

Neutral Citation Number: [2004] EWHC 2439 (TCC)

Case No: HT-04-252

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29th October 2004

Before :

HIS HONOUR JUDGE RICHARD HAVERY O.C.

Between :

EMCOR DRAKE & SCULL LIMITED
(Formerly known as Drake & Scull Engineering
Limited)

Claimant

- and -

COSTAIN CONSTRUCTION LIMITED &
SKANSKA CENTRAL EUROPE AB
t/a COSTAIN SKANSKA JOINT VENTURE

Defendant

Alexander Hickey (instructed by **CMS Cameron McKenna**) for the **claimant**
Louise Randall (instructed by **Nicholson Graham & Jones**) for the **defendant**

Hearing date 22nd October 2004:

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.

JUDGMENT

1. In this case the defendant ('CSJV') was the main contractor for the refurbishment and alteration of the Great Western Royal Hotel at Paddington. The claimant ('EDS') was one of the principal sub-contractors and was responsible for the design and installation of the electrical services there. The sub-contract was made on the standard form sub-contract DOM/2 1981 edition including some amendments that are immaterial to the matter that I have to decide.

2. I have before me an application on the part of EDS to enforce the decision of an adjudicator, Mr. C. J. Hough, made on 1st July, 2004. Mr. Hough decided that EDS was entitled under clause 11.7 of the sub-contract to an extension of time to 25th February 2002 and to payment of the sum of £201,069.34 plus VAT as applicable.

3. The defence of CSJV is that Mr. Hough's decision was made without jurisdiction and/or in excess of jurisdiction and/or that the reference was an abuse of the adjudication process such that his decision should not be enforced. Before considering that defence, I shall state the background.

4. The sub-contract provided by clause 11.2 that if and whenever it became reasonably apparent that the sub-contract works were subject to delay, EDS should give written notice to CSJV. Clause 11.3 required CSJV to give an extension of time to EDS for completing the sub-contract works if CSJV properly considered that any of the causes of the delay was an act, omission or default of itself or was the occurrence of a Relevant Event as defined in the sub-contract. Under that provision, CSJV extended the time for completion of the sub-contract works to 23rd July 2001. Practical completion took place on 27th February 2002.

5. Clause 11.7 of the sub-contract provided that if the expiry of the time when the contract works should have been completed occurred before the date of practical completion, CSJV must, not later than the expiry of 16 weeks from the date of practical completion (i.e., not later than 19th June 2002) either further extend the time for completion on the grounds mentioned in paragraph 4 above; or shorten the time for completion in the event of the issue, after the last revision of time had been made, of a variation order omitting work; or confirm to EDS the completion date previously fixed. CSJV did none of those things. Miss Randall accepted, and indeed asserted, that CSJV was thereby in breach of contract.

6. EDS made three claims to CSJV for extensions of time to be made under clause 11.7. The first, which has been called the November claim, was made in November 2002 when EDS submitted a claim for extension of time to 30th November 2001 on the ground that its works to the bedrooms had been delayed to that date. The second, the April claim, was made on 16th April 2003 when EDS submitted a claim for extension of time to 27th February 2002. That claim subsumed the November claim and sought to rely on additional events giving rise to critical delay. The third claim, the February claim, was submitted on 11th February 2004, when EDS submitted a revised claim for extension of time to 27th February 2002. That claim relied upon events and material comprised in the November and April claims.
7. On 8th May 2003 EDS referred the November claim to adjudication. The adjudicator appointed was Mr. Jon Miller. Mr. Miller gave his decision on 26th June 2003. He decided that EDS was not entitled to a declaration of entitlement to an extension of time. On 14th May 2004 EDS referred the February claim to adjudication. Mr. Hough was the adjudicator. It is the decision of Mr. Hough in that adjudication which is the subject of this application.
8. Miss Randall's first submission was that the decision made in the first adjudication encompassed and decided the issue between the parties as to what extension of time EDS was entitled to under clause 11.7 of DOM/2. No subsequent adjudicable dispute could or did come into existence relative to that issue. Mr. Hough did not have jurisdiction in relation to that issue, and so his decision, which encompassed and purported to decide the issue as to what extension of time EDS was entitled to under clause 11.7, was void for want of jurisdiction.
9. The basis of Miss Randall's submission on this point was that CSJV was empowered under clause 11.7 to grant only one extension of time. It followed that there could be only one adjudication on the point. She put her argument more attractively, but that is the essence of it. In my judgment, the argument involves a non sequitur and I reject it.
10. Miss Randall's second argument was that in reaching his decision Mr. Hough both considered facts and matters that had been adjudicated upon and reached conclusions in relation to those facts and matters that were contrary to those that had been reached in the first adjudication and by which he was bound. In doing so Mr. Hough exceeded his jurisdiction. As a result, his decision was of no effect and unenforceable.
11. EDS's referral notice in relation to the first adjudication contained the following passages:

This notice relates solely to a dispute that has arisen following a request for an extension of time made on 1st November 2002....

EDS acknowledges that the sub-contract works were not completed by 30th November 2001 due to other events subsequent to and/or not considered in this request for an extension of time. Such other events are not within the scope of this notice but have been the subject of a separate submission to CSJV that requests an extension of time up to 28th February 2002.

EDS's entitlement to an extension of time for matters relating to the guestrooms [sc., the bedrooms] was detailed in EDS's submission dated 1st November 2002.... It is CSJV's failure to award an extension of time for the matters raised in this submission that forms the subject matter of this dispute.

EDS seeks..... a declaration that EDS is entitled to an extension of time pursuant to clause 11 of DOM/2 on account of the facts and matters set out in EDS's extension of time request dated 1st November 2002 and that the period of completion of EDS's work be extended to 30th November 2001 (or such other period as the adjudicator may decide).

12. I was told, without contradiction, that the only evidence put forward in the first adjudication was evidence relating to the bedrooms: works in the bedrooms, access to the bedrooms, drawings relating to the bedrooms, and so on. The bedroom works themselves were delayed up to 30th November 2001. Mr. Miller said in his decision

[EDS] did not produce a critical path analysis because they believed their claim is straightforward as it relates to a denial of access in the bedrooms. According to [EDS], it is evident that access could not be obtained to the bedrooms and therefore they are entitled to an extension of time. [Paragraph 17].

The burden of proof is on [EDS] to show the delays to the date for completion (as extended) were not due to the fault of [EDS], and occur as a result of an act or omission of CSJV or a Relevant Event. Although a critical path analysis is not needed, [EDS] must still, (on the balance of probabilities) satisfy clause 11.7. One of the requirements of clause 11.7 is that [EDS] did not delay the completion date (as revised). CSJV tried to show [EDS] were at fault. Some of these matters, such as builders work, I have dismissed. However, some of these points, particularly in relation to the delays to

drawings, other rooms being available and [EDS's] planning whereby they would only work if 5 rooms were available, means that on balance [EDS] have not discharged their burden in order to show that [EDS] did not delay the completion date. [Paragraphs 56 to 58]

13. Thus Mr. Miller did not decide that EDS was not entitled to any extension of time; he decided merely that EDS had not discharged the burden of showing that they were entitled to an extension of time on the ground of critical delay to the bedrooms. He specifically decided that EDS was not entitled to the declaration mentioned in paragraph 11 above.

14. In the second adjudication, EDS's notice of adjudication stated, in identifying the dispute, that CSJV had failed to fix a period for completion of the sub-contract works within 16 weeks of the date of practical completion of the sub-contract works in accordance with clause 11.7 of the sub-contract, or at all, and that no such period had been fixed. A copy of the Miller adjudication was attached to the referral notice. The notice asked for an extension of time up to the date of practical completion on 27th February 2002 and for an order for the repayment of liquidated damages [paragraphs 11 and 35]. It stated [paragraph 18]

Mr. Miller decided that EDS had not established that the slippage to work in the guest bedrooms caused delay to completion. For the purposes of this adjudication EDS accepts that it is bound by this decision. Accordingly, EDS does not seek to rely in this reference on the slippage to guest bedrooms as having caused delays to completion.... Detailed information in relation to the guest bedrooms is clearly part of the factual matrix which the adjudicator needs to consider; and it is also required to enable EDS properly to address the question of whether it was itself responsible for any delay.

And in paragraph 24:

As noted above, in accordance with Mr. Miller's award EDS does not rely on delays to the guest bedrooms as having of themselves caused critical delay to completion. It submits, however, that delays to its work in the guest bedrooms which were not its responsibility caused slippage to progress and contributed to the overall delays suffered by the project. Reference has also been made to the guest bedrooms in order to address the suggestion made by CSJV in the earlier adjudication that EDS bore some responsibility for delays to the bedrooms and elsewhere.

15. It was common ground that an adjudicator must respect the decision on a point decided in an earlier adjudication between the parties. Miss Randall submitted that Mr. Miller had decided that EDS was responsible for delays that had delayed completion of the works. She relied on the passage in paragraph 58 of his decision that I have quoted in paragraph 12 above. She also relied on paragraph 59, where Mr. Miller said this:

I have looked at the evidence but decide that [EDS] are not entitled to an extension of time for an alternative period. [EDS's] approach in this adjudication has been to say they are not responsible for any delays whatsoever to the completion date prior to 30th November 2001. I therefore decide that I cannot on balance award [EDS] an extension of time prior to 30th November 2001 as the evidence before me does not indicate the extent to which delays which [EDS] were responsible for have delayed the completion date.

In my judgment, that is not an unequivocal statement that EDS had caused any delays. And although paragraph 58 does suggest that he thought EDS had caused delay, Mr. Miller made no explicit finding to that effect.

16. Mr. Hough did consider that Mr. Miller had decided that EDS had caused delay, though he, Mr. Hough, concluded that such delay was not critical. In my judgment, he was entitled to do so, since Mr. Miller had not decided whether the bedroom delays were critical. Mr. Hough said this [decision, paragraph 9]:

In making my assessment I am bound by the decision of Mr. Miller that in relation to activities concerning the construction of the bedrooms EDS has caused delay and it has no entitlement under clause 11.7 of the sub-contract to any further extension of time. In making this decision I have therefore proceeded on the basis that works to the bedrooms were not a critical activity and did not delay completion when compared with other critical activities under the sub-contract. My findings below do not therefore involve consideration of works to the bedrooms except that I have satisfied myself that works to the bedrooms had no effect on the activities I have considered.

17. Miss Randall submitted that Mr. Miller had decided that EDS had failed to establish an entitlement to an extension of time to 30th November 2001. That decision confirmed the period previously fixed and represented his decision under clause 11.7 (the third option mentioned in paragraph 5 above). Mr. Hough was bound by that decision. I do

not accept that Mr. Miller's decision did constitute a confirmation of the previous period. He simply declined to grant an extension of time on the ground of delay to the bedrooms.

18. Miss Randall submitted that in carrying out the review required by clause 11.7 and in reaching his decision Mr. Hough necessarily had to, and did, reconsider the facts and matters that had previously been adjudicated upon. The conclusion reached by Mr. Hough relative to those facts and matters was contrary to that reached in the first adjudication. Mr. Hough, accordingly, exceeded his jurisdiction, said Miss Randall. It may well be true that Mr. Hough did consider the facts and matters considered by Mr. Miller in reaching his conclusion. That in itself in my judgment is not objectionable. In my judgment Mr. Hough was not invited to trespass on Mr. Miller's decision, nor did he do so. I reject this argument of Miss Randall.
19. Miss Randall's third ground was again based on the proposition that Mr. Miller had decided that EDS was not entitled to any extension of time up to 30th November 2001. She submitted that if Mr. Hough did have jurisdiction, it was limited to considering what if any extension of time EDS might be entitled to after 30th November 2001. It follows from what I have said above that I reject that argument also.
20. Finally, Miss Randall submitted that EDS had included within its notice of referral in the second adjudication facts, matters and documentation (comprising in excess of 4,000 pages of a total of approximately 5,000 pages) relating to, and considered by Mr. Miller in, the first adjudication. It was unfair and an abuse of the adjudication process to require CSJV to respond to those facts and matters in the second adjudication. Mr. Hough's decision, if otherwise enforceable, ought not to be enforced for that reason.
21. The necessity to respond quickly to vast quantities of paperwork is one of the well-known hazards of the adjudication process. That cannot of itself be a ground for contending that there has been an abuse of process. In my judgment, the fact that the same documentation appears in two successive adjudications is a wholly insufficient ground for describing what happened as an abuse of process.
22. I conclude that the decision of Mr. Hough is enforceable.