Case No: HT-2015-000436
Neutral Citation Number: [2016] EWHC 238 (TCC)

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

Royal Courts of Justice
The Rolls Building, Fetter Lane,
London, EC4A 1NL.

Date: 12 February 2016

Before :

THE HON MR JUSTICE COULSON

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Between :

Deluxe Art & Theme Limited **Cla**

- and -

Beck Interiors Limited **Defe**

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- -

Mr Rupert Choat (instructed by **TLT LLP**) for the **Claimant**

Ms Brenna Conroy (instructed by **Rosenblatts**) for the **Defendant**

Hearing date: 4 February 2016

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Judgment

The Hon. Mr Justice Coulson :

1. INTRODUCTION

1.
The claimant ("DATL") seeks by way of summary judgment to enforce two decisions of the well-known adjudicator, Mr Matthew Bastone. The enforcement application is resisted by the defendant ("Beck"). At the heart of the application is a dispute about whether, pursuant to paragraph 8(1) of the Scheme for Construction Contracts, an adjudicator has the jurisdiction, without the consent of all parties, to adjudicate at the same time on more than one dispute.

2.
I should say at the outset that I am extremely grateful to both counsel who dealt clearly and concisely with the issues. As practitioners experienced in this sort of work, I know they will have shared my consternation that a relatively simple enforcement dispute was the subject of no less than six full lever arch files. Four of these files were never referred to. It is exceedingly rare that any adjudication enforcement dispute requires more than one lever arch file of documents. The time is fast

approaching when, unless the parties and their solicitors cooperate properly and comply with the TCC Guide, the court will simply refuse to hear cases with such promiscuous and unnecessary bundling.

2. THE RELEVANT FACTS

3.
On 7 March 2014, Beck engaged DATL as a sub-contractor to supply and install joinery items in the Lanesborough Hotel at Hyde Park Corner, London. Beck were refurbishing the hotel as the main contractor.

4.
There have been a total of three adjudications between the parties, each started by DATL and resisted by Beck. In Adjudication 1, by a decision dated 10 July 2015, the adjudicator awarded DATL the sum of £72,888.95 plus VAT and interest for variations and acceleration costs. That sum was paid by Beck.

5.
DATL started Adjudication 2 on 22 October 2015. The dispute that was referred was said in the notice to concern "the further extension of time due to [DATL] and the amount of loss and/or damage to be reimbursed by [Beck] to [DATL] as a consequence of the prolongation of the execution of the Sub-Contract Works on site."

6.
By a decision in Adjudication 2 dated 4 December 2015, the same adjudicator awarded DATL the sum of £120,559.56 plus VAT and interest. He also decided that DATL were entitled to an extension of time up to 30 June 2015.

7.
On 9 November 2015, during the currency of Adjudication 2, DATL started Adjudication 3. In consequence of their policy of appointing the same adjudicator to deal with disputes under the same contract, the RICS again appointed Mr Bastone. The dispute that was referred in Adjudication 3 was said to concern "the failure of [Beck] to reduce the rate of retention from 5% to 2.5% upon practical completion of the sub-contract works."

8.
In a letter dated 24 November 2015, Beck objected to the adjudicator dealing with two disputes at the same time. It is not suggested that this objection was made too late or that the delay in making the objection amounted to a waiver of the jurisdictional challenge or an acceptance by Beck of the adjudicator's jurisdiction in Adjudication 3.

9.
By a decision in Adjudication 3, dated 11 December 2015, the adjudicator awarded DATL the sum of £38,491.64 plus VAT and interest by reference to retention.

3. IS THERE A SINGLE DISPUTE BETWEEN THE PARTIES OR ARE THERE TWO DISPUTES, AND DOES IT MATTER?

3.1
One or Two Disputes?

10.
The first issue to decide is whether or not Adjudications 2 and 3 encompassed a single dispute between the parties, or whether in fact they encompassed two separate disputes. Although the point

was raised towards the end of Mr Choat's skeleton argument on behalf of DATL, it seems to me that, logically, this issue needs to be addressed first. If I concluded that DALT were right and there was only one dispute between the parties, then Ms Conroy's objection to the adjudicator dealing with two disputes at the same time would of necessity fall away.

11.
I am in no doubt that there were two separate disputes in this case. There are a number of reasons for that.

12.
First, it is plain that DATL themselves considered that there were two disputes. It was for that reason that they commenced Adjudication 3 on 9 November 2015. If the dispute about retention monies was already included within Adjudication 2, there would have been no need for DATL to issue the fresh notice in Adjudication 3.

13.
Secondly, the adjudicator ruled at the outset that these were, to all intents and purposes, different disputes. In his letter dated 11 November 2015, which was subsequently incorporated into his decision in Adjudication 3, Mr Bastone described this dispute as concerning "an alleged failure on the part of Beck to reduce the retention percentage from 5% to 2.5%" at practical completion. He went on to say, in respect of any possible challenge by Beck to his jurisdiction in Adjudication 3:

"…it seems to me that this is an entirely different question to that of whether an amount due in respect of loss and expense applied for an interim application for payment, should be subject to deduction of retention."

14.
Accordingly, any attempt by DATL now to argue that the adjudicator was wrong to reach this conclusion may fall foul of the law of election, because it may amount to an attempt both to approbate and reprobate the adjudicator's decision. That is not permitted on an adjudication enforcement: see **Wales and West Utilities Ltd v PPS Pipeline Systems GmbH** [2014] EWHC 54 (TCC); [2014] BLR 163. The adjudicator's conclusion that this was a separate dispute was an important element of his reasoning in respect of Adjudication 2, a decision on which DATL now seek to rely. In my view, therefore, they cannot at the same time seek to ignore the adjudicator's conclusion that these were separate disputes.

15.
Thirdly, I consider that, on an application of well-known principles, the dispute about extensions of time and loss and expense was a different dispute to the dispute about retention. Mr Choat sought to argue, by reference to the decision of Akenhead J in **Witney Town Council v Beam Construction (Cheltenham) Ltd** [2011] EWHC 2332 (TCC); [2011] BLR 707, that, on an application of the principles set out in this case, the delay claim and the retention claim were both part of the same dispute because they both related to what was due on 30 June 2015, the date of practical completion. But in my view, the proper application of Akenhead J's principles, referred to at paragraph 38 of his judgment in **Witney Town**, leads to the opposite conclusion.

16.
Akenhead J said that: "A useful if not invariable rule of thumb is that, if disputed claim No 1 cannot be decided without deciding all or parts of disputed claim No 2, that establishes such a clear link and points to there being only one dispute." In this case, DATL's claim for an extension of time and loss

and expense, as noted in paragraph 5 above, could easily be decided without any reference to the claim for the failure to reduce retention (as noted in paragraph 7 above), which was a separate and stand-alone claim. Indeed, at one point Mr Choat appeared to accept that, when he submitted that, in order to reach his decision in Adjudication 2, “the adjudicator did not need to decide decision 3”. I respectfully agree. That demonstrates that these were not part of the same dispute.

17.
There is nothing in Mr Choat’s argument that both claims related to what was due on 30 June 2015. That date is not identified in either of the relevant notices of adjudication. Moreover, the relevant date for Adjudication 2 was the date of the critical application for an interim payment (see **Section 5** below); the relevant date for Adjudication 3 was the date of practical completion.

18.
Finally, it should be noted that there is no authority to support the proposition that two different disputes, deliberately raised by the claiming party in two separate adjudication notices, and described in very different terms, could still somehow be part of the same dispute. All of the authorities about the reference of more than one dispute, which culminate in **Witney Town**, were cases where there was one notice of adjudication, and the outcome depended on the nature of the issues that had been referred to the adjudicator under that single notice. Thus, whilst I accept that the mere fact that there were two notices may not necessarily be determinative, it might be thought that it would take a very unusual set of circumstances to conclude that the disputes referred to in the adjudication notices, started at different times, both formed part of the same dispute.

19.
For all these reasons, I therefore conclude that there were two disputes between the parties, and those disputes were the subject respectively of Adjudications 2 and 3.

3.2
Does it Matter?

20.
In my view, this finding does matter. That is because the weight of the adjudication authorities is that an adjudicator only has the jurisdiction to deal with a single dispute at any one time. That was what the Court of Appeal said when refusing permission to appeal in **David and Theresa Bothma v Mayhaven Healthcare Ltd** [2007] EWCA Civ. 527; [2007] 114 Con LR 131. That was also the view of Akenhead J in **Witney Town**, referred to above.

21.
It is right to note that this conventional view was challenged by Ramsey J in his obiter remarks, starting at paragraph 75 of his judgment in **Willmott Dixon Housing Ltd v Newlon Housing Trust** [2013] EWHC 798 (TCC); [2013] BLR 325. However, it is not clear to me that all of the relevant authorities were cited to Ramsey J in that case. I also note that, in **TSG Building Services PLC v South Anglia Housing Ltd** [2013] EWHC 1151 (TCC); [2013] BLR 484, Akenhead J was not persuaded by this unconventional approach, and said that the authorities were sufficiently well-established now to suggest that only one dispute could be referred to adjudication at any one time. I agree with that.

22.
Accordingly, as there were two disputes between the parties, the question then arises as to whether the adjudicator had the jurisdiction to deal with those two disputes at the same time.

4. PARAGRAPH 8 OF THE SCHEME

23.
Paragraphs 68-74 of Ramsey J's judgment in **Willmott Dixon** explain how and why, under the Housing and Grants (Construction and Regeneration) Act 1996 ("the Act"), as amended, a party could refer two disputes to adjudication at the same time, by giving two notices of adjudication and making two referrals. This conclusion was based on the entitlement, pursuant to s.108(2)(a) of the Act, that a party could "give notice at any time of his intention to refer a dispute to adjudication."

24.
It is fair to say that, prior to **Willmott Dixon**, no-one had given much thought to this question but, by reason of the Act, and the wording of the CIC Rules which applied in that case, Ramsey J's reasoning cannot be faulted. There was nothing in the Act or in those Rules, which prevented a party from following this course. I note that **Willmott Dixon** has not been doubted, at least on this point. It is unsurprising therefore, that Mr Choat put **Willmott Dixon** at the front and centre of his submissions as to jurisdiction.

25.
In my judgment, however, there is a critical difference between this case and that of **Willmott Dixon**. This is a case in which the adjudication was conducted pursuant to the Scheme for Construction Contracts. Paragraph 8 of Part 1 of the Scheme provides as follows:

"**8–**(1) The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract.

(2) 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) All the parties in paragraphs (1) and (2) respectively may agree to extend the period within which the adjudicator may reach a decision in relation to all or any of these disputes.

(4) Where an adjudicator ceases to act because a dispute is to be adjudicated on by another person in terms of this paragraph, that adjudicator's fees and expenses shall be determined in accordance with paragraph 25."

26.
On its face, paragraph 8(1) allows the adjudicator to deal with more than one dispute at the same time, but only with the consent of all the parties. Here, as I have already noted, Beck did not consent to the disputes in Adjudications 2 and 3 being dealt with by Mr Bastone at the same time. So, on the face of it, paragraph 8(1) provides an insurmountable jurisdictional hurdle for DATL.

27.
Mr Choat made a number of submissions in order to persuade me that the clear words at paragraph 8(1) should somehow not be applied to Adjudications 2 and 3 in this case. He said that it would be unfortunate if the result was different to the result in **Willmott Dixon**, and unsatisfactory if the outcome depended on the precise adjudication rules that applied. He said that the words were intended to address the situation where an adjudicator was dealing with disputes arising out of the same notice of adjudication, and did not address the situation which has arisen here, where there were different notices of adjudication. Finally he submitted that, if all else failed, paragraph 8(1) was

ultra vires because it was contrary to s.108(2)(a) of the Act (the ability to adjudicate at any time). Forcefully though these points were put, I am unable to accept any of them.

28.
It may well be an unhelpful complication if the question of whether or not an adjudicator can deal with more than one dispute at the same time depends on the precise rules governing the adjudication. But that does not mean to say that the rules can be disregarded. In **Willmott Dixon**, as I have explained, the CIC rules did not prevent this from happening. Here, the clear words at paragraph 8(1) of the Scheme do prevent it from happening, if there is no consent. Thus the rules are different and the result of the application of those rules, at least on this point, is different too. In my judgment, any complication arises from the decision to start a second adjudication before the first had been concluded, and to ignore the clear requirement of consent in paragraph 8(1).

29.
I cannot accept that, in some way, the words of paragraph 8(1) relate only to the situation whether there are a number of different disputes on the same piece of paper (the adjudication notice), and not to the situation where there are a number of different disputes on many different such pieces of paper. That makes no sense. Moreover, there is nothing in paragraph 8(1) to allow such fine distinctions to be drawn. Whilst these type of points have only ever arisen before in cases where there was a single notice of adjudication, that is pure happenstance. It does not affect the proper construction of paragraph 8(1).

30.
I do not accept that in some way the Scheme is unlawful or ultra vires. The parties can adjudicate at any time. That is what the Act provides. All they have agreed here is that, if one party wants to adjudicate more than one dispute at the same time before a particular adjudicator, then that party needs the consent of the other party. That does not unreasonably fetter or impinge upon the underlying right to adjudicate at any time. The Scheme comprises a sensible and practical series of rules governing the way in which that right can be exercised.

31.
In addition to the above points, in the course of her skilful submissions, Ms Conroy reminded me of the decision of HHJ Humphrey Lloyd QC in **Pring and St Hill Ltd v CJ Hafner (Trading as Southern Erectors)** [2002] EWHC 1775 (TCC). I consider that this case is directly on point, even though it was concerned with paragraph 8(2) of the Scheme (set out at paragraph 25 above). There an adjudicator was appointed to decide an adjudication between the main contractor and a sub-contractor called PSH. Later, he was appointed to adjudicate between PSH and two different sub-sub-contractors, SE and JCH. SE objected to his appointment. The adjudicator rejected those challenges and made a decision against SE. SE successfully avoided enforcement on the basis that paragraph 8(2) prevented an adjudicator deciding one adjudication in the light of what he might have been told in another adjudication, unless there was consent. The judge agreed with that proposition, saying that paragraph 8(2) took effect as a contractual term and SE were entirely within their rights and acting reasonably by withholding their consent to the appointment of the adjudicator.

32.
Although Mr Choat maintained that **Pring** was a case on its own facts, I do not agree. It seems to me that the judgment in that case is directly applicable to the situation here. Adjudicators can be appointed to deal with more than one dispute at the same time or related disputes under different contracts, but under the Scheme, that can only happen with the consent of all the relevant parties.

Such consent was not forthcoming in **Pring** and provided a jurisdictional answer to enforcement. The same applies here.

33.
It is important to identify the limits of this jurisdictional challenge. Ms Conroy began her submissions by suggesting that, if she was right on this issue, neither of the decisions in Adjudications 2 or 3 was enforceable. I do not think that can be right. I put to Ms Conroy that the adjudicator had the necessary jurisdiction when he was appointed to deal with Adjudication 2. For the reasons that I have explained, he did not have the jurisdiction to deal with Adjudication 3. But the mere fact that he should not have accepted that subsequent appointment does not, in my view, affect his jurisdiction to deal with Adjudication 2. How could it? Since he never had the jurisdiction to deal with Adjudication 3, it was a nullity and cannot have affected his continuing jurisdiction in respect of Adjudication 2.

34.
With typical candour, Ms Conroy accepted that this analysis must be correct. Mr Choat's skeleton had made that point, albeit in slightly different terms. Thus, for the avoidance of doubt, I conclude that this jurisdictional challenge, based on paragraph 8(1) of the Scheme, is successful, but only to the extent that it renders the decision in Adjudication 3 unenforceable. It has no bearing on the decision in Adjudication 2.

5. BREACH OF NATURAL JUSTICE

35.
Perhaps mindful that she might need another argument to avoid enforcement of the decision in Adjudication 2, Ms Conroy alleged that there was a material breach of natural justice in Adjudication 2, which she said stemmed from the confusion engendered by the adjudicator's attempt to deal with two separate adjudications at the same time. If the argument was right, this might have the effect of preventing enforcement of the decision in Adjudication 2.

36.
The argument developed in this way. In Adjudication 2, there was uncertainty as to which payment application was being relied on by DATL in support of their claim for loss and expense. This mattered, because Beck were taking the jurisdictional point that, at the time that the adjudication started, the dispute had not crystallised.

37.
In the event, on 25 November 2015, the continuing uncertainty on this issue led the adjudicator to ask for copies of applications for payment 16 and 17. In fact there was no application for payment 17 and the position was more complicated than DATL had originally indicated. As a result, on Friday 27 November 2015, rather than simply providing copies of documents, DATL provided a witness statement and other material explaining how the relevant applications had come about.

38.
On 27 November 2015, Beck complained about this late material and asked for an extension until Tuesday 1 December 2015 to serve their rejoinder, which was otherwise due on 27 November 2015. The adjudicator's reply did not rule on the application either way, although he expressed surprise that these events necessitated any sort of delay. In response, Beck said they would serve their rejoinder on Monday 30 November 2015, and that is what happened.

39.

Ms Conroy now says that Beck were rushed into producing the rejoinder and other documents produced at that time, and that the adjudicator failed to comply with the rules of natural justice because he did not afford Beck a proper opportunity of dealing with the late information about the applications, and the accompanying documentation.

40.
Attractively though this argument was put, I have concluded that there is nothing in it. First, the courts have always recognised that questions of timetabling are uniquely a matter for the adjudicator, who has to produce his decision in a very short space of time. Here he allowed Beck to put in a rejoinder: there is plenty of authority in support of the proposition that a decision not to allow the responding party to put in a rejoinder is not a breach of natural justice: see **Balfour Beatty Construction (Northern) Ltd v Modus Corovest (Blackpool) Ltd** [2008] EWHC 3029 (TCC) and **GPS Marine Contractors Ltd v Ringway Infrastructure Services Ltd** [2010] EWHC 283 (TCC); [2010] BLR 377.

41.
Secondly, Beck said that they could put in their rejoinder on Monday 30 November 2015, and that is what they did. The evidence is not, therefore, that they were rushed; on the contrary, the evidence is that it did not affect them at all.

42.
Thirdly, there is no evidence before me that there was argument or evidence available to Beck about the payment application which they failed to take in their letter of 30 November 2015 or in their Rejoinder of the same date, but which, had they had more time, they would have taken. And following on from that, there is also no evidence that, even if there was a breach of natural justice, it had any material effect on the outcome: see **Kier Regional (Trading as Wallis) v City in General (Holborn) Ltd** [2006] EWHC 848 (TCC); [2006] BLR 315 and **Cantillon Ltd v Urvasco Ltd** [2008] EWHC 282 (TCC); [2008] BLR 250. These two ingredients would have been critical to the success of any natural justice argument, but there was nothing to be said about either of them.

43.
For all those reasons, therefore, the natural justice argument cannot succeed.

44.
Ms Conroy also complained that, when the adjudicator asked for the information in respect of the payment application, Beck thought this request related to Adjudication 2 only, and were therefore extremely concerned when, in his decision in Adjudication 3, the adjudicator said that the information he had sought actually related to his decision-making in the latter adjudication.

45.
Again I do not accept the factual premise of this complaint. The adjudicator made plain in his original email that his request related to both Adjudications 2 and 3. Moreover, even if (contrary to my view) there was anything in the complaint that the adjudicator wrongly used information gained in Adjudication 2 for his decision-making in Adjudication 3, it goes nowhere since I have already ruled, for other reasons, that the decision in Adjudication 3 is unenforceable.

46.
Finally, there was a criticism of the adjudicator in that, arising out of his decision in Adjudication 2, Beck had asked him a question which he had answered by saying that it would be clear in his decision in Adjudication 3. However, Ms Conroy accepted that this was simply a point that demonstrated what

she called the unhappy cross-fertilisation between Adjudications 2 and 3 and was not a separate, stand-alone matter of natural justice. I respectfully agree with that.

6. CONCLUSIONS

47.
Accordingly, for the reasons set out in **Sections 3** and **4** above, I conclude that the adjudicator did not have the necessary jurisdiction to decide Adjudication 3. His decision in Adjudication 3 is therefore unenforceable.

48.
For the reasons set out in **Section 5** above I do not accept that there was any material breach of the rules of natural justice in Adjudication 2. Accordingly, there is no reason why DATL are not entitled summarily to enforce the decision in Adjudication 2.

49.
I would ask the parties to draw up the order arising out of this Judgment. I am sure that the principal amount and interest can be agreed. I would also hope the parties can agree costs. If, however, costs cannot be agreed, I will deal with those separately.