

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
Technology and Construction Court

Leeds Combined Court
The Courthouse
1Oxford Row
Leeds LS1 3BG

Date: 27th February 2004

Before :

HIS HONOUR JUDGE S P GRENFELL -----

Between :

SPECIALIST CEILING SERVICES NORTHERN LIMITED **Claimant**
- and -
ZVI CONSTRUCTION (UK) LIMITED **Defendant**

Mr Michael O'Reilly (instructed by **Keeble Hawson**) for the claimant
Mr Nicholas Collings (instructed by **Beachcroft Wansbroughs**) for the defendant

Hearing date : 20th February 2004

Approved Judgment

I direct that pursuant to CPR PD 39A paragraph 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.

.....
His Honour Judge S P Grenfell

His Honour Judge Grenfell :

1. The claimant, Specialist Ceiling Services Northern Limited (“SCSN”), applies for summary judgment against the defendant, ZVI Construction UK limited (“ZVI”) to enforce an adjudicator’s decision in its favour.
2. ZVI resists on one ground, that the adjudicator should have recused himself after the claimant’s quantity surveyor had submitted without prejudice material to him in its Referral; that as a result the adjudication was unfair and should not be enforced. There is no other ground advanced for resisting summary judgment.
3. The precise details of the dispute that led to the adjudication are not relevant, except that in broad terms, the positions of the parties were wide apart at the outset with ZVI, as employer, claiming to have overpaid to the tune of some £120,000, and SCSN, as subcontractor, claiming to be owed at least £400,000. There was a dispute as to whether there should have been an extension of time for completion of the subcontract works. The relevance of these broad facts will become apparent.
4. It is right to observe at the outset that ZVI has been consistent in making this challenge to the adjudicator’s jurisdiction; that it objected to Mr Conway continuing with the adjudication as soon as it became apparent that reference had been made to the without prejudice material; that it reserved its position throughout. It is also right to observe, that had he recused himself at that stage, then only minimal costs would have been lost.
5. The without prejudice material was as follows. The Referral Notice set out at 4.01 the 10 issues on which the adjudicator was requested to decide. At 5.04 it went on:

“On 17th September 2003 Campbell (for SCSN) received from ZVI a “*without prejudice*” offer to settle the account. That offer was rejected by SCSN on 15th October 2003 and a dispute then existed.”
6. Mr Campbell, the surveyor acting for SCSN, sent a copy of Beachcroft Wansbroughs’ letter to him dated 17th September, which read:

“Thank you for your hospitality yesterday ...

“We attach the without prejudice offer which was discussed at yesterday’s meeting. We emphasise that this is a without prejudice offer made by ZVI in a spirit of compromise, and the breakdown of the offer in the final account is for your information only and does not constitute an admission or concession of the item remaining in dispute.”

7. It is clear, however, that the attached breakdown of the offer was not sent to Mr Conway.

8. Paragraph 1.07 of the Referral stated:

“ZVI valued the Sub-Contract work as at 17th September 2003 in the net sum of £401,254.87.”

9. With reference to ‘Issue No 9 – Liquid and Ascertained Damages set off by ZVI’ paragraph 14.03 stated:

“The adjudicator will note that in making this assessment [‘6 weeks @£15,000 per week = £90,000’], ZVI have allowed a “without prejudice” extension of time for the completion of SCSN’s work of 6 weeks, out of a total delay of 12 weeks and 3 days.”

10. By his letter of the 5th November Mr Conway responded to Beachcroft Wansbroughs, in particular, in the following terms:

“I request that BW details to me the reasons why it believes that a fair minded and informed observer would conclude that there was a real possibility that there could not, or would not, be a fair adjudication on the matters referred to me in this adjudication because of my having sight of Document 8 in the Referral.”

And

“...Whilst SCSN has referred to a Without Prejudice offer at paragraph 5.04 of the Referral I have not had sight of the offer and am not aware of its content. In my view this offer could be for SCSN to make a payment to ZVI, or ZVI to make a payment to SCSN or alternatively for no further payment to be made by either party to the other. I do not see how this can conflict with the position asserted by BW, that ZVI’s position in this adjudication is that SCSN owes money to ZVI.”

11. In his Decision, he gave his reasons for not withdrawing: “... that it is well established that parties to a dispute often discuss matters on a without prejudice basis ...”; “A party ...may agree [to make a payment in a dispute] ... on commercial grounds to rid itself of the dispute ...”; and “I did not believe and do not believe that my knowledge of a without prejudice offer from ZVI to SCSN to settle the whole of the final account would affect my impartiality ...”

The Law

12. I have been unable to discern any significant issue of law. How a reviewing court should approach the question whether there has been bias actual or apparent in a tribunal has been considered in depth most recently by the Court of Appeal in *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700. The Court was considering whether a lay member of the Restrictive Practices Court should have recused herself in the light of an application she had made to join an economic consultancy firm. Lord Phillips MR gave the judgment of the court, which reviewed the authorities, in particular, *R v Gough* [1993] AC 646 in the light of Article 6 of the European Convention on Human Rights and recent European jurisprudence. At paragraph 83 the Court summarised “the principles to be derived from this line of cases as follows.

“(1) If a judge is shown to have been influenced by actual bias, his decision must be set aside. (2) Where actual bias has not been established the personal impartiality of the judge is to be presumed. (3) The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do the decision of the judge must be set aside. (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court. (5) An important consideration in making an objective appraisal of the facts is the desirability that the public should retain confidence in the administration of justice.”

13. At paragraph 85 the Court summarised their conclusions:

“When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.”

14. Stanley Burnton J applied the test to a situation where a Master had read ‘without prejudice’ correspondence before completing his judgment in *Berg v IML London Ltd* [2002] 1 WLR 3271, although at paragraph 13 he made the comment: “In my judgment, the present case is not a case of bias at all.” He

went to observe that partiality connoted a relationship with one party which compromised the judge's independence. As in *Re Medicaments* it was made clear that the reviewing court should have in mind the danger of the tribunal not being able to give "his ruling objectively on the evidence and arguments that are properly before him" on account of the material he has seen and the unconscious effect that such material may have.

15. His Honour Judge Peter Bowsher QC in *Discaint Project Services Ltd v Opecprime Development Ltd* [2001] BLR 285 at paragraph 39, agreed His Honour Judge Humphrey Lloyd QC's statement in *Glencot Development and Design Co Ltd v Ben Barrett & Son* [2001] BLR 207 at paragraph 20:

"It is accepted that the adjudicator has to conduct the proceedings in accordance with the rules of natural justice or as fairly as the limitations imposed by Parliament permit."

16. In doing so, they were accepting that the principles stated in *R v Gough* as qualified by *Re Medicaments* applied to adjudicators.
17. In the event, Mr Conway was simply referred to *Berg*.
18. Mr Collings has strongly argued that the adjudicator fell short of applying the test of fairness required of him by authority; that he failed to apply the test of apparent bias, namely whether the information that he had seen would have led a fair minded and informed observer to conclude that there was a real danger that the adjudication would be unfair.
19. He submits that the perception of bias would have arisen because the adjudicator might have been more inclined to take a sceptical view of ZVI's claim to be owed money rather than the reverse. He argues that, once his attention was drawn to the without prejudice offers, he only had to do some simple calculations to conclude what was the effect of the offers; that the fair minded observer would have been bound to conclude that, at the very least, the adjudicator would have been subconsciously affected by this knowledge.
20. Mr O'Reilly accepts that SCSN's surveyor was in error in making reference to the without prejudice offers, but submits that the adjudicator acted properly in his approach to the challenge to his jurisdiction. He argues that the way in which he approached his decision in respect of the 10 separate issues plainly demonstrated an unbiased mind. Moreover, he queries how, even if the adjudicator had done any calculations in respect of the without prejudice offer and associated information, it could have affected the way he distributed it amongst the 10 issues to be resolved. Most powerfully, however, he submits that the adjudicator's own expressed reasoning and the actual approach to his Decision, involving a manifest lack of bias or influence, indicate no apparent bias.

21. In my judgment, the following facts are material.
22. Looked at objectively, any adjudicator, having at least the information that a without prejudice offer had been made, would have started the adjudication from the standpoint that ZVI's contention that it was owed money by SCSN may have been unrealistic in the light of the fact that ZVI had made the offer at all.
23. The challenge to the adjudicator's jurisdiction was not an after the event challenge, because it was made early enough to have made little impact on the costs of starting again.
24. Mr Conway's reaction to the challenge on the 5th November is the best indication of his state of mind at that time: that in fact he was unfazed by the knowledge that there had been without prejudice negotiations, because he not only expected them to occur, but in his experience offers were often made on a purely commercial basis in an effort to obviate the need for an adjudication; that he made it clear in the letter of the 5th November that he was applying the correct objective test to the question whether he should recuse himself. There is no evidence that Mr Conway ever did the calculation to determine what the without prejudice offer was. His approach to the final account is inconsistent with being influenced by the offer and entirely contrary to any objective, let alone subjective, indication of bias: it is impossible to reconcile any undue influence on his Decision in the way in which he resolved the 10 issues and decided that just under £200,000 was owing to SCSN. His approach to ZVI's request for an extension of time indicates that he was wholly unaffected by the reference to the without prejudice offer in this regard, in that he rejected SCSN's submissions entirely. There is positive objective evidence, therefore, that he approached the adjudication in an even handed manner.
25. I reject Mr Collings' submission that Mr Conway failed to apply the correct objective test. It is plain from his letter of the 5th November that he had the correct test, which he had gleaned from *Berg*, clearly in mind. When his reasons, as set out in his Decision, are read in the light of that letter, it is clear to me that he adopted the right test. He was also entitled to make it clear that he was entirely uninfluenced by such material as he had seen. I infer from this that he had in effect brushed aside the material and properly ignored it when reaching the various decisions on the issues before him.
26. In my judgment, there was no objective indication of bias or unfairness in this adjudication. As a result, there is no basis with which to challenge the claim that it should be enforced by judgment. The defence has no real prospect of success.
27. There will be summary judgment for SCSN in the sum of £255,448.37.