

Neutral Citation Number: [2003] EWHC 3100 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

St Dunstan's House
133-137 Fetter Lane
London EC4

Friday, 20 June 2003

B E F O R E:

HIS HONOUR JUDGE HUMPHREY LLOYD QC

BARNES & ELLIOTT LIMITED

(CLAIMANT)

-v-

(1) TAYLOR WOODROW HOLDINGS LIMITED

(DEFENDANTS)

(2) GEORGE WIMPEY SOUTHERN LIMITED

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(Official Shorthand Writers to the Court)

MR DUNCAN McCall (instructed by Fenwick Elliott) appeared on behalf of the
CLAIMANT

MR SIMON LOFTHOUSE (instructed by Eversheds) appeared on behalf of the
DEFENDANT

J U D G M E N T
(Revised and Approved)

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1. JUDGE HUMPHREY LLOYD QC: The claimant claims under Part 8 of the Civil Procedures Rules. It seeks to enforce the decision of an adjudicator in its favour. The adjudicator was Mr Anthony Bingham. He gave his decision at the end of May 2003. It was dated 22 May 2003. He decided that the claimant should be paid £655,188.92 plus interest and 65% of his fees. The decision was made in relation to a contract made in August 2000. The contract was subject to the conditions of the JCT 98 standard form with Contractor's Design. It was for design, refurbishment and conversion work at Long Grove, a former psychiatric hospital near Epsom. Practical Completion was certified on 8 April 2003. The adjudicator apparently decided that the liquidated damages stated in the contract were not a genuine pre-estimate of the loss. The defendants, with reason, are not happy with that conclusion (and the reasoning) but they accept that they cannot challenge it on the current application. However they resist enforcement.
2. The provisions for adjudication are set out in clause 39A. Clause 39A.5.3 states.

"The adjudicator shall within 28 days of the referral under Clause 39A.4.1 acting as an Adjudicator for the purposes of section 108 of the Housing Grants, Construction and Regeneration Act 1996 and not as an expert or an arbitrator reach a decision and forthwith send that decision in writing to the parties. Provided that the party who has made a referral may consent to allow the adjudicator to extend the period of 28 days by up to 14 days, and that by agreement between the parties after the referral has been made, a longer period than 28 days may be notified jointly by the parties to the Adjudicator within which to reach his decision."
3. The last limb of clause 39A.5.3 was invoked. On or around 12 May 2003 there was discussion between the parties' representatives and the adjudicator whereby it was agreed that, in view of the time within which under the clause the Adjudicator's decision was due, the date of 22 May would be substituted. It was suggested at one stage in the course of argument that there might be more to the agreement than that. As Mr Lofthouse rightly points out, that would be a question of fact and not appropriate for determination under Part 8. On the evidence I am content to treat the agreement as made under the last part of Clause 39A.5.3, i.e. the substitution of a different period for the original period of 28 days. In this case the period substituted was to expire on 22 May.
4. The adjudication was conducted by reference only to documents. Mr Bingham reached his decision in the sense that he arrived at a conclusion which he set out in a draft that was sent by e-mail to the parties' solicitors on 20 May 2003. He asked that his draft should be checked to see that all points had been dealt with. He said that his formal decision would be issued on 22 May 2003. He obviously made some changes necessary and signed his decision on that day, 22 May 2003. However he did not then communicate it to the parties. He sent it to the parties using the Document Exchange. It therefore arrived on 23 May, later than the date of 22 May which had been agreed.

5. Accordingly, the defendants resist enforcement of the decision on the grounds that it fell outside the authority given to Mr Bingham which was to make a decision by 22 May and that 'make' means, under clause 39A.5.3, a decision which reached the parties before the end of 22 May 2003.
6. Mr Lofthouse candidly recognises that there was no obvious prejudice suffered by the defendants and that the point taken by the defendants could be described as “technical” (to quote his skeleton). That does less than justice to the arguments that he advanced since they show that the point, although “technical”, raises issues central to the purpose and scheme of adjudication under the HGCRA 1996 and to the parties' true expectations: were they fulfilled or were they thwarted? Put another way, did the adjudicator do what he was authorised to do? Or did he, by not securing that the decision reached the parties before the end of 22 May 2003 go outside the authority given to him whereby the decision itself is no longer authorised by the parties' contract and subsequent agreement and, accordingly, is unenforceable?
7. For the claimant Mr McCall has deployed a developed argument on the basis that the decision is enforceable. It does not fall outside the Act. As a preliminary point Mr McCall suggested that the error that Mr Bingham made was a procedural error and might be discounted, in the light of authorities relied upon by him, such as C & B Scene Concept Design Limited v Isobars Civil Engineering (2002) 82 Con LR 154 (at pages 159-161), and The Project Consultancy Group v The Trustees of the Gray Trust [1999] BLR 377. In my judgment this was not a procedural error either in that it did not occur in or affect the course of adjudication prior to the making of the decision, nor did affect the content of the decision itself. However the approach of the courts to mere errors of procedure is instructive.
8. The question turns on the interpretation of Clause 39A.5.3. For this purpose Mr McCall and Mr Lofthouse both referred me to two decisions: first, some observations of His Honour Judge Toulmin CMG QC in Bloor Construction (United Kingdom) London Limited [2002] BLR 314 in which Judge Toulmin had to consider a clause 41A.5.3 of the 1980 JCT standard form, revised April 1998 (which is of course very similar to 39A.5.3.); secondly, St. Andrews Bay Development v. HBG Management Ltd and Mrs Janey Milligan (the latter being the adjudicator) [2003] ScotCS 103, 4 April 2003, a decision of Lord Wheatley in the Outer House of the Court of Session.
9. In the former case Judge Toulmin said, in relation to a case where a decision had been reached on 9 February but not communicated until 11 February:

"If this case had been persisted in, I should have concluded that the word 'forthwith' in clause 41A.5.3 meant what it said and required that the process of communication of the decision should have started immediately after the decision had been reached; i.e. that the decision has two elements: first, reaching the decision and secondly, sending that decision to the parties. Clearly, if the decision was sent only by post, it would not be received immediately. In this case it was sent by fax on 11 February 2000. In the absence of consent to an extension of time by the party referring the dispute, the decision was rendered out of time. This

issue and its consequences have not been decided by a court, but the Scheme lays down in paragraph 19(2) that, where the adjudicator fails for any reason to reach his decision, any party to the dispute may serve a fresh notice for a new adjudicator to act, i.e. a new adjudicator must be appointed (in the absence of agreement between the parties) and the adjudication starts again".

10. Thus Judge Toulmin approached the clause on the basis that there are two stages. First the decision is reached; secondly, it has to be sent to the parties. The question in contractual terms might be posed: does Clause 39A.5.3 'within 28 days of the referral' govern both reaching the decision and forthwith sending the decision to the parties? Or do they really only cover the former, and the latter is supplementary, so that, in effect, the 28 day period might effectively be extended because the decision would not reach the parties until after the end of the 28 day period. Judge Toulmin clearly took the former view in this part of his judgment which was, as was conceded by Mr McCall, obiter.
11. That too seems to be the view of Lord Wheatley in St Andrews Bay Development Limited. Lord Wheatley had to consider the effect of an adjudicator's decision due on 5 March 2003 but issued as such until 7 March, with the reasons following on 10 March. The contract included clause 39A.6.3 of the Scottish standard JCT form which is the same as the present contract. His first conclusion was (see paragraph 15):

"In the context of these submissions, I am satisfied that it cannot be said that the second respondent has reached her decision within the time limits set in accordance with either the statutory provisions or the standard contract. In terms of those arrangements it is clear, and appears to be accepted on both sides, that the second respondent required to reach her decision by 5 March 2003. In my view she did not do so. It does appear that she had completed her consideration of the matter referred to her by that date. However she had made no effort to communicate her decision to the parties or to intimate the fact that she had arrived at a decision at that time. It is true that the statutory provisions only require the adjudicator to reach a decision. This is all that is said in terms of section 118(2)(c). However, para.39A.6.3 also requires that the adjudicator reach a decision within 28 days and further provides that he shall "forthwith send that decision in writing to the parties"."

12. Lord Wheatley then considered the Act. At paragraph 16 of his Opinion he noted that the Act was totally silent on the question of intimation on communication of the decision. He said:

" There are therefore two sets of provisions which apply to the present situation. Dealing first with the statutory provision, it is clear that the only obligation upon the adjudicator in this matter described in the Act is that a decision should be reached within 28 days. The Act is totally silent on the question of intimation or communication of that decision. In these circumstances it must therefore follow that the obligation to reach a

decision must include a contemporaneous duty to communicate that decision to the interested parties. Not to require such an interpretation of the obligation to reach a decision would render the whole purpose of the legislation meaningless. It would suggest that there is no obligation on the adjudicator, having once arrived at that decision, to communicate it at all to anyone else. Alternatively, it would mean that the decision once reached did not have to be communicated within any time limit to the parties interested in receiving it, thus frustrating the purpose of a speedy resolution of building contract disputes envisaged in terms of the legislation. I therefore can only conclude that the requirement to reach a decision in terms of the statutory provisions includes a duty to intimate or communicate that decision to interested parties. An alternative interpretation of the statute is that the duty on the adjudicator is to intimate or communicate the decision reached within the time limits immediately or forthwith. On either view, it is clear that the adjudicator cannot be said to have satisfied either definition of her duties."

13. He next examined the contract. He said that the contract appeared to contemplate that the requirement to issue the decision was a separate one from the obligation to reach a decision. He said:

"17. On the other hand, the contract appears to contemplate that the requirement to deliver the decision is a separate one from the obligation to reach a decision. As I have indicated, para.39A.6.3 requires the adjudicator to reach his decision within 28 days of the referral and forthwith send that decision in writing to the parties. In terms of current commercial understanding procedure and modern methods of communication, there would appear to be little doubt that the term 'forthwith' should mean that the decision is to be sent immediately or as quickly as possible as what is currently regarded as conventional and universal world methods and business communication. In particular, therefore, there would appear to be no reason why any such decision cannot be immediately transmitted to interested parties by fax transmission. It may conceivably be arguable that the decision could be communicated or intimated to other parties by First Class postal delivery although such a claim might be regarded as archaic."

18. I therefore consider that it is appropriate to conclude that in terms of both the contractual and the statutory provisions a decision of this sort cannot be said to be made until it is intimated. If the only obligation incumbent upon the adjudicator was to reach a decision, then that decision need never be intimated. Between the time when the decision was made and the time it was intimated, the decision could be changed. As indicated above, to take any other view would frustrate the entire purpose of these various arrangements."

14. Reliance was also placed on later parts of the opinion which, for present purposes, I take as read so I shall not reproduce them. In my judgment they support the case advanced by the defendants.
15. Mr Lofthouse argues that two essential elements are required. First, it is enough that there should be a decision, but that it must be rendered within the very strict time limits set by Parliament. Secondly, it is clear from the opinion of Lord Wheatley that he would regard it as necessary to interpret a contractual provision which purports to give effect to section 108 of the Act in a way which will be consistent with not only the terms of the Act, but the interpretation which is sensibly to be placed on that Act.
16. I agree with and adopt the reasoning of Lord Wheatley. It is in my judgment exactly right. Indeed, as Mr Lofthouse said in argument, there was absolutely no reason why Mr Bingham could not have sent the decision by fax, or by e-mail, given that the parties had communicated with each other and with him by that means. He could thereby have ensured that the decision was not only made, but reached in the sense contemplated by Lord Wheatley as the meaning to be given to section 108 of the Act, namely communicated to the parties within the 28 day period, i.e. before the end of 22 May 2003. The decision itself is clearly the product of some electronic template into which standard form Mr Bingham has copied over or otherwise completed with the information, submissions and conclusions material to the case. The result is rather strange in places but no doubt the process saves time and, to the parties, cost.
17. Accordingly, in my judgment, although the point might be described as “technical”, the defendants have established that the effect of the agreement reached between the parties was that the two stages contemplated by Clause 39A.3.5 have to be met within the time specified, i.e. 28 days or such further period as the parties may have agreed, here expiring on 22 May. That therefore was the authority, or, in this case, the extended authority, given to the adjudicator.
18. However, in St Andrews Bay Development Limited Lord Wheatley then went on to consider whether the adjudicator's decision was thereby a nullity. At paragraph 21 he referred to Ballast PLC v The Burrell Co (Construction Management) 2003 S.L.T.137 at page 139 where Lord Reed said:

“[39] Balancing the various considerations to which I have referred, I have come to the conclusion that the scheme should be interpreted as requiring the parties to comply with an adjudicator's decision, notwithstanding his failure to comply with the express or implied requirements of the scheme, unless the decision is a nullity; and it will be a nullity if the adjudicator has acted *ultra vires* (using that expression in a broad sense to cover the various types of error or impropriety which can vitiate a decision) for example because he had no jurisdiction to determine the dispute referred to, or because he acted unfairly in the procedure which he followed, or because he erred in law in a manner which resulted in his failing to exercise his jurisdiction or acting beyond his jurisdiction”.

Lord Wheatley continued:

“I respectfully agree with that view. While the failure of an adjudicator to produce a decision within the time limits is undoubtedly a serious matter, I cannot think that it is of sufficient significance to render the decision a nullity. The production of a decision two days outwith the time limit provided is not such a fundamental error or impropriety that it should vitiate the entire decision. Such a failure is a technical matter, and it is of significance in the present case that no challenge is offered to the merits of the adjudicator's decision. I am somewhat reinforced in that view by the clear nature of the compliance provisions in paras.39B.2 and 39B.3 of the standard contract. While this view of the statutory and contractual provisions may be thought in some respects to be unsatisfactory, and in particular offers no sanctions against an adjudicator who fails to produce a decision within the time limits, that is not something which alters my opinion. No doubt any adjudicator who fails to comply with time limits is unlikely to find favour with those who are seeking suitable persons to adjudicate on their disputes. However, this is not relevant to my conclusions. In all the circumstances therefore I have decided that there is not a good arguable case which might suggest that this petition for judicial review would succeed.”

19. I should add it is not the case here that there is no challenge to the decision. That may well have been relevant to the grant of the relief sought by St Andrews Bay. Is Lord Wheatley's pragmatic approach to the disposition of that case appropriate in this case having regard to my earlier conclusions? In my view it can be. One way is, of course, to treat it the adjudicator's failure as de minimis. That in itself, is not, in my judgment, a sufficiently satisfactory answer. I entirely accept and endorse Mr Lofthouse's submissions, that adjudicators operating under these statutory and contractual procedures are aware, and ought to be well aware of the importance of complying with the time limits. The time limits were set by Parliament and are crucial to the effectiveness to the form of adjudication required by the Act. A party is entitled to know whether or not a decision has been given and to be free to act in its own best interests if it has not got a decision within the time allowed. The requirements of the Act can be an intrusion into contractual arrangements and, as such, may have to be read and construed narrowly if they or their operation were cut down or impede a party's rights or commercial freedom.
20. In addition, nowadays virtually all adjudicators have available instantaneous methods of transmission. Lord Wheatley was right to say that the use of first class post is archaic. If an adjudicator cannot send the decision by e-mail or fax, one or other of the parties will usually be keen to send some one to collect it. The contemporaneous duty to communicate the decision described by Lord Wheatley in paragraph 16 is one which can therefore easily and feasibly be achieved by an adjudicator. This adjudicator could have achieved it. He could have sent it by e-mail; he could have faxed it. He could have rung up the parties and agreed with them (but not just told them) that it could be collected: “The decision is ready for collection.” He did not; he simply put it in the DX. I hope, therefore, that as a result of this decision that such a practice in future will

not be followed, whether or not the adjudicator is at or close to the time limit. Lord Wheatley rightly said: “.... "forthwith" should mean that the decision is to be sent immediately or as quickly as possible by what is currently regarded as conventional and universally available methods of business communication” [my emphasis]. That is consistent with the interpretation and application of the Act.

21. But, as was explored in argument, there are two aspects to the objectives of the Act. As I suggested to Mr Lofthouse, it is necessary put them in order of priority. The first is the need to get a decision. When one stands back and looks at the legislation and the contracts that are made to give effect to it, as I and the judges of this court have said on a number of occasions, one has to adopt the pragmatic and sensible approach, not just to the interpretation of the legislation, so far as one can do so, but in particular to the interpretation of the relevant contract.
22. The fundamental purpose of the legislation was to establish a mechanism for the resolution of disputes, ostensibly arising during the course of the execution of the works (rather than after completion) which in certain circumstances would enable the parties to have some idea of what the decision of the tribunal competent to resolve the dispute might be. That should enable them to be better informed about their dispute, but, above all, to put them in a position in which they would have a decision, which they have to accept. Even if the dissatisfied party has, at least for the immediate future to put it behind it.
23. Part of that regime is the timing. It is not just secondary but integral to the objective. Timing is important since, for a system of this kind to work properly, the time limits are observed (subject always to the parties' agreement as set out in the Act). But, in my view, this tail should not wag the dog. Compliance with a time limit is not the dominant and be all factor. That is the production of the decision.
24. As a matter of competing priorities the completion of the decision, as such, comes first. Its notification to the party should follow as night follows day, but the first and primary objective is that the decision should be there within the time limit.
25. Accordingly, as Lord Wheatley says, how would you characterise a departure of this nature? Can it be characterised it in terms of something which went beyond the adjudicator's authority so as to render the decision not what the parties contracted for and thus null and void? Mr Lofthouse says: Yes, since there is an easy remedy; you just start another adjudication. You would then be soon back in the same position as we are today, though, as I pointed out in argument, possibly to the contrary effect. That in itself shows why it would be unsatisfactory to have two successive adjudications simply because the first had been ineffective as a result of an error of by the first adjudicator in not communicating the decision within the time limit. Is that what Parliament intended? Is that what the parties to this contract really intended? Is that the intention to be imputed to them? Is the decision unenforceable, because, as a result of the adjudicator's mistake about its delivery, it becomes unauthorised?
26. I do not consider that to answer the last question in the affirmative would be the result of a sensible interpretation of the contract, or of section 108 of the Act. Clearly time

remains very important, but an error which results in a day or possibly, in the view of Lord Wheatley, of two days, seems to me to be excusable. It seems to me within the tolerance and commercial practice that one must afford to the Act and to the contract. Whilst an adjudicator is not authorised to make mistakes, a decision arrived at in time is in principle authorised and valid and in my judgment does not become unauthorised and invalid because of an error by the adjudicator in dispatching the decision, it does not reach the parties within the time limit. However I should emphasise that this tolerance does not extend to any longer period (unless perhaps the parties had agreed to a very long duration) nor does it entitle an adjudicator not to complete the decision within the time allowed. If the adjudicator cannot arrive at a decision on all aspects of the dispute within the period required then, before time runs out, further time must be obtained as provided by the contract or otherwise by the parties' agreement. As Mr McCall pointed out, the claimant, if asked by the adjudicator, may have been able unilaterally to extend the time to 23 May 2003. This contract, like the Act, only confers authority to make a decision within the 28 day period or such other period as it provides.

27. As I have indicated, in the circumstances of this case (where the decision was ready within the time allowed, but leaving aside the fact that its substance was known to both parties, as that does not affect the defendants' right to hold the claimant to the parties' agreement) the alternative is unpalatable. It would deprive the parties not just of knowing where they stand in the eyes of the adjudicator but also of having a timely and enforceable decision upon which they may be to rebuild their relationship. That would not be consistent with the primary objectives of the Act. For these reasons, therefore, the argument advanced by Mr McCall on this point is fundamentally correct and I prefer it to Mr Lofthouse's submission. I conclude therefore that the decision is enforceable.