Case No: HT 06 90

Neutral Citation Number: [2006] EWHC 1569 (TCC)

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

11 St. Dunstan's House

London, EC4

Date: Thursday, 8 th June, 2006

B e f o r e :

THE HONOURABLE MR. JUSTICE RAMSEY

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MULTIPLEX CONSTRUCTIONS (UK) LIMITED **Cla**

- and -

WEST INDIA QUAY DEVELOPMENT COMPANY (EASTERN) LIMITED **Defe**

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MR. JUSTIN MORT (instructed by Mayer Brown Rowe & Maw, Solicitors) appeared for the Claimant

MR. NICHOLAS DENNYS QC and **MISS DOMINIQUE RAWLEY** (instructed by CLL, Solicitors) appeared for the Defendant

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Judgment

Mr. Justice Ramsey:

Introduction

1.
This is an application by Multiplex Constructions (UK) Limited ("Multiplex") for summary judgment to enforce an adjudicator's decision in the sum of £1,161,020 plus interest and costs made against West India Quay Development Company (Eastern) Limited ("WIQ"). WIQ engaged Multiplex as main contractor for the construction of a hotel and apartment block on the north bank of the Thames at West India Quay. The agreement was made on the JCT Standard Form of Building Contract, 1998 edition, with contractor's design and was dated 26 November 2001. The works were divided into six sections. The two sections which are material to the present action are sections 1, the hotel, and section 2, the upper storeys which contain apartments and penthouse.

2.
On 19 December 2003 in advance of completion of the project the parties entered into a final account settlement ("FAS"). The purpose of the FAS was to re-establish a baseline the project and agree a final

account sum in an effort to avoid disputes arising between the parties. The FAS preserved Multiplex's entitlement to extensions of time for relevant events occurring after 19 December 2003. At the date of the FAS the Works were already in delay and clause 12 of that settlement recorded that so long as the practical completion date of section 1, the hotel, was 29 March 2004 and an overall practical completion date of the Whole of the Works of 17 May 2004 was achieved, then extensions of time would be given to those dates and no liquidated damages would be payable. In the event section 1, the hotel, was certified as complete on 11 June 2004. Partial possession of the apartments was taken at various times before 23 December 2004, and practical completion of section 2a was certified on 23 December 2004.

3.
In November 2004 Multiplex put forward a claim for an extension of time and loss and expense. The hotel was by then complete and the Claimant identified eight events as having caused critical delay and therefore claimed an entitlement to an extension of time to 11 June 2004.

4.
In relation to the apartments and penthouses Multiplex claimed an extension of time to 23 December 2004, relying first, upon the failure of WIQ to make available design material necessary to enable the penthouses to be constructed before 4 August 2004 and, secondly, upon various other matters which delayed the execution of penthouse works between 4 August 2004 and 23 December 2004.

5.
The claims were referred to adjudication and the adjudicator decided that Multiplex was entitled to an extension of time of 41 calendar days to section 1 on the basis of two variations: 16 days for the reconfiguration of the Hi-Energy Bar and 25 days for the revision to the Employer's Requirements for the bar counters. The adjudicator therefore decided that there should be an extension of time for section 1 to 9 May 2004.

6.
For section 2a the adjudicator decided that Multiplex could not start work on the penthouses any earlier than 4 August 2004 for reasons which were contractually the responsibility of WIQ and that there was also a 28 day delay during the execution of the penthouse works, when gauged against the contractor's fit-out programme for the penthouses which indicated a completion date of 21 October 2004. The adjudicator therefore awarded an extension of time of 220 days taking the extension to the date of practical completion of section 2a to 23 December 2004.

7.
WIQ had deducted £1,661,020 as liquidated damages (£1,100,000 for section 1 and £561,020 for section 2a). The consequence of the adjudicator's decision was that Multiplex was only liable for £500,000 as liquidated damages for section 1 and as a result the adjudicator ordered WIQ to repay the balance of £1,161,020 deducted for sections 1 and 2a.

Procedural History

8.
The adjudication was commenced by a referral notice dated 13 April 2005. Mr. Gary Kitt, MSc, Diploma in Law, Diploma in Surveying, FRICS, FCIOB, FCIRAAB and a non-practising barrister, was appointed as adjudicator. There were then the following further submissions: a response to the referral by Multiplex on 3 May 2005; a reply by WIQ of 16 May 2005; a further response by Multiplex of 27 May 2005; a further reply by WIQ of 1 June 2005 and their response to WIQ's further reply by

Multiplex dated 20 June 2005. A meeting was time-tabled for 21 July 2005 but this was postponed to 21 October 2005 because of illness. It then became apparent to WIQ that programmes attached to Multiplex's response differed from those originally submitted by Multiplex. As a result the adjudicator gave directions and WIQ served a Response to Counterclaim dated 24 November 2005 and Multiplex served their Reply on 12 December 2005. The adjudicator posed a series of questions and received further submissions which he described as voluminous. He then undertook a site visit and finally made his decision on 24 March 2006, over 11 months after the referral notice but within the time limit as extended by the parties. He referred in his decision on costs to costs which had been incurred resulting from the numerous unsolicited submissions made on behalf of WIQ and which he said had added quite considerably to the costs.

9.
Following the adjudicator's decision on 4 April 2006 WIQ made an application to the adjudicator to clarify or remove an ambiguity in his decision. He responded on 5 April 2006. Multiplex then issued the Claim Form and Particulars of Claim and also made the Part 24 application with supporting evidence on 6 April 2006. Directions were given by this court on 7 April 2006 for WIQ to serve evidence by 21 April 2006, Multiplex to respond on 25 April 2006 and for a hearing on 27 April 2006. The hearing was postponed, first to 12 May 2006, and then to 6 June 2006. WIQ served its evidence on 10 May and Multiplex served evidence in response on 30 May 2006. WIQ then served a further witness statement from Mr. Rainsberry on 31 May 2006. On 2 June 2006 WIQ served a further witness statement of Ashton Doherty which for the first time dealt with questions of the financial status of Multiplex, evidently on the basis that WIQ were seeking to stay any judgment. Skeleton submissions were served at about 11 a.m. on 5 June 2006 including a supplementary skeleton by Multiplex dealing with and objecting to Mr. Doherty's latest witness statement. At the hearing it was agreed that I should deal with the question of whether Mr. Doherty's evidence should be admitted and, if so, any further necessary directions. At that hearing Multiplex was represented by Justin Mort and WIQ was represented by Nicholas Dennys QC and Dominique Rawley. I now turn to consider the issues raised on this application.

The Case of WIQ

10.
When WIQ served its evidence it produced a witness statement from Mr. Rainsberry, which set out many grounds which were not pursued at the hearing. He put in evidence which substantially filled the 9 files of evidence presented for the hearing. In many respects what Mr. Rainsberry did was to find matters which he considered to be errors by the adjudicator and characterised them as matters of unfairness, apparent bias or lack of jurisdiction. While such matters may well be pertinent in any proceedings which finally determine the extensions of time and whilst WIQ may feel aggrieved by what it believes are errors by the adjudicator that is, as now accepted by WIQ, irrelevant to my consideration of the matter. As a result I consider that there is justification in Multiplex's submission that, as originally launched, WIQ's challenge contained many matters which were simply scrabbling around to find arguments, however tenuous, to resist payment, to paraphrase the words of Chadwick LJ in Carillion Construction v. Devenport Royal Dockyard Ltd [2006] BLR 15 at para 85.

11.
However, the issues now addressed in the skeleton and at the hearing are much more focussed and it is those which I address. In summary they are first, that in respect of the adjudicator's decision on the extension of time for section 1, the adjudicator decided a case that was not put before him and adopted his own analysis without giving WIQ the opportunity to address it. It is submitted that, in

doing so, he both exceeded his jurisdiction and acted unfairly. Secondly, in respect of section 2a it is submitted that the adjudicator arrived at his decision in breach of the principles of natural justice.

12.
I now turn to the relevant principles. As the grounds relied on by WIQ show, WIQ accepts that it must demonstrate that there has been a breach of natural justice or an excess of jurisdiction before they can impeach the adjudicator's decision; an error of fact or of law is not sufficient. The grounds on which a party may rely in relation to natural justice were the subject of the decision of the Court of Appeal in Carillion Construction Ltd. v. Devenport Royal Dockyard Ltd [2006] BLR 15 at 35 where Chadwick LJ said this:

"85. 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 courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case, which (contrary to DML's outline submissions to which we have referred in paragraph 66 of this judgment) may, indeed, aptly be described as 'simply scrabbling around to find some argument, however tenuous, to resist payment'.

86. It is only too easy in a complex case for a party who is dissatisfied with the decision of an adjudicator to comb through the adjudicator's reasons and identify points upon which to present a challenge under the labels 'excess of jurisdiction' or 'breach of natural justice'. It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution which meets the needs of the case. Parliament may be taken to have recognised that, in the absence of an interim solution, the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The statutory scheme provides a means of meeting the legitimate cash-flow requirements of contractors and their subcontractors. The need to have the 'right' answer has been subordinated to the need to have an answer quickly. The Scheme was not enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the statutory scheme; or whether such disputes are suitable for adjudication under the scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.

87. 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 …"

13.

WIQ relies in this case in particular on the earlier decision of His Honour Judge Humphrey LLoyd, QC in Balfour Beatty v. Lambeth London Borough Council [2002] BLR 228 at 301 where he said in the context of an adjudicator's decision on a claim for an extension of time at paragraph 28:

"Is the Adjudicator obliged to inform the parties of the information that he obtains from his own knowledge and experience or from other sources and of the conclusions which he might reach, taking those sources into account? In my judgment it is now clear that, in principle, the answer may be: Yes. Whether the answer is in the affirmative will depend on the circumstances. The reason lies, at least in part, in the requirement that the Adjudicator should act impartially. That must mean that he must act in a way which will not lead an outsider to consider that there might be any element of bias, i.e. that a party has not been treated fairly. In addition impartiality implies fairness, although its application may be trammelled by the overall constraints of adjudication. Lack of impartiality carries with it overtones of actual or apparent bias when in reality the complaint may be better characterised as a lack of fairness."

14.
Judge LLoyd QC then referred to what Judge Bowsher QC had said in Discain Project Services Ltd. (No. 1) [2000] BLR 402at p. 405 where he said this:

"Because there is no appeal on fact or law from the Adjudicator's decision, it is all the more important that the manner in which he reaches his decision should be beyond reproach. At the same time one has to recognise that the Adjudicator is working under pressure of time in circumstances which makes it extremely difficult to comply with the rules of natural justice in the manner of a Court or an arbitrator. Repugnant as it may be to one's approach to judicial decision making, I think the system created by the [HGCRA] can only be made to work in practice if some breaches of the rules of natural justice which have no demonstrable consequence are disregarded."

15.
Judge Lloyd QC continued at page 302:

"The last sentence shows that the question that I posed cannot be given an unqualified answer as the facts have to be taken into account.

29. Nevertheless, in my judgment, that which is applicable in arbitration is basically applicable to adjudication but, in determining whether a party has been treated fairly or in determining whether an Adjudicator has acted impartially, it is very necessary to bear in mind that the point or issue which is to be brought to the attention of the parties must be one which is either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant. It is now clear that the construction industry regards adjudication not simply as a staging post towards the final resolution of the dispute in arbitration or litigation but as having in itself considerable weight and impact that in practice goes beyond the legal requirement that the decision has for the time being to be observed. Lack of impartiality or of fairness in adjudication must be considered in that light. It has become all the more necessary that, within the rough nature of the process, decisions are still made in a basically fair manner so that the system itself continues to enjoy the confidence it now has apparently earned. The provisional nature of the decision also justifies ignoring non-material breaches. Such errors, if apparent (as they usually are), will be rectified in any negotiation and settlement based upon the decision. The consequence of material issues and points is that the dispute referred to adjudication will not have been resolved satisfactorily by any fundamental standard and the chances of it providing the basis for a settlement are much less and the chances of it proceeding to arbitration or litigation are much greater. However, the time limits, the nature of the process and the ultimately non-binding

nature of the decision all mean that the standard required in practice is not that which is expected of an arbitrator. Adjudication is closer to arbitration than an expert determination but it is not the same."

The Issues in the Adjudication

16.
The issues raised in the adjudication included legal arguments as to whether time was at large and as to whether the liquidated damages clause was enforceable. As a secondary issue the question was raised of Multiplex's entitlement to extensions of time for section 1 and section 2a. After deciding an issue on concurrency, the adjudicator dealt with the extensions of time for section 1 at paragraphs 59 to 150 and for section 2a at paragraphs 151 to 166 of his decision. I now turn to consider the challenges raised on the extension of time first for section 1 and then for section 2a.

Section 1 Extension of Time

17.
In relation to section 1, which forms the hotel section of the project, the adjudicator was faced with a claim for an extension of time based on an impacted as planned analysis produced by Multiplex. That analysis was in the form of 60 individual sequentially impacted events on an as-planned base line programme. WIQ in its Response to Counterclaim produced an as-built windows analysis using progress information. The adjudicator rejected WIQ's analysis and that is not now challenged in these proceedings. At paragraphs 64 and 65 of his decision the adjudicator stated:

"64. For my part I have considerable concerns that the 'Impacted As-Planned' method is reliable, primarily because it by definition completely ignores progress such that unrealistic results can be generated by slavish application of the software.

65. Having said that, I am also conscious of the fact that there is little, if any, contemporaneous correspondence directed to Multiplex supporting the allegation that its progress was poor."

18.
He then referred to eight events which Multiplex cited as causing critical delay and stated that he would focus on those events in considering Multiplex's claim. He continued at paragraphs 69-70 as follows:

"69. My approach has been to consider both the 8 events cited as critical by Multiplex as well as the effect of those items identified by Multiplex as 'sub-critical' at Appendix F to Annexure 3 of the Response to Referral. As I read Appendix F, the only events relied upon by Multiplex, whether claimed to be critical or sub-critical, are EACI's 258, 245, 239, 221, 209 and delays resulting from de facto instructions via RI e-mails to GMS [Gleeds Management Services Limited] and GMS letter 1226.

70. Turning now to those 8 relevant events that Multiplex says caused critical delays to completion I intend to look first at the reasonableness of the periods claimed by Multiplex for design, procurement and installation of the physical works in question and then consider whether, in my view, Multiplex has demonstrated that a delay in completion was the likely result of these events."

19.
The adjudicator then proceeded to analyse each of the eight events cited by Multiplex. He rejected six of those events for reasons which he set out. In relation to two of those events he found that Multiplex was entitled to an extension of time, as I have indicated, of 16 days for the reconfiguration of the Hi-Energy Bar and 25 days for the revised Employer's Requirements for the bar counters. As a result he

found that Multiplex was entitled to an extension of time from 29 March 2004 to 9 May 2004. Multiplex had sought an extension to 11 June 2004 and WIQ had contended that no extension was due.

20.
I now consider the criticisms of the adjudicator's decision in respect of the two events for which he granted an extension of time.

The Hi-Energy Bar

21.
The case put forward by Multiplex was that information was issued to them on 25 February 2004 which allowed them to proceed to issue a revised drawing for the Hi- Energy bar on 1 April 2004 and as a result this caused a critical delay of 14 days. The adjudicator referred to Multiplex's delay impact programme 20 that showed an impact of the Hi-Energy Bar as causing a delay from 1 June 2004 to 15 June 2004, a critical delay of 14 days. The adjudicator considered this claim and concluded as follows:

"128. I am satisfied that Multiplex has demonstrated that a critical delay in respect of the co-ordination of the design of the Hi-Energy Bar occurred, with the effect that, in my view, completion of the Works was likely to be delayed beyond 29 March 2004, the Date for Completion of Section 1.

129. I find that Multiplex is entitled to an entitlement to extension of time of 16 calendar days in respect of the works carried out in reconfiguring the Hi-Energy Bar, being 14 days for the design delays to the Hi-Energy bar plus 2 days for Good Friday and Easter Monday, which occurred on 9 th and 12 th April 2004 respectively."

22.
WIQ say that in making this decision the adjudicator decided a case not put to him and adopted his own analysis without giving WIQ the opportunity to address it. First, WIQ say that the adjudicator used the impacted as-planned analysis, although he had rejected it as unreliable. In my judgment there are difficulties for WIQ in such a ground of challenge. The adjudicator did not reject that method of analysis. He raised concerns in paragraph 64 and stated at paragraph 70 what his approach was to be. I read paragraph 70 as dealing with two stages. The initial consideration was whether the period of the alleged delay caused by an instruction was a reasonable period to cover design, procurement and installation of the works in question, and then the further consideration was whether Multiplex had demonstrated that a delay in completion, that is critical delay, resulted from that event. He therefore set out in paragraph 70 an approach which shows he treated Multiplex's analysis with caution. He did not, in my judgment, decide a case not put to him and his approach to the case put forward by Multiplex was no more than an assessment by him of the evidence, as he was required to do. He did not adopt his own method as was the case in Balfour Beatty v. Lambeth. In those circumstances I can see no breach of natural justice by the adjudicator approaching the "impacted as-planned" analysis in the way he did, in the light of his concerns. If he made an error of fact or law in the application of that approach or if he made such an error in using that approach then that cannot form the basis of the limited challenge permitted to an adjudicator's decision.

23.
Secondly, WIQ say that there was no attempt by the adjudicator to analyse whether the event was on the critical path. However, the basis of his assessment as set out in paragraph 70 seems to me to do just that. In any event I cannot see that this raises any matter of breach of natural justice. If the

adjudicator was wrong in fact or in law in his analysis of the facts and in his assessment of the critical path that does not give rise to a right of challenge.

24.
Thirdly, WIQ says that the adjudicator failed to consider the extent to which the two events, for which he held Multiplex were entitled to an extension of time, overlapped. Again I do not consider that this gives rise to a breach of natural justice. At most this would be an error of fact or law.

25.
Fourthly, WIQ contends that the adjudicator determined that the effect of reconfiguration of the Hi-Energy Bar extended beyond the date on which practical completion was achieved and the adjudicator thereby exceeded his jurisdiction. This, I consider, misunderstands the “impacted as-planned” method. This method of analysis shows the impact against the “as-planned” programme and therefore may well show a greater extension than is required, if actual progress and reprogramming is taken into account. This is one of the major concerns with the method. It attempts to show the impact on the “as-planned” programme by adding the event. It is therefore the period of extension derived from that programme which is of relevance. I do not consider that the fact that this method projects completion beyond practical completion has any effect on the fairness of the process adopted by the adjudicator or led to the adjudicator exceeding his jurisdiction. Again I am not concerned with the question whether there is an error of fact or law in adopting this approach. Accordingly, I do not consider that WIQ has made out any ground of challenge to the award 16 days’ extension of time in relation to the Hi-Energy Bar in section 1.

The Bar Counters

26.
I now turn to the bar counters. The case put forward by Multiplex was that instruction EACI 258 dated 11 May 2004 caused a ten day critical delay to completion based upon the impacted as planned analysis. This instruction required Multiplex to revise the bar counters in both the lounge lobby bar and the Hi-Energy Bar, with final layouts to be approved by WIQ prior to manufacture. Multiplex contended that the effect of incorporating these changes delayed the completion of bar construction because it necessitated new builders work holes for revised python details; it delayed the installation of beer pythons and it delayed completion of finishes in the locality, removal of protection and builder’s clean. WIQ contended that this instruction required no more than a simple replacement of the bar counters with no connection between this and any subsequent decoration or carpentry activities. The adjudicator noted that WIQ did not comment on the activities which Multiplex said were affected by the introduction or the extended duration of these activities.

27.
At paragraph 145-147 of his decision the adjudicator set out his findings as follows:

“145. Accordingly, I find that the incorporation of the works required by EACI Nr. 258 did cause a delay to the regular progress of the Works and in view of the timing of the instructions was such as to cause delay to completion.

146. Following the issue of the instruction on 11 May 2004 Multiplex says that it was unable to complete the bar, following redrawing and manufacture of replacement bar counters until 4 June 2004. Having considered the evidence in respect of this instruction I accept that Multiplex acted as expeditiously as possible in sourcing and installing the replacement bar counters.

147. I find that the instruction to replace the bar counters did cause a delay to completion between the issue of the instruction on 11 May 2004 and installation of the replacement counters on 4 June 2004."

He held that the period of 24 days when added to the extension granted for the Hi-Energy Bar and taking into account a May Bank Holiday gave a revised completion of 9 May 2004.

28.
WIQ criticises this decision on the basis that the adjudicator awarded a greater extension of time in relation to the bar counters than was claimed and adopted a different method of analysis to that put forward by either party. In relation to the period granted by the adjudicator, at first sight the adjudicator decided that Multiplex was entitled to an extension of time of 25 days whereas the extension sought by Multiplex was 10 days. However, as explored in argument, the basis of Multiplex's approach is a sequential "impacted as-planned" analysis. The period of extension derived from that analysis depends on a sequential analysis and whether an extension of time has been granted for all the preceding events. That did not happen in this case. As a result if this particular event were the only one impacted on the programme it would give an impact which differed from the 10 day impact. The adjudicator referred to this aspect at paragraphs 68 and 69 of his decision and was clearly aware of the point. In these circumstances I do not consider that the adjudicator has granted a longer period than contended for by Multiplex if the totality of Multiplex's case is considered. Rather, as can be seen from bundle 4 at p. 1244, Multiplex contended that there had been a 25 day delay to the activity and on the basis of the sequential "impacted as-planned" analysis and assuming that the prior impacts gave an extension of time, then this gave a further 10 day critical delay. In those circumstances the fact that the adjudicator has found a delay of 25 days is consistent with Multiplex's case and the fact that he has held that the critical impact was 25 days and not 10 days is consistent with the assessment needed where a sequential "impacted as-planned" analysis is used. Whether that approach is right or wrong is not a matter for me to consider.

29.
As a result I do not consider that, when properly analysed, it can be said that the extension of time departs from the case put forward by Multiplex or that the adjudicator has adopted a different method of analysis. On that basis there is no question of the adjudicator exceeding his jurisdiction or acting unfairly. Further, looking at the matter more broadly, the adjudicator had to decide the question of an extension of time. WIQ contended that the date should remain at 29 March 2004. Multiplex contended that it should be extended to 11 June 2004, and the adjudicator held, based on claims raised by Multiplex, that the date should be 9 May 2004. It is difficult to see how he exceeded his jurisdiction on this basis. In relation to acting unfairly the adjudicator is obliged to make his decision and in doing so he has to assess the case put forward by each party. He did this in relation to this claim. He did not, as in Balfour Beatty v. Lambeth, create his own as-built programme and then derive his own critical path, thereby adopting his own methodology. Rather, he came to conclusions on the basis of the evidence, analysis and submissions put before him. In doing so I do not consider that there was an obligation on the adjudicator to contact the parties and invite their comments on that conclusion. Such an approach would be unrealistic and impracticable in the context of this or any similar adjudication. As a result I do not consider that WIQ has raised any matters of excess of jurisdiction or breach of natural justice which can impeach the adjudicator's decision on the extension of time for bar counters in section 1.

30.
Accordingly, WIQ's challenge to the adjudicator's extension of time of 41 days for section 1 fails.

Section 2a Extension of Time

31.
I now turn to section 2a. This section of the project consisted of apartments on floors 13-30 and penthouses at floors 31 and 32. The adjudicator dealt with this claim for an extension of time at paragraphs 155-166 of his decision. Multiplex sought an extension of time of 220 days which was derived as follows: an extension of 192 days for delayed receipt of design information for the penthouses until 4 August 2004, and a further delay of 28 days after 4 August 2004 caused by WIQ during construction of the penthouses in the period August to December 2004. The adjudicator summarised Multiplex's claims at paragraphs 153-154 of his decision and then set out WIQ's case at paragraph 155. The adjudicator first considered the issue of who bore responsibility for the delay in commencing any meaningful works in the penthouses until 4 August 2004. In doing so he said that he needed to address significant events contained in both parties' chronologies. At paragraphs 157-163 the adjudicator set out his findings on the progress of design information from WIQ which was clearly based upon the chronology. He concluded at paragraphs 162-163 as follows:

"162. … On 2 August 2004 Multiplex advised GMS of penthouse issues still requiring input from WIQ, clarification or formal instruction, this communication resulting in a two day workshop meeting at which the current co-ordinated services drawings were marked up and Multiplex proceeded in accordance with these annotated drawings.

163. On 3 August 2004 Multiplex issued its 'Penthouse Fit-Out' programme which indicated a completion date of 21 October 2004."

32.
In relation to the second period, that is after 4 August 2004, the adjudicator expresses himself more briefly, as follows, in paragraph 164:

"As I read the submissions WIQ does not offer any detailed response to Multiplex's chronology of events post dating the issue of its fit out programme on 3 August 2004" -- I interpose that this is not challenged by WIQ -- "and my own review of the chronology when read with the relevant correspondence persuades me that Multiplex has valid reasons for the delay in completion of Section 2a until the date of Practical Completion on 23 December 2004."

He therefore concludes that Multiplex is entitled to the 220 day extension of time sought by Multiplex.

33.
WIQ criticises the adjudicator's decision, and in summary it says that he decided a case that was not put to him and adopted his own analysis without giving the WIQ the opportunity to address it. They say that it is impossible to know what events the adjudicator has found to be relevant events and what periods of the delay is attributed to those individual events; there is no reference whatsoever to progress on the bulk of the work in section 2a; there is no assessment of criticality or progress in the Decision, and the adjudicator's reasoning does not begin to substantiate the extension of time awarded. It therefore contends that the Decision has been arrived at in breach of the principles of natural justice because it does not record or address the WIQ's case that delay to the apartments was critical to the completion of phase 2a or contain any analysis of the critical part of section 2a or explain how or why the penthouses were critical to the completion of the project between 19 December 2003 and 25 December 2004.

34.

As developed at the hearing these complaints also amounted to a criticism that the adjudicator failed to give reasons. I do not, however, consider that a criticism of a failure to give reasons or adequate reasons is a breach of the rules of natural justice in the context of an adjudication.

35.
In Amec v. Whitefriars [2005] BLR 1 at p. 6, Dyson LJ said this:

“The common law rules of natural justice or procedural fairness are two-fold. First, the person affected has the right to prior notice and an effective opportunity to make representations before a decision is made. Secondly, the person affected has the right to an unbiased tribunal. These two requirements are conceptually distinct.”

36.
Dyson LJ does not there identify a failure to give reasons as being a breach of natural justice in the context of adjudication. In relation to the statutory provisions, paragraph 22 of the Scheme for Construction Contracts provides that, if requested by one of the parties to the dispute, the adjudicator shall provide reasons for his decision. This demonstrates, in my judgment, that in the absence of any other provision or a request the adjudicator does not have a duty to give reasons.

37.
In Gillies Ramsay Diamond v. PJW Enterprises [2004] BLR 131 at 139, where the intelligibility of reasons was considered there was a request under paragraph 22 of the Scheme. In Carillion Construction Ltd. v. Devonport Royal Dockyard Ltd. (2005) BLR 310, Jackson J. considered the position at p. 325, paragraph 81-4 where he said this:

“During argument my attention has been drawn to certain decisions on the duty to give reasons in a planning context.”

He refers to those cases and continued:

“In my view the principles stated in these cases are only of limited relevance to adjudicators’ decisions. I reach this conclusion for three reasons:

(a) Adjudicators’ decisions do not finally determine the rights of the parties (unless all parties so wish).

(b) If reasons are given and they prove to be erroneous, then that does not generally enable the adjudicator’s decision to be challenged.

(c) Adjudicators often are not required to give reasons at all.

5. If an adjudicator is requested to give reasons pursuant to paragraph 22 of the Scheme, in my view a brief statement of those reasons will suffice. The reasons should be sufficient to show that the adjudicator has dealt with the issues remitted to him and what his conclusions are on those issues. It will only be in extreme circumstances such as those described by Lord Justice Clerk in Gillies Ramsay, that the court will decline to enforce an otherwise valid adjudicator’s decision because of inadequacy of the reasons given. The complainant would need to show that the reasons were absent or intelligible and that, as a result, he had suffered substantial prejudice.”

38.
This passage was cited without comment by the Court of Appeal in [2006] BLR 15 at 29, but this aspect does not appear to have been relevant to the appeal. However, in this case it is not alleged that

there is a breach of paragraph 22 of the Scheme. I therefore reject any criticism on the basis of a failure to give reasons and turn to the other matters relied on by WIQ to challenge the decision.

39.
First, it is said the adjudicator did not address WIQ's case that delay to the apartments was critical to the completion of phase 2a. However, it is clear that the adjudicator summarised WIQ's case, which is contained at paragraph 75 of WIQ's submissions (bundle 3, p. 733). Further, when the critical path programme relied on by WIQ is considered (bundle 6, p. 1701) it is apparent that WIQ's own case is, in fact, based on a critical path through the penthouses. Although initial critical path delay to the apartments is shown, it is concurrent with critical path delay to the penthouses. I therefore do not consider that any criticism can be made in this respect. In any event this is not a case where the adjudicator failed to consider WIQ's submissions. He clearly did. There is no possible breach of the rules of natural justice.

40.
Secondly it is said that there is no analysis of the critical path for section 2a. Given the similarity of the critical path analysis by WIQ (bundle 6, p. 1701) and by Multiplex (bundle 4, p. 1272), I do not see what further analysis was needed, particularly in the light of the position on reasons considered above. Again, I do not consider that this is a breach of the rules of natural justice.

41.
Thirdly it is said that the adjudicator has not explained how the penthouses were critical from 19 December 2003 to 25 December 2004. Again both WIQ's case and Multiplex's case shows this to be so. In the circumstances there is no basis for any criticism on the grounds of breach of the rules of natural justice. In any event, I do not consider that the complaints made by WIQ could amount to a failure to give reasons or adequate reasons under paragraph 22 of the Scheme. This provision applied in this case and there was, I understand, a request for reasons to be given. In this case it was common ground that the critical path went through the penthouses, and I do not consider that the adjudicator was required to explain this in his reasons. Accordingly, I do not consider that WIQ has any valid grounds of challenge to the decision in respect of section 2a.

Summary

42.
Having concluded that WIQ has no grounds for challenge to the adjudicator's findings on sections 1 and 2a, I find that Multiplex is entitled to summary judgment in the sum of £1,161,020 for liquidated damages and £100,571 for interest. In addition the sum of £21,638.80 claimed as reimbursement of fees and expenses of the adjudicator is not challenged. The judgment sum is therefore £1,283,229.80.

Application for a Stay

43.
I now consider the application for a stay. On any view the evidence relied on by WIQ to support its application for a stay has been produced very late, particularly given the extensions to WIQ to serve its evidence and the adjournment in the hearing date, at the parties' request, from 27 April 2006 to 6 June 2006. Multiplex submits that I should not admit the evidence or if I do and it is material then Multiplex would wish to have further time to respond to it. That would necessarily delay the final outcome of this hearing and cause further delay to Multiplex in obtaining the sum awarded in the adjudicator's decision of 24 March 2006. In such circumstances I would not be minded to allow the evidence to be admitted.

44.
However, having considered the evidence submitted by WIQ and the matters raised at the hearing I do not consider that the evidence is sufficient to justify a stay in any event, because it does not amount to special circumstances under RSC Order 47, as retained by Part 50 of the CPR. I do not consider the evidence establishes that Multiplex would probably be unable to repay the sum. The evidence shows that Multiplex has had a turnover of £335 million in 2005 and £324 million in 2004. As the accounts show, it is currently suffering large losses on the Wembley Stadium project. It is being supported by its parent company, Multiplex Ltd., and while the accounts cautiously state that there can be no certainty in relation to that support indefinitely, I have no evidence to lead me to the conclusion that such support is likely to be withdrawn. The 2005 accounts show Multiplex has net assets of £8.5 million after a share capital injection provided by the parent. The accounts of the Australian Multiplex Group show a total equity of Australian Dollars $3,298,982,000 for 2005. That is well in excess of a thousand million pounds. In such circumstances I accept Multiplex's submission that the evidence of Mr. Ashton Doherty does not establish that Multiplex would probably be unable to repay the sum at issue in this case. In the circumstances had I admitted the evidence my conclusion would have been that no stay should be granted.

45.
Accordingly, in those circumstances I give judgment for £1,283,229.80 and invite submissions as to interest and costs.

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