

Surplant Ltd v Ballast Plc (T/A Ballast Construction South West) [2002] TC 33/02 : LV290236

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JUDGEMENT : His Honour Judge MacKay : Liverpool District Registry TCC : 28th October 2002.

1. This is an application by the claimant pursuant to its application notice dated 12th September 2002 for Summary Judgement under Part 24 of the CPR to enforce a decision of an Adjudicator dated 27th August 2002. The Adjudicator was appointed pursuant to the Provisions of the Housing Grants Construction and Regeneration Act 1996. The claim form and particulars of claim issued and served by the Claimant claim a total of £348,799.43 together with accruing interest.

2. By a written sub-contract agreement between Surplant and Ballast Plc (t/a Ballast Construction South West) ("Surplant" and "Ballast") made in or about October 2002 Surplant undertook to construct for Ballast certain highway adoption works and service diversion works at the site of a new B & Q Warehouse at Culverhouse Cross in Cardiff. The sub-contract agreement incorporated the JCT Standard Form of Building Contract with Contractor's Design 1998 Edition ("the Contract").

3. Pursuant to Article 5 of the contract it was an express term that either party had the right to refer any disputes under the Contract to adjudication in accordance with Clause 39A thereof. Pursuant to Clause 39A.7.1. of the Contract, it was an express term that the decision of the Adjudicator would be binding upon the parties until such dispute was finally determined by arbitration or legal proceedings or by an agreement in writing between the parties made after the decision of the Adjudicator had been given.

4. Further, pursuant to Clause 39A.7.2. of the Contract, it was an express term, that without prejudice to their other rights under the Contract, the parties will comply with the decision of an Adjudicator and would ensure that the decision was given effect. By Clause 39A.7.3. of the Contract, it was an express term that if either party did not comply with the decision of an Adjudicator, then the other party was entitled to take legal proceedings to secure such compliance pending any final determination of the referred dispute pursuant to Clause 39A.7.1.

5. There is a helpful chronology set out in the argument of the Claimant and it is set out below.

(i) 25.06.2002 Telephone conversation between Mr Twigg (of Ballast) and Mr Weedon (of Surplant) arranging a meeting to discuss the final account on 2nd July 2002.

(ii) 26.06.2002 Date of Surplant's Valuation No. 8

(iii) 28.06.2002 Further conversation between Mr Twigg and Mr Weedon during which the proposed meeting was rearranged for 4th July 2002.

(iv) 02.07.2002 Valuation No. 8 delivered to Ballast's offices.

(v) 04.07.2002 (Afternoon) meeting between Mr Twigg and Mr Weedon

(vi) 05.07.2002 Mr Weedon's letter to Mr Twigg (sent by fax and post)

"Further to the meeting between your Mr Adam Twigg and the writer, we write to express our concerns over the evaluation of our accounts.

Your assessment of our Valuation No. 8 of a gross figure of £650K, we believe is grossly incorrect. We would be grateful to receive a full breakdown of this assessment, however we must conclude that we are now in dispute."

(vii). 08.07.2002 "Notice of Intention to Refer differences and a dispute to Adjudication" served by or on behalf of Surplant:

"The Respondent Party has failed to certify and pay the proper value in respect of the measured account and direct loss and/or expense included in the Referring Party's Valuation No. 7. The Referring Party has

issued a further Valuation No. 8 and the Respondent Party has again indicated that it will not certify and pay the proper value in respect of the measured account and direct loss and/or expense. The effect on the Referring Party's cash flow is such that an immediate reference to Adjudication has been deemed necessary".

(viii) 08.07.2002 Mr Weedon made a signed statement in relation to the setting up of and the matters discussed at the meeting with Mr Twigg.

(ix) 09.07.2002 Ballast's Notice of Payment in respect of Surplant's Valuation No. 8 sent: (Valued at approximately £615,000).

(x) 11.07.2002 Always Associates (on behalf of Ballast) raise a jurisdiction issue, (Note: This is not the jurisdiction point which is now taken. There is no mention of Surplant's letter of 5th July or the terms of the Notice of Adjudication.)

(xi) 12.07.2002 The RICS nominated Mr Dennis Baldwin as Adjudicator who duly accepted the appointment.

(xii) 15.07.2002 Mr Twigg wrote to Mr Weedon disputing, for the first time, the contents of Mr Weedon's letter of 5th July 2002 and putting forward his version of what transpired at the 4th July meeting.

(xiii) 15.07.2002 Surplant's Referral documents were served upon the Adjudicator.

(xiv) 16.07.2002 Surplant's Referral documents were received by Ballast

(xv) 16.07.2002 Always Associates (on behalf of Ballast) wrote to the Adjudicator raising three "serious... jurisdictional issues." (Again, none of these matters addresses the 5th July 2002 letter (or Mr Twigg's belated response thereto) or the terms of the Notice of Adjudication).

(xvi) 17.07.2002 The Adjudicator stated that for reasons to be set out in a later letter he had concluded that there was no merit in any of Ballast's jurisdictional points.

(xvii) 18.07.2002 The Adjudicator gave his detailed reasons for rejecting Ballast's jurisdictional challenge (see paragraph 7. 3 in particular).

(xviii) 19.07.2002 Always Associates made another attempt to persuade the Adjudicator that he had no jurisdiction. The allegations in respect of the phone call (sic) are refuted and reliance is [p] laced upon the letter of 15th July 2002.

(xix), 22.07.2002 The Adjudicator reiterated his view that he had jurisdiction making the important point that:

" ...Ballast do not point to any contemporaneous written documents produced prior to the 8th July (Notice of Adjudication) rebutting Surplant's 5th July letter assertion that a dispute as to their Valuation No. 8 entitlements had come into being then." "

6. Following the events set out above the adjudication process took its course with Ballast participating fully therein but at all times (it is accepted) reserving the jurisdiction points raised by Always Associates on its behalf. On 27th August 2002 the Adjudicator published his decision awarding to Surplant the sum of £276,973.17 plus VAT and directing Ballast to pay his fees and expenses of £23,099.56 (inclusive of VAT). In fact, Surplant has discharged the Adjudicator's fees and expenses.

7. It will be noted that the Valuation No. 8 was made on the 26th June 2002 and it was delivered on the 2nd

July 2002. There was a meeting on 4th July 2002 between Mr Twigg and Mr Weedon. On 5th July 2002 Mr Weedon wrote to Mr Twigg setting out his conclusion that they were in dispute. On the 8th July 2002 the notice of intention to refer the differences and a dispute to adjudication was served by or on behalf of Surplant. It states that the crucial issue was Valuation No. 8 and on the 9th July 2002 Ballast's

notice of payment was sent. On the 12th July 2002 the Adjudicator was nominated Therefore there was certainly a dispute on the 9th July 2002 and the contractual time limit for the Defendant ran out on 10th July 2002.

8. The Defendant's main point in these proceedings is that there was no dispute as to the matters referred to in adjudication at the date of the Notice of Adjudication. The Defendant says that the due date for payment had not been reached and therefore was not due and that there was no dispute within the meaning of Section 108 of the 1996 Act as to the Claimant's application for payment at the date of the notice of Adjudication. The Defendant: says that there is a clear dispute between the parties as to the terms of the conversation on 4th July 2002. The Defendant further states that the due date under the contract was 10th July 2002 and that the contractual terms relating to "due" and "final" date of payment and the services of notices are found at Clause 7.2. of the Contract.

9. The Claimant submits that there was a dispute at the date of the notice of Adjudication (8th July 2002) or alternatively if there was no dispute at the date of the notice of Adjudication this is immaterial since there was an arguable dispute 24 hours later on the 9th July 2002 and this date was before the appointment of the Adjudicator and the referral documents of the Defendant detailing the dispute and the claims made were served.

10. In VHE Construction Plc v RBSTB Trust Co Ltd (2000) BLR 187 His Honour Judge Hicks Q.C. agreed with and adopted two passages from reported decisions in the Court the first being part of the judgement of Dyson J in Macob Civil Engineering Ltd v Morrison Construction Ltd (1999) BLR Ltd 92 at page 97:

"The intention of Parliament in an Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional basis, and requiring the decisions of Adjudicators to be enforced pending the final determination of disputes for arbitration, litigation or agreement . . . Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening stage in a dispute resolution process. Crucially it is made clear the decisions on Adjudicators are binding and are to be complied with until the dispute is finally resolved."

11. Judge Hicks also referred to the case of Outwing Construction Ltd v H.Randell and Son Ltd (1999) BLR 156 Judge Humphrey Lloyd Q .C. stated:

"The overall intention of Parliament is clear: disputes are to go to Adjudication and the decision of the Adjudicator has to be complied with, pending final determination."

12. The Claimant says that the letter of Mr Twigg of 5th July 2002 is clear and was not disputed before the issue of the Notice of Adjudication. The only dispute as to the accuracy of the letter was made after the Adjudicator had been appointed. The Claimant also points out that the various jurisdictional points raised by or on behalf of the Defendant did not seek to deal with the letter of 5th July. The Claimant also says that the balance of the evidence makes it clear that the version given by Mr Twigg is inherently improbable.

13. The Claimant also says that on a proper construction of the Contract in the events which happened the fact that there may not have been a dispute at the date of the Notice of Adjudication is irrelevant in that Clause: 39A.4.1.provides that when a party requires a dispute to be referred to arbitration [adjudication] he shall give notice of his intention to refer to the dispute briefly identified in the Notice of Adjudication and if an Adjudicator is appointed within 7 days of the Notice then the party giving the Notice shall refer the dispute to the Adjudicator within 7 days of the Notice. By the dates of appointment and referral the Defendant had served (on 9th July 2002) its Notice of Payment disputing Valuation No. 8. In doing so, the Claimant says, the Defendant ratified the existence of the dispute set out in the Notice of Adjudication the Defendant says that provided what is referred is in dispute at the time it is referred and the subject matter of the referral is consistent with the Notice of Adjudication therefore the Adjudicator has the relevant jurisdiction to determine the dispute so referred.

14. What the Defendant says is that there is no extraneous evidence before the court upon which the credibility of Mr Twigg or Mr Weedon's recollection may properly be weighed even for the purposes of the test applicable on some major restrictions.

15. The Defendant also says that the contract required that the dispute could only become crystallised by the 10th July 2002 and in fact the Defendant certified the sum due on the 9th July 2002 the due date was therefore, according to the Defendant, 10th July 2002. The Claimant had no entitlement to payment in advance. Until the due date there is no sum due under for the contract. Therefore the notice was premature. The dispute referable under Section 108 is the dispute that has crystallised at the date of the Notice of Adjudication and the Claimant's notice was premature. The Defendant was entitled to continue the process of consideration and evaluation until 10th July 2002. Therefore the Defendant says that the Adjudicator's appointment was itself invalid and he was without jurisdiction in the matter.

16. The Defendant also says that the contract gave the Defends at certain rights. The Adjudicator was not entitled to substitute his own machinery for that of the contract. The Defendant also says that it is entitled to exercise its set off pursuant to its contractual rights and obligations and the adjudicator failed to take that set off into account and that that set off can be pursued against the Claimant in this or related litigation. The Claimant submits that the Adjudicator took the view that he had no jurisdiction to continue the set off sought to be advanced and that the Defendant refused to extend his jurisdiction. The Claimant says that the alleged set off cannot be used as a partial defence to the claim of the Claimant.

17. This is a neat and interesting point. It seems to me that the appointment of the adjudicator is the crucial moment in time and that at that stage there was clearly a dispute between the parties. If the defendant had done nothing on the 10th July 2002 then there would have been a dispute because the contract provided for that date to be the final date for delivery up of the appropriate notice by the Defendant. When the adjudicator was appointed there was clearly a dispute. Was there a dispute when the notice of intention to refer the dispute to the Adjudicator was made? It seems to me that the letter of 5th July 2002 is very strong evidence for that dispute being in existence. The evidence with regard to the meeting is of course subject to the recollection of the parties who attended that meeting on 4th July 2002. However the letter of 5th July 2002 seems to be clear that there was a dispute and there was no material evidence other than that letter until 15th July 2002.

18. It seems to me to follow from that that there was a dispute when the Claimant's notice was made. If I am wrong on that then it seems clear that there was a dispute a day later. Should the Claimant have made a fresh notice to make the position clear and unambiguous? It seems to me that there was no need for the Claimant to take that course. The Claimant had a notice and there was a dispute and a few days later the adjudicator was appointed. It does not seem to me that the Adjudicator was taking upon himself the right to interfere with the contract. The contract gave him the necessary jurisdiction and authority. The contractual period has not expired but there was clearly a dispute between the parties.

19. I consider that the position is not altered by the set off claimed by the Defendant. The Defendant refused to extend the Adjudicator's jurisdiction. I accept the Claimant's argument that the case of *Levolux A. T. Ltd. - v - Ferson Contractors Limited* [2002] BR 341 is of interest and authority in this matter. I note that His Honour Judge David Wilcox said in that case at paragraph 40:

"In any event the provisions of Section 111 (1) are clear:

A party to a construction contract may not withhold payments after the final date of payment of the sum due under the contract unless he has given effective notice of an intention to withhold payment ... A party has no right to set off[f] claims not dealt with by the Adjudicator as a defence to the enforcement of the Adjudicator's decision. See *BHE...: Northern Developments (Cumbria) Limited – v J&J Nichol* (2000) BLR pages 158 and 164: *Solland International Limited - v – Darayden Holdings Limited...* 15th February 2002".

20. It follows therefore that I accept the Claimant's argument that the dispute came into existence before the notice and if I am wrong on that the Claimant's further argument is accepted namely that the dispute plainly came into the existence before the Adjudicator was appointed and that the Adjudicator had the necessary jurisdiction and that the Defendant is not entitled to attack the Adjudicator's award in these proceedings by reason of the contractual sums which it says are now due to it. Therefore I find that the Defendant has no real prospect of successfully defending the claim as pursuant to Part 24 of the Civil Procedure Rules. Therefore there should and shall be judgment for the Claimant in the sum claimed.

21. May I thank both Counsel for their interesting argument in this interesting case. I was given to understand that the matter had not been the subject of decisive authority before the institution of this clam. I was also given to understand that there seems to be a difference of opinion with regard to the issue of disputes between a number of Judges in the Technology and Construction Court and it may well [well] be that the unsuccessful party before me will seek permission to Appeal. This matter will therefore go back into my list on a Friday (probably 2.15.pm) so that the necessary order can be made with regard to this case.

Surplant represented by Ian Pennicott

Ballast represented by Delia Dumaresq