Neutral Citation Number: [2013] EWHC 3417 (TCC)

Case No: HT-13-356

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

Royal Courts of Justice

Rolls Building

7 Rolls Buildings, London EC4A 1NL

Date: 11 November 2013

Before:

MR. JUSTICE EDWARDS-STUART

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Between :

Roe Brickwork Limited **Cla**

- and -

Wates Construction Limited **Defe**

- -

- -

Ronan Hanna Esq (instructed by **Quigg Golden Limited**) for the **Claimant**

Miss Jessica Stephens (instructed by **Mayer Brown LLP**) for the **Defendant**

Hearing dates: 25th October 2013

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Judgment

Mr. Justice Edwards-Stuart:

Introduction

1.
This is an application by the Claimant for summary judgment to enforce the decision of an adjudicator dated 2 September 2013. The Claim Form was issued on 23 September 2013 and, in accordance with the practice of this court, directions were given for an expedited hearing which then took place on Friday, 25 October 2013.

2.
The Claimant was a brickwork subcontractor for the construction of three blocks of flats on the Ocean Estate in Tower Hamlets, East London. The Defendant was the main contractor. The Claimant's claim in the adjudication was that its work had been delayed by about six months and that, as a result, it had suffered significant loss and expense.

3.
The claim included, amongst others, the following three heads of claim:

i)
Additional preliminaries and loss of overheads and profit ("OHP") in the sums of approximately £52,000 and £121,000, respectively.

ii)
Loss of productivity, broken down by various causes. The total sum claimed under this head was about £465,000.

iii)
Additional supervision and management in the sum of about £122,000.

4.
The adjudicator did not decide that a particular sum was due to the Claimant. What he did was to assess the value of the claims referred to him, which he valued at £381,459.75, plus interest. His actual decision was in these terms:

"The sum of £381,459.75 + interest is awarded above. The actual net due shall reflect the amounts already paid under each head of award above. It is payable within 10-days of today. The parties will know what is already paid under each head."

In addition, he awarded interest at 3.5% from 31 January 2013.

5.
The Defendant resists the application on two grounds. First, that the adjudicator did not have jurisdiction to assess the OHP in the way that he did (which was by increasing the amounts awarded in respect of the other heads of loss by 13%), alternatively that to adopt the approach he did without allowing the parties an opportunity to make submissions on it was a breach of natural justice which had a significant or material impact on his finding as to the value of the claim.

6.
The second ground is that his decision lacks certainty and is therefore unenforceable. This is because the adjudicator made no findings about the sums that had been paid by the Defendant under each head and, since these were not agreed, there is no way of knowing what amount is due from the Defendant to the Claimant in consequence of the Decision. The Claimant's answer to this is that, although the amounts paid on account have not been agreed, the Defendant has since asserted that it has paid £97,992.23 on account of these claims. Accordingly, the Claimant submits that there can be no dispute about its entitlement to the balance, namely £283,467.52 and so it confines its application to that sum, plus interest.

7.
The Claimant was represented by Mr. Ronan Hanna, instructed by, Quigg Golden, and the Defendant was represented by Miss Jessica Stephens, instructed by Mayer Brown.

The proceedings in the adjudication

8.
In its Referral Notice the Claimant put the relevant parts of its claim in this way:

“RBL are entitled to an extension of time, primarily due to the non availability of work upon issue of notices to commence and due to insufficient bricks on site, and RBL are entitled to additional preliminaries and overhead recovery.

…

As a result of items 3.1 to 3.7 RBL were unable to proceed with agreed orders with WCL for works on other sites, and were unable to commit to works for other contractors, and are therefore entitled to loss of overheads and profit on those works.”

9.
Items 3.1 to 3.7 set out a number of causes of loss of productivity allegedly caused by the Defendant. The redress sought in the Notice of Adjudication was as follows:

“That WCL pay forthwith any amount outstanding, plus interest, plus costs, plus continual interest until such sums are paid, plus the Adjudicator’s fees and expenses in the matter, plus any other sums the Adjudicator sees fit.”

Identical wording was used in the Referral Notice.

10.
The claim for OHP was calculated using the “Hudson formula”. The theory behind this approach is that, by having had part of its workforce tied up on a contract for an extended period, the contractor has thereby lost the opportunity to earn profit on another project, the price of which would also include an element to allow for the cost of maintaining its head office. The “Hudson formula” involves a calculation of the contractor’s OHP as a percentage of turnover based on a fair historical average. This is then multiplied by the contract sum and the period of delay and divided by the contract period.

11.
The calculation in the Claimant’s claim, based on a percentage contribution to OHP of 22.5%, was as follows:

Sub Contract Sum Divided by Contract Weeks	£1,541,429.08 73
Value per week	£21,115.47
OHP @ 22.5% No of Weeks due as Extension of Time	£4,750.98 25.60
Entitlement to recovery of OHP on formula basis	£121,625.09

12.
The figure of 22.5% was derived following an analysis of turnover and cost of sales for the previous four years. The details of the calculation are not material for present purposes. The adjudicator considered the figures put forward and concluded that the correct percentage was 13%, not 22.5%. I did not understand there to be any complaint about this aspect of his decision.

13.
Having reached that conclusion, the adjudicator then went on to say that the Claimant had earned an element of OHP from the very substantial variations account (which was of the order of £½ million). He then said this:

“Therefore, there are no grounds for awarding further head office overheads, nor grounds for lost profits, it would be double recovery. Bear in mind however that the additional costs via disruption and prolonged supervision, surveyors, directors, plant, and small tools etc. is all compensated elsewhere in this Award. It does however appear correct to add 13% OH&P to the allowed for costs.”

14.
The adjudicator then determined that the following sums were due to the Claimant in respect of loss and expense:

Prelims £11,293.00

8,400 hours loss of productivity £182,700.00

1,800 hours directors and surveyor £54,000.00

2,400 hours supervision £53,379.00

Forklift driver £28,119.00

Plant £8,084.00

£337,575.00

+ OH & P @ 13% £43,884.75

£381,559.75

15.
The adjudicator decided that only 20 weeks of the 26.5 weeks claimed carried an entitlement to loss and expense. For reasons which will become clear later in this judgment, it is relevant to note that, if the adjudicator had substituted that figure, together with his figure of 13%, in the calculation set out at paragraph 11 above, he would have derived a figure for OHP of £54,900.21, instead of the £121,625.09 claimed by the Claimant. Had he done this in the first place, there could have been no complaint that he had decided an issue that was not referred to him or that he had committed a breach of natural justice.

16.
In relation to disruption, the Claimant’s claim included a number of spreadsheets showing the disruption to separate parts of the work from the various different causes. The degree of disruption was expressed as a percentage of the hours provided for in the Claimant’s tender for the relevant part of the work. The resultant amount of disruption (in hours) was then multiplied by the Daywork Rate for the relevant tradesmen.

17.
The Daywork Rates were set out in an appendix to the contract. They were as follows:

“To the extent that a Valuation relates to the execution of work which cannot properly be valued by measurement, the Valuation shall, if applicable, be based on the rates and procedures set out below:

Rates

Valuation shall be at the all inclusive daywork rates set out below or included elsewhere in the Sub-Contract Documents.

Foreman [Daywork] £26.50 per hour

Bricklayer [Daywork] £22.50 per hour

Labourer [Daywork] £19.50 per hour”

18.
Miss Stephens submitted, in my view correctly, that the fact that the Daywork Rates were described as “all-inclusive” rates meant that they included an allowance for OHP. This, so far as I am aware, is pretty much standard practice. Additional or varied work is usually valued by reference to the contractual daywork rates only as a last resort. It is regarded by employers and main contractors as a very expensive method of paying for additional work. Standard forms of construction contracts typically set out various methods of valuation which are to be applied to varied or additional work. In the standard form of contract on which this sub-contract is based, they are described as The Valuation Rules. It is relevant to note that The Valuation Rules in this standard form make no reference to Daywork Rates.

19.
The Defendant’s principal contention in the adjudication was that the Claimant’s claim should be valued by reference to the cost of the additional or wasted hours, and not by using the Daywork Rates. In the alternative, if the Daywork Rates were to be used, the Defendant contended that there should be no separate and additional claim for OHP because that head of loss was already taken care of in the Daywork Rates (the Defendant did not dispute that prolongation costs were otherwise recoverable in principle). Finally, if the Defendant was wrong about that, it contended further that the preconditions for the application of the “Hudson formula” (or another formula known as the “Emden formula”) had not been met in the circumstances of this case. For the purposes of this judgment, it is unnecessary to explain how the “Emden formula” works.

20.
It is clear, therefore, that there were issues squarely before the adjudicator relating to: (a) the validity of using Daywork Rates at all; and (b) the duplication between the Daywork Rates (if used) and the separate claim for OHP based on the “Hudson formula”.

The law

21.
It is now well understood that the court will not interfere with the decision of an adjudicator who has answered the question referred to him (I shall use “him” throughout since this adjudicator was a man), even though the court takes the view that the answer is wrong or that the adjudicator has made an obvious mistake (I leave aside those rare cases where the resisting party brings on concurrent Part 8 proceedings for a declaration to be heard at the same time as the application for summary judgment to enforce the award).

22.
It is also well understood that an adjudicator must observe the rules of natural justice. In this context, that means that he should not decide a point on a factual or legal basis that has not been argued or put forward in the submissions made to him: see Balfour Beatty Construction v London Borough of Lambeth [2002] BLR 288. However, this rule is often easier to state than to apply.

23.

If an adjudicator has it in mind to determine a point wholly or partly on the basis of material that has not been put before him by the parties, he must give them an opportunity to make submissions on it. For example, he should not arrive at a rate for particular work using a pricing guide to which no reference had been made during the course of the referral without giving the parties an opportunity to comment on it.

24.
By contrast, there is no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party has contended, provided that the parties were aware of the relevant material and that the issues to which it gave rise had been fairly canvassed before the adjudicator. It is not unknown for a party to avoid raising an argument on one aspect of its case if that would involve making an assertion or a concession that could be very damaging to another aspect of its case.

25.
In Balfour Beatty His Honour Judge Humphrey Lloyd QC said this, at paragraph 29:

"… 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 [of] 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."

26.
In that case the adjudicator produced his own "as built programme" to depict the actual progress of the work but did not invite the comments of the parties as to whether or not that programme was a suitable basis from which to derive a retrospective "critical path". Nor did the adjudicator inform either party of the methodology that he intended to adopt, or seek their observations as to the manner in which it or any other methodology might reasonably and properly be used in the circumstances in order to establish or test Balfour Beatty's case. The Judge held that the adjudicator should have done so because Balfour Beatty had not presented its case on that basis. That, in my view, was a clear case where the adjudicator should have invited submissions from the parties on the course that he was proposing to take and the judge's conclusion was, I respectfully suggest, entirely correct.

27.
Miss Stephens relied also on some observations made by Akenhead J in Cantillon Ltd v Urvasco Ltd [2008] BLR 250, at paragraph 57 (e), where he said:

"It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide the case on a factual or legal basis which has not been argued or put forward by the other side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of Balfour Beatty Construction Co Ltd v The London Borough of Lambeth was concerned comes into play. It follows that, if either party has argued a

particular point, and the other party does not come back on the point, there is no breach of the rules of natural justice."

28.
It is, I think, fairly obvious that a conclusion as to whether or not there has been a breach of natural justice is one that in the great majority of cases will be very fact specific.

The submissions of the parties

29.
In paragraph 21 of her skeleton argument, Miss Stephens summarised the point at issue as follows:

"Whilst there was a dispute as to whether or not the Claimant was entitled to recover loss and/or expense on the basis of the contracted Daywork rates, there was no dispute and the parties agreed (contractually and within the adjudication) that the contracted Daywork rates were 'all inclusive' and, particularly, that they were inclusive of overhead and profit. The Claimant did not suggest that it should recover Dayworks rate plus overhead and profit on its disruption/loss of productivity claim."

In the light of this, she submitted that the adjudicator had the following options open to him:

i)
He could determine the number of hours for which the Claimant was entitled to recover loss and/or expense, decide that the Claimant should recover overhead and profit and apply the all inclusive contractual Daywork rates;

ii)
He could determine that the Claimant was entitled to recover its actual costs only and ascertain what those costs were;

iii)
He could decide that the Claimant was entitled to recover its costs together with a contribution to overhead and profit and identify the costs and make an allowance for overhead and profit.

30.
Miss Stephens submitted that what the adjudicator was not entitled to do was to identify the number of hours, apply the contractual all inclusive Daywork Rates and then add an allowance for overhead and profit. She submitted that he "simply did not have the jurisdiction to take such an approach" (paragraph 23).

31.
In her succinct and well developed oral submissions Miss Stephens amplified these points. Mr. Hanna's short answer on behalf of the Defendant was that the Claimant had claimed OHP in addition to its losses calculated by reference to the Daywork Rates, and its entitlement to do so had been very much in issue. All that happened, submitted Mr. Hanna, was that the adjudicator decided that the Claimant was entitled to recover OHP in addition to the losses based on the Daywork Rates, but he just calculated it in a slightly different way and in an amount that was considerably less than the sum claimed by the Claimant. Instead of using the Hudson formula, the application of which the Defendant had in any event disputed, the adjudicator applied an uplift to the losses that he considered the Claimant had suffered.

32.

I have to say that Miss Stephens came close to persuading me that she was correct. However, on reflection, I consider that Mr. Hanna's submissions are to be preferred, and that what the adjudicator did in this case fell within the scope of his jurisdiction.

33.
In arriving at his figure for loss of productivity the adjudicator adopted a figure of £21.75 per hour. He said that he derived this by taking the figure for labour in the Claimant's tender and dividing it by the number of hours. In fact this figure also represented a "blended" hourly rate of a team of three bricklayers and one labourer using the Daywork Rates stated in the contract, and was in fact the rate that the Claimant used when compiling its tender. This is why the figure taken by the adjudicator reflected precisely the contractual Daywork Rates.

34.
But, as I have already pointed out, the Claimant made a separate claim for OHP in addition to its claim for loss of productivity based on the Daywork Rates. As Miss Stephens accepted, it was open to the adjudicator to assess the loss of productivity by reference to the Claimant's costs and then add an allowance for OHP. This is, in effect, what he did. In reality, the Defendant's real complaint is that the adjudicator treated the Daywork Rates as representing the cost to the Claimant of its labour. That point was thoroughly ventilated during the referral.

35.
It is true that the adjudicator did not produce a calculation that was consistent with the approach that had been adopted by the Claimant, but his methodology differed in only one minor respect from the way in which the case had been presented to him. There can be no dispute that his figure of 13% was derived from material put forward by the Claimant (the adjudicator had substituted this figure for the 22.5% put forward by the Claimant). The difference in the approach adopted by the adjudicator was that he applied the 13% uplift for OHP to the figure representing the total loss of productivity, rather than to the figure arrived at by multiplying the weekly value of the total contract by the number of weeks extension of time following the Hudson formula.

36.
As I have already noted, the effect of the adjudicator's approach was to produce a lower figure for OHP than the sum which would have been produced if he had adopted the Claimant's methodology. So, even if Miss Stephens had persuaded me that the adjudicator should have consulted the parties before adopting the approach he did, the result would probably have been the award of a greater amount for OHP than that actually made in the Decision.

37.
In these circumstances, I consider that the adjudicator neither exceeded his jurisdiction nor acted in breach of the rules of natural justice but, even if he did, it had no effect on the quantum of the claim that was adverse to the Defendant's position. Accordingly, the breach - if there was one - was not a material breach.

38.
I can dispose of the second ground of challenge to the Decision quite shortly. It is true that the adjudicator did not ascertain that any particular sum was due to the Claimant. However, as I have already mentioned, by the time of the application for summary judgment the Defendant had accepted that no more than £97,992.23 had been paid on account of the claims. In those circumstances, there was no remaining dispute between the parties that the sum arrived at by the adjudicator, less the

£97,992.23 paid by the Defendant, was due to the Claimant as a consequence of the adjudicator's Decision.

Disposal

39.
In my judgment, therefore, the Claimant is entitled to summary judgment for the difference, namely £283,467.52, together with interest at 3.5% from 31 January 2013 as determined by the adjudicator. In addition, the Claimant is entitled to recover 50% of the adjudicator's fees in accordance with his Decision.

40.
This leaves a sum of about £50,000 in dispute between the parties, representing the difference between the rival contentions as to the sums paid on account of the claims. That was not a dispute that was before the adjudicator.

41.
In these circumstances, it seems to me that the appropriate course, as suggested by Mr. Hanna, is to stay this action in order for that dispute to be referred to adjudication if the Claimant is minded to do so. Unless the Defendant wishes to make any submissions to the contrary, which I will entertain in writing, that is the order that I propose to make. There would of course be permission to both parties to lift the stay on, I suggest, two weeks notice.

42.
I will hear counsel for the parties on any questions of costs if these cannot be agreed.