Case No: H20CL003

IN THE COUNTY COURT AT CENTRAL LONDON
TCC LIST

Thomas More Building
Royal Courts of Justice

Date: 15/03/2021

Before :

HHJ PARFITT

- -

Between :

DMD ENVIROMENTAL LTD	**Claimant**
- and -	
MITCHELL DEMOLITION LTD	**Defendant**

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- -

John Steel (instructed by **Birketts LLP**) for the **Claimant**
Nicholas Kaplan (instructed by **Rogers & Norton**) for the **Defendant**

Hearing date: 5 March 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic. This judgment has been handed down by way of circulation to the parties' counsel by email.

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HHJ PARFITT

HHJ Parfitt :

Introduction

1. The Claimant applies to enforce an adjudication award dated 9 November 2020. The Defendant says summary judgment should not be granted because the adjudicator lacked jurisdiction, this being a two contract case ("the Jurisdiction Issue") and because the adjudicator breached natural justice in making the adjudication award without considering expert evidence which would have demonstrated that the Defendant did not receive an email dated 5 June 2019 ("the Natural Justice Issue").

2. The Claimant provides specialist asbestos removal services and the Defendant provides demolition services. In broad terms the relevant adjudication related to a final account dispute following works done by the parties preparatory to the redevelopment of the riverside stand at Craven Cottage.

3. On 27 August 2020 the Claimant issued a payment application on that final account for £326,596.59. On 4 September 2019, the Defendant issued a payless notice seeking a payment in the Defendant's favour of £25,007.53. The adjudicator found that a sum of £16,597.77 was due to the Claimant and also determined that the Defendant should bear the costs of the adjudication.

4. The parties have been much assisted by their respective counsel but notwithstanding all their best efforts, it was not possible to complete the hearing and give judgment on 5 March 2020 (the remote hearing finished just before 5.00 pm) and I indicated to the parties that I would provide judgment in writing. In the circumstances, however, I have kept this judgment as brief as is appropriate bearing in mind the summary nature of the enforcement process and the benefit in making this decision available in good time.

5. With that in mind, I start by setting out the relevant law, as to which there was no real dispute, and then consider the parties' submissions and my conclusions on the two issues identified above.

The Law

6. Section 108 of the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act") requires a construction contract to make provision for adjudication and if the contract does not do so implies into that contract the terms of the scheme contained in the 1998 Regulations ("the scheme"). The alleged contracts in the present case would have been subject to the scheme requirements – no side alleges any express agreement of adjudication terms.

7. The general principles relevant to the summary judgment enforcement of adjudication awards are well known and summarised at paragraph 21 of Amec Group Ltd v Thames Water Utilities Ltd [2010] EWHC (TCC), Coulson J (as he then was). The purpose of the adjudication regime is to give priority to efficient interim resolution to assist cash flow and generally awards will be enforced by summary judgment except where it is plain that an adjudicator acted without jurisdiction or contrary to natural justice. It is not relevant to that enforcement process that the adjudicator might have got it wrong – an award will be enforced as is even if it contains an obvious error. In

familiar summary: as long as the adjudicator has addressed the right question the answer cannot be questioned.

8. The scheme rules state that an adjudication cannot deal with more than one dispute or one contract without the consent of the parties to the dispute (paragraph 8). No such consent was given in the present case.

9. This leads to the decision in Grovedeck Ltd v Capital Demolition, 2000 WL 191158, HHJ Bowsher QC, where at [35] the judge, briefly, said that enforcement would have been refused since the reference to adjudication involved more than one contract without consent from the other party.

10. However, in Air Design (Kent) Ltd v Deerglen (Jersey) Ltd [2008] EWHC 3047, Akenhead J recognised that there can be cases where the dispute which is referred to adjudication cannot be determined on the merits without the adjudicator deciding whether heads of work part of the dispute fall within the contract the subject of the adjudication by subsequent agreement or whether such works are referrable to a different contract. Substance and jurisdiction might overlap in those circumstances but substance should prevail and a valid jurisdiction challenge cannot be based on the adjudicator getting that determination wrong.

11. This substantive scope overriding potential jurisdiction problems because of an assertion of multiple contracts has been recognised and/or applied in other cases[1] but for present purposes I need only refer to RMP Construction Services Ltd v Chalcroft Limited [2015] EWHC 3737 (TCC), Stuart-Smith J, who at [3] identified that in the case before him regardless of the route by which a contract was formed the scheme would apply (this is the same as the present case) and so, at [43], if that route did not make a substantive difference to the outcome a jurisdiction challenge should fail (as per the judge's decision in *Purton*) but addressed, between [44] and following, what the enforcing court's response should be when the choice of contracts would make a substantive difference to the outcome and decided at [52] and [53] that so long as the adjudicator would have had jurisdiction under the scheme a difference in substantive outcome dependent on contract formation should not be a ground for jurisdiction challenge.

12. It is not disputed but still relevant that a final account dispute is an example of one dispute for the purposes of the "one dispute" unless consent rule (Lorriane Lee v Chartered Properties (Building) Limited [2010] EWHC 1540 (TCC), Akenhead J at [21]. It being trite that a final account dispute is likely to have within it many other sub-issues which make up the rival contentions on that account.

13. There are circumstances when an element of a decision which was made without jurisdiction might be severed without undermining the integrity of the remainder (LJH Paving Limited v Meeres Civil Engineering Limited [2019] EWHC 2601 (TCC), Adam Constable QC at [35]. Albeit that LJH Paving is an extreme case on the facts because of the small value of the claim that might have been severed.

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[1] I was referred in summary to Camillin Denny [2009] EWHC 2110 (TCC), Akenhead J; Supablast [2010] EWHC 56 (TCC); Viridis [2014] EWHC 268 (TCC), HHJ Stephen Davies and Purton [2015] EWHC 2624 (TCC), Stuart-Smith J.

14. The principles relevant to a breach of natural justice challenge are considered and summarised in Amec at [54] of which the most relevant (in my summary) are that natural justice applies and does so within the context of the adjudication process and the court's role is to make sure that obviously unfair decisions are not enforced but not encouraging (or allowing) "overly-sensitive concern for procedural niceties". For present purposes I will take the obvious proposition that the Defendant had to have a fair opportunity to present its case as the relevant test.

The Jurisdiction Issue

15. The Defendant's case is that the adjudicator lacked jurisdiction because in a non-binding determination as to jurisdiction the adjudicator determined that the basis of contract was the Defendant's acceptance of a quotation emailed to the Defendant by the Claimant on 5 June 2015 which included both "stadium works" and "soil works" (to use the shorthand which the parties have done) when in fact those works were the subject of separate oral contracts agreed shortly before 10 June 2015 for the stadium works and much later in the year so far as the soil works were concerned (Mr Mitchell's witness statement for the adjudication sets out the Defendant's factual case but it is not entirely clear as to when the soil works were contracted but as I read it, it would be no earlier than October 2019 and no later than when the Claimant's soil works started in December 2019).

16. The Claimant says this apparent jurisdiction argument is a typical example of circumstances where the substantive dispute is not about jurisdiction but about what was agreed: either way the scheme would apply and the adjudicator would have been appointed and been able to determine the nature and scope of the final account issue before him. It is a dispute about what was agreed – which is the proper question addressed by the adjudicator.

17. I agree with Mr Steel and can explain why briefly.

18. The starting point is the nature of the dispute which was referred to the adjudicator. This was the final account dispute, which was summarised in paragraph 3 above. There can be no doubt on the facts of this case that such a dispute was within the adjudication requirement under section 108 of the 1996 Act and that the scheme would apply. It made no difference to that jurisdiction issue which of the disputed unwritten contracts might apply to establish that jurisdiction. In any event, there was substantive jurisdiction to determine the final account dispute.

19. If the Defendant wished to argue that any item in that account did not form part of the contractual agreement alleged by the Claimant and so fell outside the matters to be determined by the adjudicator then it could do so and the adjudicator's decision on that would be a substantive decision about whether or not monies were due under the final account he was determining.

20. I can add, it is of some background relevance to the natural justice issue addressed below, that for my own part I regard the parties' concern – particularly the Defendant's but I suspect the Claimant got caught up in this as well – about the receipt or otherwise of the 5 June 2019 email as beside the point. This is because:

i) The 5 June 2019 email says nothing significant itself but it attaches a pdf quotation which is the relevant document ("the pdf"). It is common ground that the parties were discussing these potential works at this time. At most the pdf must evidence what the Claimant was prepared to offer to carry out the works at that stage. This offer has no contractual significance of itself ("it is a thing writ in water" etc. etc.).

ii) The Claimant's case in the adjudication on acceptance lacked details. The Referral merely said in or around June 2019 a contract was entered into which incorporated the quotation and then later, at paragraph 5.10, the conclusory statement that MDL accepted the quotation but without any facts to support that assertion.

iii) The Defendant's position was that at 5 June 2019 it had sufficient price and scope information – some of which came from the Claimant – to quote a price to its customer and then after further negotiation with the customer that price was reduced and then agreed around the time works commenced on 10 June 2019. At about that time it was orally agreed, said the Defendant, between the Claimant and the Defendant that the price for the stadium works would be £360,000. The Claimant then carried out the works.

iv) For present purposes I will assume there were the discussions Mr Mitchell refers to but does not give evidence about – he also refers only to conclusions to be drawn from the discussions, not what was said. In any event those discussions must have included some discussion between the relevant people from each party about the price and it is that which is likely to have led to a price agreement not the mere receipt (or not) of the email. It is difficult to imagine a potential discussion after 5 June 2019 which would not of itself make the pure issue of receipt or not of the 5 June quotation on 5 June 2019 redundant. If there was no such discussion then I cannot see why the mere starting of work would itself, in this context of parties who have a long history of informal dealings, amount to an acceptance of the 5 June 2019 offer rather than a right to be paid a reasonable sum.

21. In those circumstances I understand why the Defendant considers that the adjudicator got the decision wrong about the incorporation of the pdf price into the parties' agreement but this was a substantive decision of the administrator about the price for the stadium works. It is not an error that goes to substantive jurisdiction because on the particular facts of this case, there was substantive jurisdiction to determine the final account dispute regardless of the route by which that jurisdiction was established.

22. The case, in that respect, is within the statement of principle in RMP and the jurisdiction objection fails. The adjudicator was doing what May LJ refers to as "sufficiently secure identification of the contractual terms was intrinsically necessary to the proper performance of his adjudication task" (quoted in RMP at [48]).

The Natural Justice Issue

23. This relates to the Defendant's case that it did not receive the pdf because it did not get the 5 June 2019 email ("the receipt issue").

24. It might be thought that given what I have said above about the misplaced priority given to the receipt issue by the Defendant that I could dismiss the natural justice issue peremptorily on the basis that it does not give rise to a plain case of unfairness – consideration of Mr Mitchell's witness statement and the other material the parties chose to put before the adjudicator about contract formation and the agreement of price and scope should have been of far more importance than the incidental receipt in the course of oral discussions of a particular quotation which at best (and presumably) reflected the Claimant's position at a particular point in time in those negotiations. However, that has not been how the matter has been presented and I will not address it on that basis.

25. I agree with Mr Kaplan that in order to address the substance of the point put forward it is necessary to look at the procedural correspondence in some detail. The key question to be borne in mind throughout is whether it was unfair that the decision was made without the Defendant being able to rely on the expert report of Mr Munsey (or any expert evidence) which, in the event, was produced on 11 November 2020. The 11 November 2020 being before 12 November 2020 (the date the adjudication decision was expected) but after 9 November 2020 which was the date the decision was sent out. The Defendant says it was unfair because the Claimant and the adjudicator led the Defendant to believe that the submission process would include expert evidence about the receipt issue, it not being vital for this purpose whether that evidence was to be a single report from Mr Munsey or a joint report.

26. Mr Kaplan's skeleton argument took me through all of the correspondence. I will not do the same in this judgment but will focus on what I am told are the key documents. The Defendant's Response was directed to be sent not later than 13 October 2020. The Defendant had decided at the outset that the non-receipt of the 5 June 2019 email was crucial for its case both as to jurisdiction and substance. In exchanges between 5 and 8 October 2020 disclosure of meta-data was raised between the parties and the issue was referred to the adjudicator who said the Defendant's submissions regarding the email could be made in the Response, due for 13 October 2020.

27. The Defendant addressed the problem in more detail on 9 October 2020 and stressed that (a) Mr Munsey required more metadata than that provided already (b) Mr Munsey was looking at the Defendant's devices for any trace of the email and (c) it might be necessary for Mr Munsey to access the Claimant's devices, all of which meant the Defendant reserved its position on seeking an additional extension of time. The next working day was 12 October (and the adjudicator asked for a response by noon on that day). The Claimant responded at 11.32. Mr Kaplan's skeleton says this response is "crucial" and in oral submissions relied also on that of the adjudicator that followed it.

28. The 12 October 2020 response did the following:

    i) Addressed queries about the address used to send the email and another email address used by the sender of the email and the way in which Microsoft Exchange Server would handle these addresses within the Claimant's IT systems.

ii) Stated the Claimant's position that proof of sending was sufficient to prove receipt but that what evidence about this the Defendant wanted to include in the Response was a matter for them.

iii) Addressed Mr Munsey's wish to access the Claimant's devices and said it was premature before (a) Mr Munsey had completed looking at the Defendant's devices but (b) if the adjudicator determined at any point that access was required then it should be by an independent expert.

29. The adjudicator's response was timed at 12.14 on the same day. It included: *I note the contents of Birketts email and in particular that if there is to be any investigation into DMD's IT systems that it should be undertaken by an independent expert. I agree this would be a sensible way forward. It seems to me that even if Rogers & Norton don't like Birketts response, it is for Mitchell Demolition Ltd to now submit their Response in which they can make such contentions as they consider appropriate and for DMD to be given opportunity to Reply. Accordingly, I look forward to receipt of the Response….*

30. In submissions to me, the Defendant says that they understood this to mean that the adjudicator "wanted the Defendant to set out a prima facie case as to non-receipt of the email, at which point a joint expert would be instructed to investigate and confirm the position" and so they "held off instructing Mr Munsey" (Mr Hastings statement [34.4]). I will come back to that below.

31. The Response was served on 13 October 2020, together with Mr Mitchell's statement asserting the non-receipt of the 5 June email (and referring to Mr Munsey not completing his searches) and on 16 October 2020 the adjudicator circulated his non-binding jurisdiction determination which was premised on the 5 June 2019 email being the basis of the contract between the parties. The Defendant was particularly irked that one of the adjudicator's reasons was to refer to Mr Mitchell saying that Mr Munsey had not finished his searches yet – since the Defendant had halted those searches on the basis that it considered a joint report would be instructed.

32. On 16 October 2020 the adjudicator asked for an extension to provide his decision until 12 November 2020 as he was agreeing an extension for the Reply until 23 October 2020. The 12 November 2020 extension was agreed.

33. On 21 October 2020, the Defendant returned to the expert issue. This repeated Mr Munsey's view that he would require access to both sides' IT systems. It then referred to the adjudicator's jurisdiction decision as indicating his view that further evidence would be needed to satisfy him that the email was not received (this is not exactly what the adjudicator said but I will leave that for now) and asserted that such evidence can only come from an IT expert with access to both systems. It then invited the adjudicator to either accept Mr Munsey's report once completed or appoint a joint expert. The adjudicator asked for comments from the Claimant. These came later that evening.

34. The Claimant's position was that they had previously confirmed that if the adjudicator thought there was reasonable doubt about receipt of the quotation then the Claimant agreed to an independent expert but that there was, in the Claimant's view, no evidence from the Defendant that would create such a doubt and so there was no

reason to incur the time and cost of an expert report. The adjudicator was right in his 16 October 2020 determination and should not depart from that. In my view this description of the Claimant as to its position in the correspondence of 12 October 2020 is not accurate but I do take this description into account when considering my conclusions on the natural justice issue.

35. The adjudicator's reply on 21 October 2020 determined the procedural issue about a joint expert against the Defendant. The adjudicator made 6 points: (1) it was not for him to tell the Defendant how to defend itself; (2) the Defendant engaged an IT expert but did not rely on any report from that expert; (3) the receipt issue was not new because the pdf had been referred to in earlier adjudications; (4) the adjudicator agreed with the Claimant that the Response had not raised a reasonable doubt about receipt of the 5 June 2019 email; (5) therefore the time and cost of a single joint expert was not justified; (6) and so no such direction would be made.

36. The Defendant instructed Mr Munsey to complete his report but limited to investigating the Defendant's systems. In the event the adjudicator's decision was produced before this report was available. The Defendant told the adjudicator that Mr Munsey was completing his report and asked for further time. The Claimant refused to agree an extension beyond 12 November 2020 for the decision and so no such extension could be given as a matter of procedure under the scheme. The Defendant raised the natural justice issue, reserved its rights and said that it would get the report completed as soon as it was able.

37. I address each of Mr Kaplan's submissions set out at paragraph 21 of his skeleton in turn (in my summary of them):

    i) The 12 October emails indicated that a joint expert would be appointed if a prima facie case of non-receipt was made out. I disagree. The position as at 12 October was not this at all. A reasonable reader of those emails in context would have understood three things: (a) the Defendant could put forward what evidence it wanted in the Response; (b) Mr Munsey would not get access to the Claimant's IT systems and (c) if an independent expert was to be considered that would have to be determined later. There was no assumption about the circumstances in which such an expert might be appointed. It remained open for either party to ask for that direction or for them to agree it or for the adjudicator to make that decision for himself (for all of which see paragraph 13 of the scheme).

    ii) The Response evidence where Mr Mitchell said the Defendant had not received the email established a prima facie case. I agree but do not consider this takes the matter further since this was a factual / procedural issue for the adjudicator. Mr Kaplan also says that the jurisdiction decision indicated that an expert report would be necessary. I disagree. The adjudicator makes a different point which was only that the incompleteness of the expert's report referred to in Mr Mitchell's own statement undermines Mr Mitchell's assertion that the email was not received (the logical basis for this is not that you need an expert report to prove non-receipt but that if Mr Mitchell considered that an expert was required then its non-completion demonstrates a gap in the basis for Mr Mitchell's own conclusion). The underlying point remains – it was for the Defendant to put forward that report in its Response if it wanted.

iii) The adjudicator should have instructed an expert as previously indicated. I disagree. There was no such indication and whether or not to instruct a joint expert remained at large. It was a matter for the adjudicator having heard what the parties had to say about it. It is at this point that it is relevant to keep in mind how the Claimant categorised its position in the 21 October 2020 exchange. Nevertheless, it was still a matter for the adjudicator to determine, essentially as a matter of case management whether he considered that the additional time and expense of a joint report would be justified.

iv) The Adjudicator refused to make any decision. I disagree. The Adjudicator determined on 21 October 2020 that there would be no joint expert report.

v) The Adjudicator should have waited for Mr Munsey's report. I disagree. If the Defendant had wanted to rely on such a report it should have put it in its Response.

38. It follows that there was no substantial breach of natural justice in determining the adjudication without expert evidence on the receipt issue. I disagree that there was any legitimate expectation arising out of the exchange of emails on 12 October 2020 that there would be a joint expert appointed. The possibility of a joint expert remained just that – it was for the Defendant to pursue that if it wanted and/or put forward such expert evidence as it wished as part of the Response due on 23 October 2020. There was no substantial unfairness to the Defendant in what happened.

Conclusion

39. The objections raised by the Defendant fail to establish a real prospect of resisting enforcement of the adjudicator's award and the application for summary judgment is granted. I ask Counsel to agree the order.

Post Draft Judgment Issues

40. Counsel were able to agree some aspects of the order required by the judgment above but interest on the adjudication sums and costs remained disputed. By sensible agreement the parties provided written submissions addressing these issues. My decisions are:

i) I agree with the Claimant that the obligation to pay the adjudicator's fees was at core a contractual obligation to which the LPCDA applies and so the interest rate and compensation provisions are as set out in that Act.

ii) I do think that the parties should have cooperated better (or the Claimant should have done) in order to make the completed bundle available for both sides counsel in good time for the skeleton arguments to be prepared. I also consider that the failure to do this added to the work done by Mr Kaplan in a way which should be reflected by some reduction in the costs otherwise payable to the Claimant. On the other hand so far as rate and reasonableness of those costs are concerned, I agree with Mr Steel that they are proportionate and that no reductions are required to the phases of costs identified in the N260. I will make a £1,000 reduction and so the costs assessed shall be £7,942.00.