Neutral Citation Number: [2010] EWHC 2344 (TCC)

Case No: HT-10-290

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

St. Dunstan's House

133-137 Fetter Lane

London EC4A 1HD

Date: 9th September 2010

Before:

MR JUSTICE COULSON

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Between:

VOLKER STEVIN LIMITED **Cla**

- and -

HOLYSTONE CONTRACTS LIMITED **Defe**

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Ms Fiona Parkin (instructed by DLA Piper UK LLP) appeared on behalf of the **Claimant**.

The Defendant did not appear and was not represented.

JUDGMENT

Mr Justice Coulson :

A. INTRODUCTION

1.
By a subcontract dated June 2005, and incorporating the NEC3 Standard Form, the Claimant ("Volker") engaged the Defendant ("Holystone") to carry out the drainage works at a site at Smiths Dock in North Shields. Work began on 22nd June 2009, but four months later, on 20th October 2009, Volker terminated the subcontract. They claimed that this termination was in accordance with the terms of the subcontract, but Holystone disagreed and alleged that Volker were in breach of contract. Holystone referred this dispute to adjudication. In a decision dated 15th March 2010, the first adjudicator, Mr P R Ainsworth, concluded that, contrary to Holystone's case, the termination was indeed valid.

2.
The first adjudication did not address the financial consequences of the termination. Accordingly, on 16th June 2010, Volker commenced a second adjudication seeking the sums due as a consequence of the termination. The notice of intention to seek adjudication sought a reasoned decision that Volker was entitled to "payment of any sums the adjudicator may determine as due to Volker under the subcontract in respect of the termination of the subcontract works". The second adjudicator was Mr B Holloway. By a decision dated 19th July 2010, he decided that the total sum of £561,993.48 plus

interest was to be paid by Holystone to Volker. That sum has not been paid. On 5th August 2010, Volker commenced these enforcement proceedings. Today's hearing of their application for summary judgment, pursuant to CPR Part 24, was fixed by Akenhead J in an order dated 9th August 2010.

3.
Holystone have provided a helpful written skeleton which runs to 83 paragraphs and is dated 7th September 2010. They have also provided a lengthy witness statement. Both of these documents were produced by their technical director, Mr Michael Savage. They were represented in the adjudication by claims consultants. They have chosen not to attend today and I have a letter from them referring to their financial position. They have set out a number of matters which they ask me to take into account, and I shall address those issues as follows:

(a) In **Section B** below, I deal briefly with the principles of enforcement in adjudication cases.

(b) In **Section C**, I deal with Holystone's contention that the Court should not and cannot deal with the issues that arise in this case in less than two days and that, therefore, this hearing should be adjourned.

(c) In **Section D** below, I deal with the four specific issues raised by Holystone which touch on jurisdiction and natural justice.

There is a short summary of my conclusions in **Section E**.

B. PRINCIPLES OF ENFORCEMENT

4.
The best summation of the position on enforcement remains paragraphs 85 to 87 of the judgment of Chadwick LJ in **Carillion Construction Ltd v Devonport Royal Dockyard Ltd** [2005] EWCA Civ 1358. He said:

"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 the courts will interfere with the decision of an adjudicator ...

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 ... The need to have the 'right' answer has been subordinated to the need to have an answer quickly ...

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 …"

5.
Accordingly, the fact that the unsuccessful party in an adjudication disputes the merits of the decision is neither here nor there. The decision must be enforced and, if the unsuccessful party wishes to take the matter further, he must first pay up and then commence separate arbitration and court proceedings. In **Harlow & Milner Ltd v Teasdale** [2006] EWHC 1708 TCC, I said this:

"Standing back from the authorities for a moment, it is worth considering what the effect would be if I acceded to the defendant's request not to make the order for sale because of the on-going arbitration. It would mean that any unsuccessful party in adjudication would know that, if they refused to pay up for long enough, and started their own arbitration, they could eventually render the adjudicator's decision of no effect. It would be condoning, in clear terms, a judgment debtor's persistent default, and its complete refusal to comply with the earlier judgment of the court. For those reasons, it is a position which I am simply unable to adopt."

C. THE APPLICATION FOR AN ADJOURNMENT

6.
The principles which I have set out above as to the Court's approach to the enforcement of an adjudicator's decision provide a complete answer to Holystone's application for an adjournment and the fixing of a two day hearing instead. That application is based on the misconception that, in enforcement proceedings, the losing party is entitled to go into the substance of the issue that was the subject of the adjudication, and reargue the matters that have already been decided by the adjudicator. There is no such entitlement. Subject to any legitimate points that the losing party may raise as to jurisdiction and natural justice, the unsuccessful party is obliged to pay now and argue later.

7.
In those circumstances, I turn to those limited matters (four in all) in respect of which Holystone claim that the decision should not be enforced.

D. THE ISSUES RAISED BY HOLYSTONE

D1. The Defence

8.
It is necessary to set out verbatim the four points raised by Holystone in their Defence to this application. They are:

"The adjudicator's decision dated 19th July 2010 is ineffective and therefore unenforceable because:-

(1) The adjudicator strayed from the agreed contractual procedure in allowing the Claimant to submit new material after the agreed deadline for submission of material.

(2) The adjudicator allowed the Claimant to change its pleaded case and pleaded monetary claim during the course of the adjudication proceedings and after the Defendant had submitted its response to the referral.

(3) During the adjudication proceedings and before the publication of the adjudicator's decision, the Claimant wrongfully made the adjudicator aware that a without prejudice offer of settlement had been made.

(4) Even if the primary matters relied upon (as above) do not render the adjudicator's decision invalid and unenforceable, an adjudicator's decision is to be 'binding but temporary' pending resolution of the dispute by (in this case) arbitration. Enforcement of this decision would render the Defendant insolvent, thereby leading to winding up of the Defendant. This would cause a serious misjustice as the Defendant would be prevented from referring the full dispute to arbitration."

9.
Before turning to deal with each of the four matters in turn, it is worth noting what is not in dispute. It is not disputed that this was a written contract which contained an agreed set of detailed adjudication provisions. It is not disputed that Mr Holloway was validly appointed as the adjudicator pursuant to those provisions and it is not disputed that, since Mr Holloway could not go behind the decision of Mr Ainsworth, the first adjudicator, as to the validity of Volker's termination, Mr Holloway was obliged to proceed on the basis that Volker's termination was indeed valid. I also note that Mr Holloway's decision was provided within the 28 day time limit.

D2. Issue 1: The Receipt of New Material

10.
Holystone's response in the adjudication was served, as directed by the adjudicator, on 30th June. Thereafter, both before and after the service of Volker's reply on 7th July, the adjudicator sent a number of requests to Volker on a number of detailed quantum issues, in particular dealing with their spreadsheet, which contained details of actual and forecast costs and contained a formula by reference to which a factor uplift for completing the subcontract works was applied. Volker provided detailed responses to these requests. In the course of this process, the spreadsheet was amended. The amendments reduced the sums claimed. The interchanges between Volker and the adjudicator and the amendments to the spreadsheet were all provided to Holystone. During that part of the process, Holystone did not comment at all on that new material. On 13th July, the adjudicator expressly invited them to deal with the material and, not having heard from them further, he repeated that request on 14th July. Holystone eventually replied to the new material at three minutes past four in the afternoon of 14th July. In so doing, they did not say that they had had insufficient time to deal with any new issues raised by Volker. The adjudicator then permitted Volker to have the last word and they responded to Holystone's points in a letter dated 15th July.

11.
It is plain that, in conducting this part of the adjudication process, the adjudicator did not exceed his jurisdiction. He was entitled to make these enquiries and to take account of the responses. He was obliged to decide the dispute that was referred to him: what, if anything, was due in consequence of the termination? If the adjudicator needed further information in order to allow him to answer that question properly, he was entitled, indeed obliged, to ask for it. An adjudicator should not stand mutely by, hoping that one side or the other gives him the information that he wants: if he considers that he lacks vital information, he must take the initiative and ask for it directly.

12.
Furthermore, I note that this commonsense position is expressly enshrined in clause W2.3 of the NEC Trading Standard Form. Clause W2.3(2) entitled the adjudicator to have regard to "any further information from a party", although the suggestion is that such information has to be provided within

14 days of the commencement of the adjudication. However, even if it was thought that there was some sort of temporal limit on the information that could be provided under that sub-clause, clause W2.3(4) contained no such limitation. That clause permitted the arbitrator to "take the initiative in ascertaining the facts relating to the dispute" and "instruct a party to provide further information related to the dispute within a stated time". Accordingly, the adjudicator was quite entitled to ask for information within a stated time, and that is what he did. There can be no suggestion that, by doing so, he exceeded his jurisdiction. As Mr Savage himself accepts in his witness statement, the exchanges to which I have referred amounted to no more than "the adjudicator asking for explanations that would enable him to understand the Claimant's claim and the Claimant responding to the adjudicator's emails by providing the explanations and additional documents".

13.
Of course the adjudicator was also obliged to ensure that the process was fair. In this context, that meant ensuring that Holystone saw the new material and were given the opportunity of commenting upon it. That is in accordance with the principles set down in a number of TCC cases, including **Multiplex Constructions (UK) Limited v West India Quay Development Company (Eastern) Limited** [2006] EWHC 1569 TCC. Again, that is what the adjudicator did. There was nothing in Holystone's reply of 14th July to suggest that they had been given insufficient time to deal with this new information and, since that letter was only prompted by the adjudicator's direct request, it does not appear that Holystone considered that the new material was particularly significant. At all events, there can be no breach of natural justice on those facts.

14.
For those reasons, there is no arguable case that the procedure that the adjudicator adopted in the latter stages of the adjudication meant that in some way he acted outside his jurisdiction or was unfair.

D3. Issue 2: The Amendment of the Monetary Claim

15.
On 7th July 2010, with Volker's reply, they served the revised spreadsheet to which I have earlier referred. The revisions reduced the quantum of the claim from £667,000-odd to £611,527.05. It was clear that this reduction had been prompted by certain points properly made by Holystone in their response, and in particular the fact that the spreadsheet had originally failed to take account of Volker's instruction to Holystone to omit certain works.

16.
The change in the value of the claim made against them can give Holystone no right to complain now. It is inevitable in any complex construction claim that the figures will change as more information becomes available and, as is often the case, errors are corrected. The changes here reduced the value of the claim; they did not increase it. The adjudicator plainly had the jurisdiction to deal with an amended or reduced figure, not least because, as I have already noted, the original notice of intention to refer did not confine the dispute to a particular claim figure, but said instead that Volker would seek "such sum as the adjudicator determined". Again, since Holystone were given notice of the new figures and commented upon them, no breach of natural justice can arise. There is, therefore, nothing in this second criticism of the adjudicator.

D4. Issue 3: The Without Prejudice Offer

17.

Prior to the commencement of the adjudication, there had been a without prejudice meeting between the parties to discuss Volker's claim. That meeting had taken place on 15th May 2010. Subsequently the meeting was referred to in terms in a number of different places in Holystone's response submissions. It was also referred to in Holystone's letter to the adjudicator dated 14th July 2010.

18.
In response to that letter, Volker's solicitors wrote to the adjudicator in these terms:

"It is also frustrating that Holystone should continue to seek to go behind the cloak of privilege and refer to what was allegedly discussed at a without prejudice meeting that took place on 17th May 2010. Volker will not reply in this regard as a party cannot unilaterally waive privilege. However, in relation to payment of the adjudicator's fees, Volker are prepared to waive privilege to allow Holystone to inform the adjudicator of the amount and terms of its offer to settle. Volker are also prepared to concede that in the event that your decision does not exceed that amount, this may be taken into account when deciding who pays your fees in the same way as a Calderbank or Part 36 offer."

19.
Although, as I have noted, Holystone had referred to the without prejudice meeting on a number of occasions themselves, in their letter of 19th July 2010, they complained that the reference to the offer made on that occasion was improper. The adjudicator's response early on the morning of 19th July, and before his decision was provided, was that his task "had not been informed in any way either by Holystone's information in its response or Volker's disclosure". In his decision on his fees, which was the part of the dispute that had given rise to the indication that an offer had been made, the adjudicator said:

"9.2 I refer to Volker's invitation to Holystone that the latter may reveal details that are without prejudice and Volker's follow-up on 19th July 2010 wherein it asks me to draw inferences from Holystone's failure to reply to this invitation. I prefer Holystone's position that it is entitled to reserve its position without disadvantage. Holystone contends that, if I am minded (I am so minded) to direct that Holystone pays my fees and expenses, it asks me to take careful consideration of the fact that I have spent several days involved in a lengthy exchange of emails with Volker to understand its claim. Several days would be an exaggeration but it is a fact that I found the spreadsheet difficult to understand and needed to ask Volker to explain some matters and to provide additional documentation. I note Volker says it has been compelled to pursue this adjudication to recover its considerable losses, but it is a fact that Volker's spreadsheet and methodology is difficult to understand and it needed to be properly understood in order to assess its reasonableness. I consider a fair assessment of such is seven hours. Therefore my fees are due and payable as follows."

The adjudicator then sets out the sums concerned.

20.
The issue is whether the adjudicator's knowledge of the fact that a 'without prejudice' offer had been made by Holystone to Volker meant that, however unconsciously, he was biased towards them. The relevant test is set out by the Court of Appeal in **In Re Medicaments and Related Classes of Goods (No. 2)** [2001] 1 WLR 700. Lord Phillips put it in this way:

"The Court must first ascertain all the circumstances which have a bearing on the suggestion that the Judge was biased. It must then ask whether those circumstances would lead a fair-minded and

informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

21.
I am in no doubt that a fair-minded and informed observer would not reach any such conclusion here, and any suggestion to the contrary is entirely unrealistic. The adjudicator's letter of 19th July 2010, and his written decision, made clear that he was wholly unconcerned with the fact that an offer had been made. On the face of both documents, the adjudicator treated his knowledge of the fact of the offer as irrelevant. There is other evidence that supports that conclusion. On 14th July, that is to say at a time before the adjudicator was aware that an offer had been made, he noted that "many elements of the decision have been decided". That suggests, therefore, that the bulk of the decision had indeed been produced before he was aware of the fact of the offer. Moreover, the nature of the decision itself also leads to the conclusion that his knowledge had no effect: as Ms Parkin correctly points out, in his decision the adjudicator went through each item of claim, and each defence to that item of claim, in painstaking detail, explaining how and why he had reached the view he had done.

22.
Looking at the position rather more widely, I simply cannot see how the adjudicator's knowledge could suggest even unconscious bias. In any construction dispute, the adjudicator, just like a TCC judge, would tend to expect that negotiations had taken place between the parties, and that offers had been made. It is a very rare case in which negotiations or offers do not occur. Accordingly, so it seems to me, the adjudicator would have been unsurprised by the fact that an offer had been made by the responding party. Indeed, in this case, I would go one stage further and observe that, since liability had already been decided by the first adjudicator, and since Mr Holloway was dealing solely with what, if anything, was due to Volker as a result of their valid termination, he would probably have been amazed if he had been told that no offer of any kind had been made by Holystone. In a dispute where the only issue was the quantification of the consequences of termination, the party who has unsuccessfully contested the validity of the termination must almost always expect to pay something, and will therefore make an offer to protect its position on costs sooner rather than later.

23.
More generally, I also ought to note this. It is not so long ago that, in arbitration, a white envelope containing the without prejudice offer would be formally presented to the tribunal and reside on the arbitrator's desk for the duration of the hearing. The arbitrator never knew if the without prejudice offer was for £1 million or a penny, but it was never suggested in those circumstances that in some way the arbitrator was unconsciously biased as a result of his knowledge of the fact of an offer. On the contrary, doubtless to convey the impression of reasonableness on their part, it was often the respondent who insisted on the public presentation of the envelope.

24.
Ms Parkin reminded me that there is support for my analysis in the earlier case of **Specialist Ceiling Services Northern Limited v ZVI Construction (UK) Limited** [2004] BLR 403. In that case, on very similar facts, HHJ Grenfell reached the same conclusion. Indeed, the two points of difference between this case and that make this an even stronger case for the conclusion that there could be no bias. First, unlike this case, in **Specialist Ceiling Services** liability remained in issue. Moreover there, when it was communicated to the adjudicator, the fact of the offer was accompanied by at least some indication of its make-up, although the amount of the offer and its precise composition was not revealed. In such circumstances, I take considerable comfort from the fact that Judge Grenfell reached the same conclusion in his case that I have reached here.

25.
For those reasons, therefore, I reject the suggestion that the fact that the adjudicator knew that an offer had been made by Holystone would lead a fair-minded and informed observer to conclude that the adjudicator was or even might have been biased. There is simply nothing to support such a contention. That third ground of objection, therefore, falls away.

D5. Issue 4: The Possible Insolvency of Holystone

26.
This last objection can be dealt with shortly. It is suggested that, if the decision is enforced, Holystone will go into liquidation. The first point for me to note is that there is no evidence of that contention. It is, therefore, not a matter that I could properly take into account in any event.

27.
But, in my judgment, even if there were such evidence, the point is ultimately irrelevant on an enforcement application of this kind. I have already set out the principles of enforcement above, and it would cut across those principles if a losing party could avoid enforcement of the decision simply by pleading poverty.

28.
There is no application for a stay of execution and no evidence of any alleged financial difficulties on the party of Volker. Thus, for all those reasons, this last point of objection also falls away.

E. CONCLUSIONS

29.
For the reasons that I have given, there is no basis, either in jurisdictional terms or in relation to natural justice, on which the adjudicator's decision should not be enforced. On the contrary, I find that this was a clear and careful decision which, in accordance with the express terms of the contract, requires to be enforced. Accordingly, the claim for summary judgment in the sum of £563,441.66 inclusive of interest is allowed. That sum is payable within seven days, that is to say by September 16th 2010.

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