

CA on appeal from the High Court of Justice, QBD, Bristol District Registry (HHJ Havelock-Allan QC) before Waller LJ; Dyson LJ. 14th May 2007

Lord Justice Dyson:

1. In these proceedings the Contractor seeks to enforce an award made by an adjudicator who was appointed pursuant to the Housing Grants, Construction and Regeneration Act 1996. The Contractor was appointed under the JCTIFC 1998 Form of Contract. Also relevant is the scheme for Construction Contracts (England and Wales) Regulations 1998 ("the Scheme").

2. The Contractor gave notice of adjudication in April 2006. The notice identified four disputes:

- "(i) The date for completion of the Contract,*
- (ii) Scope and validity of Architect's Instructions issued to date,*
- (iii) The issue and non-withdrawal of the Notice of Non-Completion, and*
- (iv) The sum of Valuation Number Nine ..."*

Paragraph 13 of the notice sought a number of remedies. These included:

- "(i) That the Adjudicator make a finding of fact over the original date for Completion of the Contract and determine the revised date in the light of the agreed Extension of Time for completion granted by Mr Robin Hancock FRICS on 7 February 2006,*

...

- (iii) That the Adjudicator either order withdrawal of the Certificate of Non-Completion or declare [that] the same [was] invalid and improperly issued,*
- (iv) That the Adjudicator [determine] the true sum properly payable to [the Contractor] under Valuation Number Nine and order such sum to be payable forthwith together with interest ..."*

The sum sought by the Contractor by Interim Claim 9 was based on a gross valuation of £440,531.74. One item in that valuation, at the foot of page 3, reads: "Steel kitchen portakabin@£28.80 per week, £1296, 45 weeks [and an item of delivery]".

The significance of that item is something to which I shall shortly return.

3. The adjudicator granted an extension of time, which led to a revised date for completion of 1 May 2006. He held that the certificate of non-completion issued by Mr Hancock was invalid. He awarded the Contractor a further net amount of £13,579 in respect of Interim Valuation 9 and directed the employer to pay £6,668.25 for 85% of his, the adjudicator's, fees. The employer was therefore directed to pay the Contractor a total of £21,247.25. That sum was not paid and the Contractor therefore instituted these proceedings to recover that sum.

4. The employer resisted the claim on a point of jurisdiction. Clause 8(1) of the Scheme provides: *"The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract."*

It follows that, in the absence of such consent, an adjudicator has no jurisdiction to determine more than one dispute at the same time.

5. It is, I think, accepted on behalf of the claimant that whether more than one dispute has been referred to an adjudicator is a question of fact. I should say that when the adjudicator was appointed, the employer took a number of specific points as to his jurisdiction, none of which has any materiality for purposes of today's application.

6. The employer also made a general reservation of its right to take any other point as to the adjudicator's jurisdiction. The employer did not, however, take the point, at that time, that the Contractor purported to refer to the adjudicator more than one dispute, so as to engage the provisions of clause 8(1) of the Scheme.

7. HHJ Havelock-Allan QC decided that the adjudicator purported to determine two unrelated disputes: 1) the correct figure for Valuation 9; and 2) the Contractor's entitlement to extensions of time and the validity of the certificate of non-completion. He said at paragraph 29: *"I am in no doubt that on this aspect of the application Miss Lee's submission is correct. Any successful challenge to the issue of the certificate of noncompletion in the adjudication would have been, and indeed was, of no monetary consequence to the sum awarded under valuation 9. That is to be contrasted with valuation 10 where, based upon the assumed extension of time, the contractor claimed extra preliminaries."*

A little later in paragraph 30, he said: *"... If the sums claimed under valuation 9 were liable to alter by reference to either the original completion date or the extension, then I can see the force of the argument that the extension issue and the completion date issue was all part and parcel of the financial claim, the single dispute as to what sum is due to be paid under valuation 9. However, on the facts here, that was not the case, and so in truth there were two independent disputes which Mr Hinchcliffe [the adjudicator] entertained."*

When the matter came before me as a paper application for permission to appeal, I expressed the view that the judge's reasoning, to which I have just referred, was correct. I said that if Interim Claim 9 had included a claim for extended preliminaries and any other time related sums, there would have been a clear link between the figure claimed for Valuation 9 and the claimant's claim in relation to extensions of time and the validity of the certificate of non-completion. I also expressed the view that the judge's decision on the question of waiver was correct.

8. Before us this morning, Mr Newman does not seek to revive the waiver or estoppel issue that was raised before the judge. Moreover, as I understand it, he does not seek to challenge the reasoning of the judge to which I have referred. He accepts that in this case there was no claim for extended preliminaries in the ordinary sense. His main point is that the claim for 45 weeks, for the hire of kitchen portakabin, was a time-related item sufficient to provide a bridge between the claim in respect of Interim Valuation 9, and the time issues raised by the claim for extension of time and the issue in relation to the validity of the certificate of delay.
9. The portakabin issue was not the subject of any argument, either before the adjudicator or before the judge. It seems to me that the portakabin matter has no materiality to the issues which the Contractor seeks to raise before this court. It is not in dispute, as I understand it, that the portakabin was not for the Contractor's use and was no part of its preliminaries. The portakabin was hired by the Contractor for the use of the employer in relation to kitchen work, which would not be finished until after the completion of the appellant's works. It seems not to be in dispute that there was an agreement between the parties that the employer would reimburse the Contractor fully for the cost of the hire of the kitchen and portakabin and that they did so without dispute. There was simply no dispute between the parties about this item.
10. In my judgment, it is wholly artificial to say that because Interim Valuation 9 included as one of its many items this portakabin item, that that afforded the necessary link between the valuation dispute raised by the claim under Valuation 9 and the time related disputes to which I have already referred.
11. Mr Newman submitted, in the course of his oral argument, that the adjudicator should have undertaken an inquisitorial role of examining not merely the portakabin matter, but also more generally the Valuation 9 claim, to see whether there were elements in it which were time-related and which, if disputed, should have led him to appreciate that, at any rate, a part of the Valuation 9 dispute was time-related and therefore linked with the claims for extension of time and liquidated damages.
12. In my judgment, there is no substance in this submission. The adjudicator may, in some circumstances, have to perform an inquisitorial role to some extent but, in first instance, the dispute is defined by what is referred to in the adjudication notice. In this case, there was a dispute as to pure valuation in relation to parts of Valuation 9. No doubt, in the course of the argument before the adjudicator, the elements in the Valuation 9 claim advanced by the Contractor, which were in issue, were identified.
13. No disputes were identified which had any time implications at all. The Contractor did not include any time-related claims in Interim Valuation 9. He did so in Interim Valuation 10. Had he done so in relation to Valuation 9, then the necessary link between the dispute arising from Interim Valuation 9 and the time issues would have been provided. But, in my judgment, the facts in the present case do not support the proposition for which Mr Newman contends and I remain of the view which I expressed on paper, that the judge reached the right conclusion and that this is a matter in which the Contractor would have no real prospects of success on an appeal.

Lord Justice Waller:

14. I have had some concern about this application, because it has seemed to me a somewhat technical point for the employer to take. Four points appear to be identified in the reference. No point was expressly taken by the employer as to the adjudicator's jurisdiction to deal with more than one point, but unfortunately the employer made it clear that he reserved his position in relation to jurisdiction in very wide terms; so wide indeed that Mr Newman has very properly not pursued an argument that, in some way, the employer had consented to more than one point being argued or consented, or waived any question of jurisdiction on that basis.
15. As to the question whether there were in reality two disputes referred to the adjudicator, again I have wondered whether we should not give permission because again the point does appear to be somewhat technical, but it really serves no useful purpose to allow an appeal to go ahead where the would-be appellant is likely -- not only likely, but almost bound -- to lose the appeal. If one did that, one would simply be creating a situation in which an argument which is practically hopeless will simply give rise to further costs being incurred and further costs being ordered to be paid.
16. For the reasons given by Dyson LJ this is a case where there is no prospect of success and therefore it simply cannot be right to grant permission to appeal. I agree that this application must be refused.

Order: Application refused.

MR P NEWMAN (instructed by Messrs Nash & Co Solicitors LLP) appeared on behalf of the Appellant.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.