

**Buxton Building Contractors Ltd v Governors of
Durand Primary School**

[2004] EWHC 733 (TCC)

QUEEN'S BENCH DIVISION (TECHNOLOGY AND CONSTRUCTION COURT)

12 MARCH 2004

JUDGE THORNTON QC

APPROVED JUDGMENT

THIS JUDGMENT WAS MADE IN WRITING AND WAS HANDED DOWN BY THE COURT. FOR THE PURPOSES OF PARAGRAPH 5-12 OF 52PD-19 (PRACTICE, DIRECTION - APPEALS), THIS WRITTEN JUDGMENT IS TO BE TAKEN AS REPLACING AN OFFICIAL RECORDING AND APPROVED TRANSCRIPT OF THE JUDGMENT.

JUDGMENT

1. This is a claim to enforce an adjudicator's decision. The defendants to the application are the Governors of Durand Primary School ("the School"), which is located in south London, and the claimant is Buxton Building Contractors Ltd ("Buxton"). Buxton carried out extensive work for the School in constructing in 2001, under the JCT IFC 98 Form of contract, a new residential block for use by visiting students and key workers.

2. The Contract Administrator issued certificates during the course of the work in the required contractual sequence. These certificates included Interim Certificates issued prior to Practical Completion which, certified sums for interim payment, the Practical Completion certificate which certified Practical Completion as having occurred on 21 December 2001 and the certificate that certified that the expiry of the Defects Liability Period had occurred on 21 December 2002, The certificate of Making Good Defects was then issued on 17 June 2003 and, at that stage, all that remained for certification and payment was the second of two tranches of retention that had previously been withheld from payments under the contractual provisions for retention from sums certified for payment. This remaining retention fund represented 2¹/₂% of all sums previously certified. The contract provided that this second tranche of retention should be certified for payment as an integral part of, and at the same time as, the Final Certificate.

3. The Contract Administrator subsequently issued a certificate, following and on a later date to the certificate of Making Good Defects which, although described on its face as being an Interim Certificate,

certified that the second tranche of the retention fund should be released to Buxton but he did not then, or subsequently, issue a Final Certificate.⁴ There had remained, on 17 June 2003, a series of complaints that had been the subject of a long-running dispute between the School and Buxton. These related, amongst other things, to door handles, to the flushing system of the toilets located in bedrooms and to the fluctuating and unduly low pressure of the hot and cold water supply from the energy suite serving the new accommodation.

5. It is clear from the documents that were submitted to the adjudicator that, prior to and following Practical Completion these complaints were addressed to Buxton by the School and, as the School saw the situation, were never addressed or dealt with by Buxton. It is not for me to form any views as to the validity of these complaints nor of the appropriateness of Buxton's responses to them. What is clear is that the School from the outset contended that, as a result of Buxton's perceived failure to address its complaints, had had to call out its maintenance team, in particular its resident maintenance man on many occasions, both in and out of hours, to undertake extensive call out duties in relation to the defects in question. This work included the frequent rodding out of the toilets which were ultimately discovered to have had a cross piece inserted in the plumbing in an inappropriate location. From the outset, the School maintained that Buxton was liable to reimburse it for all these costs that it had incurred.

6. The School maintained these claims against Buxton from the time the defects first appeared until the date of the referral of Buxton's claim and its cross-claim to adjudication. The School accepted that, save for one defect involving the fluctuating and unduly low pressure in the hot water system; it had remedied the defects prior to Buxton's reference of Buxton's claim to adjudication. The School's response to Buxton's claim was, from the outset, its cross-claim. The School were therefore contending that there was outstanding, a substantial consequential loss claim which Buxton should meet as damages for breach of contract.

7. The factual background to the issue of the disputed retention fund certificate is important. By the middle of 2003, the Contract Administrator clearly regarded himself as being faced with a problem. He could see that outstanding defects had been remedied but that the School had a substantial outstanding monetary claim representing its consequential loss, the School still retained a substantial sum as a retention sum since the second half of the retention fund had not yet been released and would only be released on the issue of the Final Certificate. However, the Contract Administrator believed that it would not be appropriate to issue the Final Certificate unless and until the dispute as to how much, by way of damages, the School should recover on its cross-claim had been resolved or determined. In consequence, the Contract Administrator advised the School to serve a notice on Buxton informing it that the School would withhold the value of its cross-claim from the second tranche of the retention. The School served such a notice and the Contract Administrator then issued the certificate relating to the release of the

second half of the retention.

8. This certificate was clearly not the Final Certificate since it stated on its face that it was an Interim Certificate. It was, moreover, not a certificate which was authorised by the JCT IFC 98 Form of Contract since that contract only provides for Interim Certificates to be issued prior to Practical Completion. The only certificate provided for in the contract which relates to or provides for the release of the second half of the retention fund is the Final Certificate. Thus the certificate in question was issued extra contractually and was, in reality, an expression of the opinion of the Contract Administrator that, subject to the School's cross claim, the second half of the retention should be released to Buxton even though the Final Certificate had not yet been issued.

9. It follows that the situation that Buxton found itself in after that certificate had been issued may be summarised as follows: Buxton wished to be paid the last instalment of the contract sum, being the second tranche of the retention and the sum appeared to be due, given the issue of the non-contractual certificate certifying that it should be paid. However, there was no contract machinery provided for that concerned the payment of that sum since no Final Certificate had been issued. There was, therefore, a sum which was due but which could not be shown to be payable. In those circumstances, Buxton could, and on analysis did, operate paragraph 8 of Part II of the Scheme for Construction Contracts which applied to this contract and which also applies to payment where there are no adequate contractual payment provisions. This paragraph provides for the Final Date for Payment of any instalment of the contract sum which becomes due under a construction contract but for which there is no prescribed date for payment. This paragraph was relevant since a sum had become due to Buxton by virtue of it having been certified in a certificate which was not provided for in the contract and for which, therefore, there was no prescribed date for payment. There was in consequence no provision in the contract that provided for payment of that sum. Paragraph 8 of the Scheme requires a contractor in the position that Buxton found itself in to serve a claim on the employer and, having done so, the final date for payment would be the day 17 days from the service of that claim. Buxton, no doubt recognising that there was uncertainty as to when the certified sum would become payable, issued an invoice for the certified sum. This invoice was in the nature of a claim and was, therefore, one that triggered the prescribed 17-day period within which the certified sum should be paid.

10. Following the issue of the retention release certificate and before the issue of Buxton's invoice, the School had written letters to Buxton which had provided details of the nature and quantification of its cross-claim which it proposed to withhold. This cross-claim totalled £16,200. It was, on analysis, a claim for damages for breach of contract where the damages represented the consequential loss incurred by the School that it had incurred prior to the relevant defects being repaired. The School's claim was therefore neither loss nor damages that could be abated or set-off from certified sums otherwise due to Buxton but

was, instead, a claim which could be set against such sums as a cross-claim for damages.

11. Thus, prior to the issue of the release of retention certificate, the School had served a general notice of an intention to withhold payment and, before the issue of Buxton's invoice and before the date for payment of the invoiced sum, had also served details of the sum to be withheld and of the reasons for withholding. That, withholding was intimated as being a cross-claim against retention when it became due for payment albeit that the documents sent by the School were not all served together and were not in a form in which a notice of intention to withhold payment is usually drafted.

12. Buxton followed its invoice with a notice of adjudication and, following the appointment of the adjudicator, a referral notice which claimed the certified sum and identified the dispute as being a simple one. The sole question, Buxton contended was whether the certified sum, stated to have been certified in an Interim Certificate, was due and payable in the absence of any notice of intention to withhold payment being served by the School. The adjudicator directed that he would receive written submissions and any relevant documents from each party and would then decide the dispute without a hearing or meeting. Given the nature and size of the dispute, that direction was clearly a reasonable one. It was, however, given that the School was not legally represented and given the need for him to himself ascertain the applicable facts and law, incumbent on him to identify fully all the issues that had arisen that he had to decide and then to decide them.

13. The School submitted copies of all the correspondence that had passed between it and Buxton that fully identified the nature of its cross-claim and its other contentions that I have already referred to. Buxton's solicitors then submitted to the adjudicator, in a written reply document, that this material that had been submitted by the School should not be considered or referred to by the adjudicator since it was irrelevant as no valid withholding notice had been timeously served. No submission was made by Buxton as to the merits or quantification of the School's cross-claim

14. It followed, once the contents of the documents referred to the adjudicator were analysed and taken into account, that the dispute that had been referred for decision by the parties involved a number of difficult questions. These questions included the following: (1) a consideration of the contractual nature of Buxton's claim, given that it was based on a certificate which was neither authorised nor provided for in the contract and which was misdescribed on its face as being an Interim Certificate; (2) a consideration of the nature of the sum that was being certified as being due and, in particular, a consideration of whether that sum amounted to a retention release or was instead the value of work that had been performed that was being certified for the first time; (3) a consideration of the nature of the School's cross-claim and its validity and proper quantification; (4) a consideration of when Buxton's claim first became due and payable; and (5) a consideration of whether the timing and content of the School's notices constituted them as valid and effective withholding notices in the light of whatever date was found to be the date for

payment of Buxton's claim.

15. The adjudicator, in his decision in favour of Buxton, decided, in effect, that the sum that was being claimed was due pursuant to a validly issued Interim Certificate; that that sum represented part of the Contract Sum not previously certified so that it was not a partial retention release; that no withholding notice, had been served by the School; that the Supervising Officer must be presumed to have taken the School's claim into account in computing the sum being certified as due; and that the date for payment of the sum certified was 14 days after the issue of the certificate (since the certificate was to be equated to the Interim certificate issue prior to practical Completion) and not 17 days after the submission by Buxton of its invoice.

16. The adjudicator's decision showed that the adjudicator did not consider at all the nature, content, validity or quantification of the School's cross-claim; did not investigate the material provided to him by the School; did not decide whether the School's cross-claim had in fact been taken into account by the Supervising Officer when certifying but instead made an erroneous assumption that it had been; did not consider whether the certificate was issued with contractual validity and instead wrongly assumed that the certificate was one that was duly authorised by the contract conditions and that its payment was provided for by those conditions; and did not take into account or consider the validity of the correspondence from the School which amounted, or arguably amounted, to a valid withholding notice that had been served timeously.

17. The adjudicator also erroneously concluded that the sum being certified represented part of the value of the work which had not previously been certified and did not consider at all the possibility that this sum was a partial release of retention that had been previously certified and then validly retained. The significance of that error was that the adjudicator did not consider one of the School's principal arguments to the effect that one of the purposes of the retention fund was to provide a fund to reimburse the School for the kind of loss that made up its cross-claim. The withholding notice had been served on the advice of the Supervising Officer and he had envisaged that the sum that he had certified as being due would then be subject to a withholding equal to the School's cross-claim. In consequence, the cross-claim could and should be set against the retention release in question.

18. Miss Gilles, in her cogent and succinct submissions on behalf of Buxton, contended that, whether or not the adjudicator's decision was erroneous in the respects that I have summarised, it was still a valid decision whose not conceded, were ones within jurisdiction and *were* therefore not which or should impugn that decision or render it unenforceable.

19. I accept these submissions so far as they go. However, they do not, and cannot, address the fundamental flaw that attaches to the adjudicator's decision and which Mr. Martin, the School's Head who

represented the School at the hearing with admirable courtesy and clarity, pointed to. That flaw is that the decision had been reached, or must be taken to have been reached, without the adjudicator considered or decided upon the contents of the submissions, documents and issues referred to him by the School. *This is* not surprising because the adjudicator had been invited to ignore the documents submitted by the School by Buxton's reply submissions. Given the content of his decision set against the issues referred to him the adjudicator had clearly acceded to that invitation and had set aside, unconsidered, the material that had been referred to him by the School.

20. The consequences of that failure to consider the School's referral issues and materials is two-fold. Firstly, the adjudicator did not fulfil his statutory duty to decide the dispute referred to him, he only decided that part of the dispute alerted to him by Buxton whilst failing to decide that part referred by the School. This duty to decide the entirety of the dispute referred is a duty imposed by section 108(2)(c) of the Housing Grants, Construction and Regeneration Act 1996. Secondly, the adjudicator failed to decide all matters in dispute or to consider the representations of the School. These failures constituted serious irregularities in the adjudication procedure since they amounted to serious failures to conform to paragraphs 17 and 20 of Part I of the Scheme for Construction Contracts applicable to the adjudication. These paragraphs required the adjudicator to consider all relevant information submitted to him by any of the parties to the dispute and to decide all matters in dispute.

21. It follows that the decision is one that is now unenforceable, certainly on a summary judgment application. It is a decision which is intrinsically unfair in that it was arrived at following a failure to consider or decide core referred issues that were and remained in dispute and was also arrived at following a failure to take into account relevant material and information that had previously been placed before the adjudicator. In consequence, the decision is one which potentially exceeds the adjudicator's jurisdiction, has potentially been reached in breach of his statutory obligations and is, in a public law sense, sufficiently unfair as to lack enforceable validity.

22. I conclude that the summary judgment application must be dismissed. I will not give directions for trial since the parties should first attempt to negotiate a settlement of the entirety of the disputes that have arisen. These include those arising out of the claim, out of the cross-claim, out of the outstanding dispute as to hot water pressure and the suggested need to replace ill-functioning components in the energy suite and as to all questions of costs and interest. I will stay the proceedings and give liberty to either party to apply to lift the stay and for further directions if these are subsequently seen to be required.

23. The disposal order is, therefore: that the application is dismissed, that all costs applications are reserved and that a stay will be imposed generally with liberty to either party to apply on notice for the stay to be

lifted and for further directions.