

Neutral Citation Number: [2003] EWHC 2421 (Technology)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand
London WC2

Friday 3 October 2003

B E F O R E:

THE HONOURABLE MR JUSTICE FORBES

JW HUGHES BUILDING CONTRACTORS LIMITED

(CLAIMANT)

-v-

GB METALWORK LIMITED

(DEFENDANT)

Tape transcription by Smith Bernal Wordswave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Court Reporters)

MS J STEPHENS appeared on behalf of the CLAIMANT

MR A JINADU appeared on behalf of the DEFENDANT

J U D G M E N T
(As Approved by the Court)

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JUDGMENT

MR JUSTICE FORBES:

1. This is an application brought by the Part 20 Claimant ("GBM") to enforce the decision of Mr M Dight acting as an adjudicator on 31 July 2003. In the adjudication it was found that the Defendants ("JWH") should pay £24,354.41 together with £688 interest and £1,675 expenses. GBM has sought recovery of these sums unsuccessfully and now brings proceedings to enforce the adjudicator's decision.
2. This matter arises out of a subcontract for the fabrication and erection of steelwork. The sub-contract was formed by JWH's written acceptance of 13 December 2001. It is common ground that GBM was to commence work in January 2002 although work on site was delayed until 15 August 2002. As a result of delay it is said that GBM accelerated steelwork erection and completed on 12 Oct 2002. GBM submitted a claim for additional works and variations. JWH responded with a claim for contra charges.
3. JWH has taken 2 basic points whereby it seeks to resist enforcement: (i) The adjudicator lacked jurisdiction to make the decision because there was no dispute, the dispute having been compromised prior to the purported referral to adjudication; (ii) it is said that the way the adjudication proceeded infringed natural justice: in particular, it is said that JWH was put at a significant and irremediable disadvantage as a result of not being provided with a certain critical documentation during the course of the adjudication. It is further said that, having become aware that such was the case, the adjudicator failed to take appropriate steps to enable JWH to deal with that documentation fully and properly in presenting its own case.
4. I turn first to deal with the lack of jurisdiction point. In order to understand that point it is necessary to refer to certain correspondence between the parties in the context of certain conversations between Mr John Hughes of JWH and Mr Graham Burke of GBM. According to Mr Hughes, his understanding was that those conversations had resulted in a binding compromise of all outstanding matters between the parties and represented agreement as to the final account relating to this subcontract. On 29 October Mr Joe Hughes wrote to Mr Graham Burke in the following terms:

"Dear Graham, Following your recent discussion with John I write to confirm our intention to place contracharges at the finalising of your account. The contracharges do not account for out of sequence working or delays to programme, these are mainly costs incurred by JW Hughes during the contract. I would be happy to provide backup for that attached breakdown should you require it."

5. On 31 October 2002 Mr Burke replied, *inter alia*, as follows:

“Dear John ... I received a letter and schedule from Joe with regard to contracharges. Could you please clarify the dates for the craneage as we are not aware of there being four days. Could you also clarify the position with regard to our application costs outlined in our letter dated 18 October 2002. As we are understandably keen to arrive at an agreed final account settlement with you, can you please clarify whether you intend to levy any charge for delay to programme or out of sequence working.”

6. On 4 November 2002 Mr Joe Hughes replied, *inter alia*, as follows:

“The amended contracharges total should be £8,040.45. I should also confirm that JW Hughes Building Contractors Limited have not claimed any costs for the delay to programme or out of sequence working. It is not our intention to enforce these costs against GB Metalwork as long as the contracharges are honoured. You will appreciate these are direct costs met by ourselves as a result of your works. As regards the additional extras, we are in the process of claiming these items. I cannot comment on the likelihood of receiving payment as we are waiting for the client contract manager to respond. I will contact you as soon as I have further information.”

7. In my judgment, it is clear from the final paragraph of that letter that Mr Hughes was fully aware that there were outstanding matters relating to GBM’s subcontract claims that were additional to the contract sums and were ones in respect of which it was hoped that JWH would then be able to pass the financial responsibility up the line to the employer. The examination of other correspondence shows that this, in fact, was a process which went on and that the surveyors acting for the employers dealt with various items, accepting some, disputing others.
8. The important point to grasp, however, is that by 4 November 2002 it is quite clear from the correspondence that there were additional matters outstanding which remained to be resolved before the final account on this subcontract could be finally agreed, albeit it is also clear that Mr Burke of GBM was anxious to reach finality on the final account as soon as possible.
9. However, it is against the background of that correspondence that it is submitted on behalf of JWH that in conversations earlier on October 2002, GBM had in fact compromised the whole of its financial claims relating to this subcontract. In my view, having regard to the correspondence, that argument is plainly very difficult to sustain, whatever private view may have been formed by Mr John Hughes with regard to the effect of the conversation or conversations that he had had in early October 2002 with Mr Burke.

10. It is perhaps worth pointing out that Mr Burke wholeheartedly disputes the suggestion that there was any such agreement reached between himself and Mr Hughes. Again, for what it is worth, as it seems to me, Mr Burke's view of the matter is wholly consistent with the correspondence, whereas that of Mr Hughes is not.
11. So it is that Mr Jinadu, on behalf of the claimants, submitted that this particular argument does not get to first base. It was his submission that there was no compromise and it is clear from the correspondence that there was no compromise. The adjudicator therefore had full jurisdiction to deal with the matter because it is common ground that there was a dispute between the parties arising out of a construction contract to which the 1996 Act applies. I agree with this submission.
12. However, the point does not end there, because it is also submitted by Mr Jinadu that, in any event, the matter was considered by the adjudicator and dealt with in the course of his adjudication decision. It is trite law that the adjudicator does not have power to determine his own jurisdiction unless the parties agree that he should do so for the purposes of the adjudication process. In this case it is clear from an examination of the documents that the parties did so agree.
13. After nomination, the adjudicator communicated with the parties and made it clear that one of the terms of appointment would be that he should have jurisdiction to determine his own jurisdiction. In the terms which he submitted to the parties he made it clear that if these terms were not to be agreed then he should be notified. In fact, neither party took any objection to any relevant term that the adjudicator proposed, including the term to which I have just referred.
14. It is to be noted that at that stage JWH was represented by an experienced firm of solicitors and the matter proceeded with the adjudicator taking charge of the adjudication and proceeding to deal with it. At no stage was it suggested that his terms were not accepted. Therefore, even though there was not express acceptance of all his terms and conditions, it is quite clear that both parties agreed by their conduct to the adjudicator having jurisdiction to deal with matters relating to his jurisdiction in accordance with the terms and conditions that he had proposed.
15. In the event, that is precisely what the adjudicator actually did. The jurisdiction point was taken at the adjudication meeting. JWH, by then no longer represented by its solicitors, took the point that its understanding was that GBM's claims had all been compromised and that there was no dispute. The adjudicator considered the arguments and rejected them. He held that he did have jurisdiction and that there was a dispute. In my judgment, by reference to the terms and conditions that he had proposed and which had been agreed by the parties, he had right to so decide and that decision is binding upon the parties for purposes of the adjudication and the resulting adjudicator's decision.

16. As Mr Jinadu very properly and frankly acknowledged, that decision does not bind the parties for the purposes of resolving the underlying dispute. Again, that is trite law. Mr Jinadu also submitted that, by reason of the way in which the matter was dealt with before the adjudicator, there was an ad hoc agreement by the parties to the adjudicator having jurisdiction to deal with his jurisdiction. Again, I agree with that submission and there is no need, in my view, to elaborate it further.
17. Finally, Mr Jinadu submitted that the way in which the matter was dealt with by JWH at the meeting before the adjudicator amounted to a waiver and/or estoppel with regard to his having jurisdiction to deal with matters of jurisdiction and, again, I agree with the submission. However, having regard to the way in which I feel that this particular matter is most conveniently resolved for the purposes of this judgment (ie by reference to Mr Jinadu's first submission), it does not seem to me necessary to elaborate my reasons for coming to that latter conclusion. Accordingly, the first ground for resisting enforcement of this decision manifestly fails.
18. I turn, therefore, to consider the second point made by JWH. This argument is based on the proposition that JWH did not have a fair hearing at the adjudication meeting. It is said that it had not been provided with the written statement of case and/or the referral to adjudication and supporting documentation that had been prepared by GBM.
19. It is important to say at the outset that no criticism is made of the adjudicator or of GBM as having some responsibility for JWH not having the documents in question. It is common ground that the documents in question were served by GBM on JWH's solicitors at the time those solicitors were instructed in early July 2002. If JWH did not itself receive these documents, its lawyers certainly did. If there is any fault to be attached to anybody at all for JWH not having those documents at the adjudication meeting, the fault plainly is that JWH's former solicitors and not of the adjudicator or GBM.
20. However, the position is not quite as simple as one in which it can be said that JWH arrived at the adjudication meeting only to be met with the realisation that there were important documents to which it had not had access as a result of solicitors' incompetence. Again, in order to understand the proposition it is necessary to make brief reference to some correspondence passing between the parties and/or the adjudicator. On 17 July, by which date JWH's solicitors were no longer acting for JWH, JWH wrote to the adjudicator in the following terms.

"Dear Mr Dwight, I refer to the adjudication you have kindly agreed to deal with between GB Metalwork and ourselves. We have never been involve in adjudication before and thought that the process would not start until after 18 July 2002. Our solicitor has today faxed over recent correspondence indicating that you have 'hit the ground running' and are already liasing with Mr Goodwin. Our response advises you that after taking the advice of a QS we have complied our

own response that I hope will be acceptable. All contact should now be channelled through myself.

“Having read the documents from Irwin Mitchell [the solicitors who had been acting for JWH] Mr Goodwin’s letter of 10 July 2003 mentions two letters from us dated 28/02. Can you please fax over copies and comments. Mr Goodwin’s penultimate paragraph that only one method of calculation of steel work is used, ie tonnage, this is not the case, quite the opposite. Often quantities of steel work are measured at price per metre, different suppliers having different rates for various sections. Mr Burke was never asked to quote on a tonnage basis, as confirmed by the engineer, and in any event he admits to his miscalculation as being the reason for him using the wrong tonnage.

“ I note from your letter, dated 3 July, advises the need for both sides to provide each other with all submissions to your office. Clearly, Mr Goodwin has now provided you with two files but has failed to supply us with copies. Should we send a copy of the response we are sending to you tomorrow to Mr Goodwin? [Again, I interpolate, Mr Goodwin is the person who was then acting for GBM.] Please feel free to phone any time for clarification and we welcome the opportunity to attend a round table questions and answers meeting if necessary. Many thanks, Regards, Joe Hughes.”

21. On 17 July 2003 the Adjudicator wrote to both parties. So far as GBM is concerned, the letter is addressed to Mr Goodwin’s firm and so as far as JWH is concerned, the letter is addressed to the company itself. *Inter alia*, the adjudicator said this:

“The respondent correctly notes my directions in my letter, dated 3 July 2003, that the parties are ‘to provide each other with all submissions to me’. However, having noted this direction, the respondent appears to have failed to comply by having failed to send Messrs Daniel Goodwin and Associates a copy of its fax and a reply ... Finally, I note that the respondent’s advice that Messrs Irwin Mitchell is no longer instructed to act on its behalf in this matter. Accordingly, I direct that all subsequent communications to the respondent in this matter are to be served on the respondent itself.”

22. In a second letter on 17 July the adjudicator wrote again to the parties, again to the addresses to which I have earlier referred. *Inter alia*, he said this:

“Prior to my first letter of today, all communications from me to the respondent have been served on Irwin Mitchell. Irwin Mitchell, acting on behalf of the respondent, have communicated with me in regard to the timetable for this adjudication and a revision thereto has been agreed between the parties and me ... (ii) The respondent appears from its fax to have only today received certain

correspondence from its 'solicitor', which I take to mean Irwin Mitchell. Arrangements between the respondent and its duly authorised representative for the exchange of incoming correspondence is a matter for the respondent and has no relevance to this adjudication.

"(iii) The respondent suggests that the correspondence received today from Irwin Mitchell indicates that I have 'hit the ground running' and am 'already liaising with Mr Goodwin'. I have done no more than conduct this adjudication in a way which is consistent with the time made available to me to reach my decision. If this is properly described as 'hitting the ground running' then so be it. However, the reference to my liaising with the referring party is potentially misleading and must be corrected. All communications from me have been sent simultaneously to both parties or their representatives so I have been no more 'liaising' with the referring party than I have been 'liaising' with the respondent

"(iv) The respondent says it is aware that the referral sent to me compromises two files but says that the referring party has failed to provide the respondent with copies. I presume that the respondent is aware of the existence of these two files by having had sight of Daniel Goodwin and Associates' letter, dated 7 July 2003. It will be noted that this letter was copied to Irwin Mitchell together with, I presume, the two files compromising the referral. In the circumstances, I fail to see how the respondent can properly say that there has been any failure on the referring party's part."

23. By a further letter on 17 July 2003, addressed the same addresses as before indicated, the adjudicator said this:

"I do not propose to pursue the point concerning the service of the referral on the respondent unless the respondent would wish otherwise, in which event it is to advise me accordingly. From a practical point, however, it seems to me that unless the respondent has the benefit of considering what it said in the referral it will be somewhat of a disadvantage in responding to the case as stated by the referring party."

24. As I have just indicated, that letter was written on 17 July 2003 and the meeting before the adjudicator, which eventually resulted in his decision, did not take place until six days later, on 23 July 2003. Notwithstanding the express notice given by the adjudicator in the last letter to which I have just referred, it appears that no step was taken by JWH by means of any further representations to the adjudicator with regard to the referral and the accompanying documents which JWH claimed not to have received.

25. I am told that JWH did take it up with their former solicitors, only to be told that their former solicitors were unable to locate any such documents. If that be right, this was yet another example of a failure on the part of JWH's solicitors to conduct their client's affairs with reasonable competence. I say that because it emerged later that they did indeed have the documents that had been served on them by those who were acting for GBM.
26. When the matter came before the adjudicator on 23 July it is said that JWH became aware that there were matters in the statement of case and supporting documentation which they had not fully appreciated. It is said that they sought an opportunity to consider the statement of case and supporting documentation and it is said that, after the adjudicator had given GBM the opportunity to consider whether JWH should be given further time, GBM refused to do so, as the result of which the adjudicator then proceeded with the adjudication.
27. I am bound observe that that account of what is said to have taken place is hotly disputed by both Mr Goodwin and Mr Burke. That say that, to the extent that there were any "time-outs" taken during the course of the meeting, those simply to deal with a request by JWH to introduce further documentation in support of its claim to contracharges and had nothing to do with any embarrassment that JWH might have experienced as the result of not having been given the original referral supporting documentation.
28. It seems to me that there is no realistic prospect of JWH establishing anything to the contrary. There is nothing in the adjudicator's decision which gives any indication that the adjudicator was aware of any embarrassment being experienced by JWH in dealing with the matter before him by reference to any failure of JWH's solicitors to provide them with a copy of the original referral documentation.
29. Furthermore, it appears that all the documents in support of the statement of case were documents which were common between both parties, consisting largely of interparty correspondence, none of it surprising. To the extent that there was a discrete document that had not been seen before, it was a bar chart, I am not persuaded that there is any basis for saying that JWH were placed at a disadvantage by reason of having to deal with that on the day of the meeting.
30. I come to a similar view with regard to the written statement of case. The statement of case was not evidence, it was merely the way in which GBM had set out its case in writing. JWH apparently had not had any difficulty in putting together a response to what they had understood the case to be, because they put forward a detailed response and lodged it with the adjudicator well in advance of the meeting, as stated in the correspondence to which I have referred. I am not persuaded that the fact that they did not have sight of the way in which GBM put its case in writing prior to the meeting itself gave to any irremediable or overwhelming disadvantage in dealing with the matter before the adjudicator.

31. It must be remembered that adjudication is not litigation, it does not arrive at a final decision binding on the parties unless overturned on appeal. The adjudication process is intended to be swift and to deal with matters fairly as possible within the time constraints of the timetable imposed upon the parties by the process itself. The adjudicator is also subject to a strict timetable. The process is one in which he has to make decisions as to how best to conduct the adjudication in order to arrive at an appropriate decision within the appropriate timescale. The decision, once made, is binding upon the parties but only provisional until the final resolution of the underlying dispute by way of litigation or arbitration. All these observations are trite law.
32. However, I accept that the rules of natural justice and/or procedural fairness do apply as appropriate in the adjudication process and I do not take any particular issue with the observations of His Honour Judge Seymour QC in RSL South West Limited v Stansell Limited [2003] EWHC 1390 TCC, at paragraph 32.
33. However, this was wholly different case that this adjudicator had to deal with. He had been aware in advance of the meeting that JWH had some problems with regard to missing paperwork. He was satisfied that GBM had done what they were required to do by way of serving documentation on JWH's then solicitors. He invited JWH to raise the matter further with him some six days in advance of the meeting if it felt that it was necessary to do so. JWH did not do so.
34. To the extent that JWH raised any question at the hearing itself, there is no reason to suppose that this adjudicator should have formed the view that, if the matter proceeded on that day, JWH would be put at a significant and unfair disadvantage. I am not persuaded there is any realistic prospect of JWH establishing that such was the case. All the signs are that it was fully aware of all the relevant documentation upon which GBM relied for the purposes of establishing their case. They were all familiar documents
35. The only additional document, the bar chart, does not appear to have figured as a document of great significance. Even if it had, I cannot believe that it would have caused any particular difficulty in being dealt with on the day by anybody familiar with the circumstances of the dispute. It is commonplace that documents come to light at the last minute in litigation and other procedures involving dispute resolution and are dealt with there and then, without any delay or adjournment proceedings.
36. I have considered this matter with some care and I have listened carefully to the well argued submissions put before me by Miss Stephens but I find myself wholly unmoved. There is absolutely nothing in this case to suggest that the course taken by the adjudicator can be arguably said to involve any form of procedural unfairness. In my view, quite the reverse. It would seem to me that this adjudicator dealt with the matter in an entirely satisfactory manner. He got on with the process as the legislation requires him to do, that is to say, he dealt

with it promptly and fairly and arrived at his decision within the normal tight timescale. There is nothing in this second point.

37. Accordingly, there is no basis upon which this court can or should interfere with the adjudicator's decision by refusing to enforce it. Accordingly, I am satisfied that for those reasons GBM is entitled to judgment and, accordingly, I hold that it is entitled to judgment in the amount claimed.
38. I will now go on and deal with the question of a stay.

(Submissions given by counsel)

39. There is now an application for a stay of execution of the judgment which I have just given in this matter on the basis that there is a significant question mark over the solvency of GBM sufficient to justify me exercising my discretion in ordering a stay.
40. I take the appropriate approach in law on this aspect of the matter, as conveniently stated by His Honour Judge Wilcox in Total M & E Services Limited v ABB Building Technologies Limited [2002] CILL 1857. In that case, at paragraph 52, the learned judge said this:

"Where a stay is sought the court must consider all circumstances. It must consider whether there are special circumstances which render it inexpedient to enforce the judgment. The risk on an inability on repay on due time is one of a number of factors to be taken into account in the balancing exercise. Where the risk is high, as where there is strong un-contradicted evidence of a present inability to pay or a company is in administration, a stay may be appropriate on terms safeguarding the disputed monies. The burden is clearly upon the party seeking a stay to adduce evidence of a very real risk of future non-payment.

"The balancing exercise is, of course, subject to the overriding considerations of part I of the CPR ensuring justice and fairness between the parties. In considering what is just and fair in an application for a stay of execution of summary judgment under part 24, in circumstances such as these the court must be careful not to reallocate the commercial risks accepted by the parties who engage in a construction contract, mindful of the provisions of the Housing Grants Construction and Regeneration Act 1996 and subject to the general safeguards of insolvency law."

41. Stated briefly, it is Miss Stephens' submissions that examination of GBM's accounts as lodged at Company House for the year ending 31 December 2002 and its current credit ratings suggest that there is a high risk of insolvency. The accounts show a retained loss brought forward of £189,157. The credit rating report gives a failure score of 1, which is apparently the highest failure score given

by this particular credit rating organisation. I refer to the contents of page 296 of the bundle.

42. However, that is only part of the overall picture in relation to the company GBM. As to the retained loss carried forward from 2001 of some £68,000, there is a letter from GBM's accountants, dated 1 October 2003, that is to say, two days ago, which is worth quoting:

"For the period 1 January 2003 to 31 August 2003 the management accounts show a profit before tax of £90,504. The retained loss brought forward was £189,259. The net position is £98,755 retained loss. Based on these figures we project that the net profit before tax for year ended 31 December 2003 will be £135,000, after tax £120,275. The company's net asset position will have improved from a negative of £189,157 as at 3 December 2002 to a negative of £68,882 at 31 December 2003, and it is anticipated will move into a positive figure in 2004. This does not include income from Snowfield SE1, due in the sum of £29,386.54 which improves the above by that amount."

43. It is also worth noting that there is a letter from GBM's bank, HSBC, dated 2 October 2003, which confirms GBM's current overdraft facility (which is due for review) and anticipates that it will be extended for a further period at least at the level presently agreed.
44. In my judgment, it is clear from that additional information that GBM's financial position has improved significantly from that which would appear to have been revealed by the 2002 accounts. It is interesting to note that the accountants project a net loss for 2003 which will be on a par with the retained loss that existed at the date of the subcontract. In fact, once the amount due in respect of this adjudicator's decision is paid, GBM's position will improve even more. It is also important to note
45. In my judgment, therefore, this cannot possibly be categorised as a case in which it can be said that there is a high risk of a present inability to pay the money in the event that GBM is ordered, as the result of the resolution of the underlying dispute, to return any or all of the money which the adjudicator's decision has made available to them as a result of the adjudication decision.
46. I am satisfied that there is no proper basis on which a stay of execution can be ordered and, accordingly, the application is for those reasons refused.