made competent by subordinate legislation. Accordingly, an argument based on the proposition that the Scheme allows more than one dispute to be heard in a single arbitration, in contradiction to sec 108(1), cannot succeed.

Interpretation Act 1978

[39] Counsel for the defenders sought to apply sec 6 of the Interpretation Act 1978 to allow references under sec 108 to include the plural. In my view that cannot be done here.

The 1978 Act introduces a means of dealing with technical arguments which serve to defeat the intended purpose of a statute. For example, it is difficult to anticipate that parliament would normally intend to give a right to a 'he' but not to a 'she', or arbitrarily to one person but not another. I would consider sec 6 might be used, for example, to defeat an absurd (hypothetical) argument that sec 108, in referring to 'the right to refer a dispute' restricted a party to one dispute per contract. So when does a 'contrary intention appear' in any Act? In my view, it is when either the gender, or the plural, materially affects the purpose of the legislation. Here, sec 108 would have materially varying effect depending on whether 'party', or 'dispute', or 'adjudication' are read in the singular or the plural. Sec 108 uses the singular to achieve a distinct legislative purpose, and as such a contrary intention must be inferred. That would be so even if the principle or purpose were opaque. I infer such a contrary intention here, and exclude sec 6 of the Interpretation Act as an aid to construction.

[40] My conclusion is the same as reached by Lord Macfadyen in *Barr* (para 16), but may appear to differ from certain obiter remarks in *Grovedeck* (para 34). I note, however, those latter remarks were made in relation only to 'contract', in a manner consistent with subsequent jurisprudence. A dispute may be presented under several contracts, as long as it is a single dispute.

Natural justice

[41] As the adjudicator did not have jurisdiction, this question does not arise.

[42] It is interesting to note that Mr Hunter did in fact apportion liability for defects between the pursuer and MA. The details are not explored in the pleadings, but the findings are available. It may be that the defender has a legitimate fear of being deprived of sight of relevant material. However, parties were at one on the principles to be applied, these being

set out in *Costain* and subsequent cases. At this stage, because of the very limited allegation of breach of natural justice (by the incorporation within a disclosed report of a reference to another, undisclosed report, relied upon only as a cross-check to the author's own conclusion) I would not yet have been prepared to find, in a pleadings-based exercise, that this was one of the 'plainest of cases' overcoming the presumption of regularity (*Atholl Developments* at para [17]), or that I should be satisfied at this stage that the breach is substantial and relevant (*Costain* at para [28]).

Disposal

[43] The defender's argument is correct, and the adjudicator did not have jurisdiction. This adjudication cannot be enforced. Parties agreed how I should deal with this outcome. Accordingly I will sustain the defender's second plea-in-law to the extent of granting decree of absolvitor. No other order is necessary. Expenses were to follow success, so I will find the pursuer liable to the defender in the expenses of process as taxed. Parties also agreed that I should certify the cause as suitable for the employment of junior counsel, which I do.

[44] I record my appreciation for the high quality written and oral argument by both counsel on 12 March. I was much assisted by their thorough and knowledgeable presentation. I am grateful also to agents for their thorough preparation which allowed this case to be heard and decided in a short timescale.