

NEUTRAL CITATION NO: [2006] EWHC 814 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Monday, 20th March 2006

Before:

MR JUSTICE JACKSON

M. ROHDE CONSTRUCTION

Claimant

v

NICHOLAS MARKHAM-DAVID

Defendant

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Official Court Reporters
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MISS ELIZABETH REPPER appeared on behalf of M. ROHDE CONSTRUCTION
MR NICHOLAS MARKHAM-DAVID, the defendant, appeared in person.

JUDGMENT

MR JUSTICE JACKSON:

1. This Judgment is in five parts, namely: Part 1 - Introduction; Part 2 - The Facts; Part 3 - The Present Proceedings; Part 4 - Does the defendant have a real prospect of successfully defending the claim? Part 5 - In the exercise of its discretion, should the court set aside the default Judgment?

Part 1 - Introduction

2. This is an application to set aside a default judgment, obtained by the claimant. The claimant in these proceedings is Mr Martin Rohde, trading as "M Rohde Construction". The defendant is Mr Nicholas Markham-David.
3. The present litigation arises out of an adjudication, which took place in 2001. The statutory provisions, which apply in that adjudication, are contained in the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act"). Section 107 of the 1996 Act provides:

"(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purpose of this Part only if in writing.

The expressions "agreement", "agree" and "agreed" shall be construed accordingly. (2) There is an agreement in writing-

- (a) if the agreement is made in writing (whether or not it is signed by the parties),
- (b) if the agreement is made by exchange of communications in writing, or
- (c) If the agreement is evidenced in writing.

(3) Where the parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement."

4. Section 108 of the 1996 Act provides:

"(1). A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this Section.

For this purpose the word "dispute" includes any difference.

(2) The contract shall

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

(d) allow the adjudicator to extend the period of 28 days by up to 14 days, with the consent of the party by whom the dispute was referred;

(e) impose a duty on the adjudicator to act impartially; and

(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute

(5) If the contract does not comply with the requirements of subsections(1) to(4), the adjudication provisions of the Scheme for Construction Contracts apply."

5. Section 115 of the 1996 Act provides:

“(1) The parties are free to agree on the manner of service of any notice or other document required or authorised to be served in pursuance of the construction contract or for any of the purposes of this Part.

(2) If or to the extent that there is no such agreement the following provisions apply.

(3) A notice or other document may be served on a person by any effective means.

(4) If a notice or other document is addressed, pre-paid and delivered by post-

(a) to the addressee’s last known principal residence or, if he is or has been carrying on a trade, profession or business, his last known principal business address, or

(b) Where the addressee is a body corporate, to the body’s registered or principal office,

it shall be treated as effectively served.”

6. The Scheme for Construction Contracts, which is referred to in Section 108(5) of the 1996 Act, is set out in the Schedule to the Scheme for Construction Contracts, (England and Wales) Regulations 1998. In this judgment I shall refer to the Scheme for Construction Contracts as “the Scheme”.

7. Paragraph 19 of the Scheme provides:

“1. The adjudicator shall reach his decision not later than-

(a) twenty eight days after the date of the referral notice mentioned in paragraph 7(1), or

(b) forty two days after the date of the referral notice if the referring party so consents, or

(c) such period exceeding twenty eight days after the referral notice as the parties may, after the giving of that notice, agree ...

(3) As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the parties to the contract”.

8. Finally, I should say that Judge Thornton is the assigned judge in this litigation and he has made the previous orders. The change of judge to myself occurred because of listing difficulties last week. Following the recent reforms, I should perhaps make it clear that this court will (so far as practicable) reclassify and reassign cases at short notice, in order to avoid standing any case out of the list.
9. After these introductory remarks, I must now turn to the facts.

Part 2 - The facts

10. In 1998 the defendant was living with his wife and children at 22 Hamilton Road, Salisbury. The defendant and his family owned another property, which was formerly a farmhouse, known as Upper Skenchill in Herefordshire. The defendant intended to renovate this property and then sell it.
11. In October 1998 the defendant engaged the claimant to carry out building works to Upper Skenchill. The claimant proceeded with those works but there appear to have been differences between the parties, concerning quality of work, delays and so forth. There were also differences between the parties concerning the valuation of variations. The defendant made payments on account, but the claimant contended that substantial additional sums were due.
12. During 1999, whilst the building works were in progress, the defendant's marriage came to an end. The defendant and his wife separated. In due course the defendant moved to a new address in Salisbury, namely 3 Wordsworth Road. The defendant's wife also moved to a new address in Salisbury, namely 12 Wyndham Road.
13. Although the defendant's home address changed, his place of business remained the same. The defendant continued to manage a quarry known as Callow Quarry at Buckholt in Herefordshire.
14. In March 2001 the claimant decided to refer to adjudication his claim for the balance of monies owing to him. On the 30th of March 2001 Messrs Castons (a firm of quantity surveyors acting for the claimant) served or purported to serve a notice of

adjudication upon the defendant. The address to which Castons sent the notice of adjudication was 22 Hamilton Road, Salisbury.

15. Thereafter the adjudication proceeded. Mr Andrew Pennifold was appointed adjudicator. Mr Pennifold received submissions and evidence from the claimant. On the 18th of May 2001 he promulgated his decision, which was that the defendant owed to the claimant the sum of £37,589.00.
16. During the course of the adjudication, various communications were sent to the defendant at 22 Hamilton Road, Salisbury. All such communications were returned as undelivered. This is evidenced, for example, by Castons' letters to the adjudicator, dated 17th April, 8th May and 23rd May 2001.
17. The defendant asserts that he never received any documents relating to the adjudication. He was in dispute with the tenants who were occupying 22 Hamilton Road, because those tenants had failed to pay rent. Furthermore, the breakdown of the defendant's marriage was acrimonious and his former wife was not passing documents to him.
18. The defendant has submitted evidence concerning his personal and business affairs. I will not embark upon an analysis of that evidence. On the evidence as it now stands, I am quite satisfied that I should proceed on the basis that the defendant was unaware of the adjudication. This, however, is not a final decision, which will be binding upon the parties at trial. At trial there will no doubt be further evidence about these matters and both parties can be cross-examined.
19. Let me now return to the narrative. The adjudicator's decision was not implemented. The defendant did not make any further payments to the claimant, beyond the sums which had previously been paid on account.
20. The claimant was aggrieved by the defendant's non-payment. Accordingly he commenced the present proceedings.

Part 3 - The present proceedings

21. By a claim form, issued in the Technology and Construction Court on 7th November 2001, the claimant claimed against the defendant the sum of £37,528.00 as awarded by the adjudicator.

22. The claimant applied for and obtained an order for service by an alternative method. On the 18th of January 2002 this court made an order for service by the following means: "Service to be effected by process agents by hand delivering to a person appearing to be in occupation of 22 Hamilton Road, Salisbury Wilts and a further copy of the documents to 12 Wyndham Road, Salisbury Wilts."
23. The proceedings were duly served in accordance with that order. The defendant did not respond or acknowledge service. On the 18th of March 2002 this court gave judgment in default against the defendant for the following sums: debt plus interest to date of judgment £41,066.56, costs £480.00, total £41,546.56.
24. That judgment was not enforced. There matters rested for some time. During 2004 the claimant commenced other litigation against the defendant and his daughter, in the Hereford County Court. The claimant obtained judgment in default in both actions.
25. The default judgment against the defendant in the county court was subsequently set aside with an order that the claimant pay the defendant's costs in the sum of £1,175.00. I am told that those costs have not yet been paid. I have not seen any documents relating to the action against the defendant's daughter, but the defendant tells me that the default judgment was set aside and the whole action against his daughter was struck out.
26. The defendant asserts that he was unaware of the litigation against him in the TCC in London until October 2005. In that month he became aware of the judgment and, through solicitors, he tried to obtain copies of the relevant documents. On 19th December 2005 the defendant applied to set aside the default judgment, which had been entered on 18th March 2002.
27. The grounds of the defendant's application are twofold. First, the defendant has a real prospect of successfully defending the action. Secondly, there was a good reason why the defendant did not respond sooner, namely that he was unaware of the proceedings. The evidence, which has been lodged in connection with the present application is the following: a brief statement of the defendant which appears on the second page of the application notice, a statement of the claimant's solicitor dated 1st February 2006, two further statements of the defendant dated 17th February and 10th March 2006.

28. The defendant's application to set aside judgment came on for hearing on Thursday, 16th March 2006. The defendant appeared in person. The claimant was represented by counsel, Miss Elizabeth Repper. During the course of the hearing both parties furnished to me additional bundles of documents of varying degrees of legibility. I said that I would consider all the material, including some additional authorities handed up during the hearing, and give my decision on Monday, 20th March. This I now do.

Part 4 - Does the defendant have a real prospect of successfully defending the claim?

29. The strength of the defendant's proposed defence is the first matter, which I am required to consider, pursuant to Civil Procedure Rules, rule 13.3(1).
30. I therefore turn to the question whether the adjudication award is one which the claimant is entitled to enforce. The defendant raises an issue as to whether his original contract with the claimant was "in writing" for the purposes of Section 107 of the 1996 Act. That contract appears to have been contained in three documents, namely a letter dated 22nd October 1998, a quotation and an outlined specification. Although these are homespun documents, and in part impossible to read, they do appear to contain all the essential contractual terms. In the course of argument I asked the defendant whether there was any contractual term, which was omitted from those documents. He said that there was not. Indeed, he pointed out that the October letter covered all essential matters, such as the procedure for dealing with variations. I have come to the conclusion that a defence based upon non-compliance with section 107 of the 1996 Act is unlikely to succeed.
31. A further issue raised by the defendant is whether the adjudicator's award is invalid by reason of having been delivered out of time. The correspondence bundle is incomplete in this regard. I have the adjudicator's amended decision but not his original decision. Unfortunately, some of the relevant documents are in the possession of Messrs Castons, with whom the claimant is currently in dispute. Nevertheless, drawing reasonable inferences from the available documents, I think it probable that the adjudicator's decision was delivered in time. In any event, a slight delay is not fatal to the decision: see Barnes and Elliott Limited v Taylor Woodrow Holdings Limited [2003] EWHC 3100 (TCC); [2004] 1BLR 111; Simons Construction

Limited v Aardvark Developments Limited [2003] EWHC 2474 (TCC). I have therefore come to the conclusion that this proposed line of defence is likely to fail.

32. The final matter, which I must address, is the defendant's ignorance or probable ignorance that the adjudication was proceeding. Miss Repper, quite rightly, draws attention to section 115 of the 1996 Act. She points out that the notice of adjudication and other documents concerning the adjudication were all sent to the claimant's last known principal residence. Miss Repper points out that this constitutes effective service, under section 115(4) of the 1996 Act.
33. An important feature of the present case is that it appears on the evidence that the defendant could quite easily have been contacted. The defendant had a business operating at Callow Quarry. A notice board outside the quarry displayed the defendant's home telephone number. The claimant was well familiar with the quarry, having previously carried out work there on behalf of the defendant.
34. The defendant contends that the claimant deliberately avoided contacting him via the quarry. The claimant deliberately used a method of service, which was unlikely to bring the documents to the defendant's attention.
35. In the context of the present application, where there is no witness statement at all from the claimant, I am certainly not prepared to make any finding of disingenuous conduct on the claimant's part. There is, however, a serious factual issue to be tried in this regard. I would formulate the issue in these terms: did the claimant have available during the adjudication a ready means of contacting the defendant, which the claimant chose neither to use nor to communicate to the adjudicator?
36. If it should turn out that the answer to this question is yes, then an issue of law will arise. That issue of law is whether section 108(3) of the 1996 Act and paragraph 23 of the Scheme require an adjudicator's award obtained in those circumstances to be enforced. Unsurprisingly, the defendant was not able to assist me in relation to the question of law. Miss Repper kindly did some research during the short adjournment on Thursday, but she did not find any relevant authorities. In the circumstances the issue of law has not been fully argued on either side. I make no complaint about that, because I am simply dealing with an interlocutory application.

37. In Carillion Construction Limited v Devonport Royal Dockyard [2005] EWCA Civ 1358 Lord Justice Chadwick, giving the judgment of the Court of Appeal, said this at paragraphs 85 to 87:

“85. The objective, which underlies the Act and the Statutory Scheme requires the courts to respect and enforce the adjudicator’s decision, unless it is plain that the question which he has decided, was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator. The courts should give no encouragement to the approach adopted by DML in the present case, which (contrary to DML’s outline submissions to which we have referred in paragraph 66 of this Judgment) may indeed aptly be described as “simply scrabbling around to find some argument, however tenuous, to resist payment”.

86. It is only too easy in a complex case, for a party who is dissatisfied with the decision of an adjudicator, to comb through the adjudicator’s reasons and identify points upon which to present a challenge under the labels, “excessive jurisdiction” or “breach of natural justice”. It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely (if not more likely) to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge. The time constraints within which he is expected to operate are proof of that. The task of the adjudicator is to find an interim solution, which meets the needs of the case. Parliament may be taken to have recognised that in the absence of an interim solution the contractor (or sub-contractor) or his sub-contractors will be driven into insolvency through a wrongful withholding of payments properly due. The Statutory Scheme provided a means of meeting the legitimate cash and flow requirements of contractors and their subordinates. The need to have the “right” answer has been subordinated to the need to have an answer quickly. The Scheme was not

enacted in order to provide definitive answers to complex questions. Indeed, it may be open to doubt whether Parliament contemplated that disputes involving difficult questions of law would be referred to adjudication under the Statutory Scheme; or whether such disputes are suitable for adjudication under the Scheme. We have every sympathy for an adjudicator faced with the need to reach a decision in a case like the present.

87. In short, in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the Scheme must be to pay the amount that he has been ordered to pay by the adjudicator. If he does not accept the adjudicator's decision as correct (whether on the facts or in law), he can take legal or arbitration proceedings in order to establish the true position. To seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice (save in the plainest cases) is likely to lead to a substantial waste of time and expense, as we suspect the costs incurred in the present case will demonstrate only too clearly."
38. If, after hearing evidence in the present case, it turns out that the claimant took a deliberate decision, which deprived the defendant of the opportunity to make representations in the adjudication, then I consider that this may be one of those rare and exceptional cases in which the court will decline to enforce an adjudicator's decision by reason of breach of natural justice.
39. Let me now draw the threads together. For the reasons set out above, I have made no binding findings of fact on the evidence. I have reached no decision on the question of law. I am however, satisfied that the defendant has available a defence with a real prospect of success. Accordingly, my answer to the question posed in part four of this Judgment is "yes".

Part 5 - In the exercise of its discretion, should the court set aside the default judgment?

40. Civil Procedure Rules, Rule 13.3(1) gives the court a discretion to set aside a default judgment where the defendant has a real prospect of successfully defending the claim. Rule 13.3(2) provides:
- “In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly.”
41. Miss Repper makes the point that it is now four years since the default judgment was entered. That factor weighs heavily against exercising any power to set aside. The defendant, on the other hand, contends that he was unaware of the present action until October 2005. Since then he has moved promptly to set aside the judgment.
42. The evidence on this issue is certainly not all one way. The enquiry agent, who made the original investigations on behalf of the claimant, was Mr Rossinger. Mr Rossinger also effected service on the 18th of February 2002, by the method which this court had specified. I have Mr Rossinger’s two reports dated 5th December 2001 and 18th February 2002, as well as his witness statement dated 18th February 2002. I note that in his report dated 5th December 2001 Mr Rossinger says this: “A search revealed a Georgina Markham-David living at 12 Wyndham Road, Salisbury, which is one street away from Hamilton Road. I attended this property and spoke with an adult female, who identified herself as Nicholas’s ex-wife. She would not give out any information regarding her ex-husband, stating that she did not wish to get involved”.
43. This statement tends to corroborate the defendant’s assertion that his ex-wife was unco-operative and unlikely to forward documents to him.
44. The position in relation to the tenants at 22 Hamilton Road is more complex. There was an issue during the hearing as to when those tenants moved out. It is difficult for me to resolve that issue. Nevertheless, I can find no reason to reject the defendant’s evidence that he was in conflict with those tenants because of non-payment of rent.
45. A further factor, which influences me, is the inherent probability. The defendant’s two witness statements are forceful and articulate. Furthermore, at the hearing on Thursday, the defendant presented his case with vigour and clarity. It seems to be unlikely that a person such as the defendant would do nothing to contest the proceedings, if he had been aware of them.

46. I have carefully considered all of the evidence lodged by both parties. I have come to the conclusion that, for the purposes of this application, I should proceed on the basis that prior to October 2005, the defendant was unaware of the present litigation.
47. I express my conclusion in a somewhat cautious and guarded manner for this reason. If the present action proceeds to trial, the credibility of both the claimant and the defendant will be seriously in issue. If the trial judge prefers the evidence of the claimant to the evidence of the defendant in relation to the crucial events of 2001, then the judge may take a different view from that expressed above in relation to events between 2002 and 2005.
48. Let me now come to the crucial issue. I have come to the conclusion that the defendant has a defence with a real prospect of success. I have also come to the conclusion that I should proceed on the basis that the defendant was unaware of the present proceedings until October 2005. In those circumstances it seems to me that the defendant has moved with reasonable promptness to set aside the judgment.
49. Miss Repper has very properly urged upon me the prejudice which the claimant will suffer if judgment is set aside. I accept that submission and I take into account the prejudice, which the claimant would suffer in this regard.
50. What I have to do now is to weigh up the competing factors. I have to consider (a) The prejudice which the claimant would suffer if judgment is set aside; (b) The prejudice which the defendant would suffer if judgment is not set aside; (c) The interests of justice and (d) all the circumstances of this case. I must perform this exercise, having regard to the overriding objective set out in Part 1 of the Civil Procedure Rules.
51. I have duly carried out that assessment exercise. It seems to me that if the default judgment stands there is a real risk that the defendant will suffer injustice. The prejudice caused to the defendant by dismissing his application outweighs the prejudice caused to the claimant by setting the judgment aside. The defendant has moved with reasonable promptness to make his application. The proper course is to set aside the default judgment and let the action proceed to trial. Accordingly that is the order which I shall make. The defendant succeeds in his application.