

JUDGMENT : HIS HONOUR JUDGE THORNTON QC. TCC. 26th March 2007

Introduction

1. This judgment relates to the trial of the action brought by Mr Rhode to enforce an adjudicator's decision. The application for summary judgment was heard by Jackson J who gave permission to defend. The judgment, [2006] EWHC 814 (TCC), is to be found on the TCC section of the BAILLI website. This case provides a good example of why a court should always be vigilant when asked summarily to enforce an adjudicator's decision and, where necessary, grant permission to defend the action so as to enable the action to be tried out with oral evidence. In this case, as will be seen, enforcement was refused once the action was tried out.

Factual Background

2. Mr Rhode is a builder who is a sole trader and who carried out some refurbishment work for, or on the instructions of, Mr Markham-David in 1999 to a property near Salisbury, Wilts. Both parties represented themselves and the dispute has become something of a grudge match between them. The contract was an informal contract which was evidenced in writing but contained no adjudication clause.
3. The property in question was owned at the material time by Mr Markham-David's wife from whom he had separated. He was living in a house in the same locality, in Hamilton Road, Salisbury, which was owned by his daughter and from whom he was occupying the house rent-free. Mr Markham-David was arranging for the work to be carried out on his wife's property to assist her before she put it on the market. He, meanwhile, was living in his daughter's house whilst sharing it with his two children who were dividing their time between their two parents' respective residences. Mr Markham-David was also working from home, managing a quarry that was also owned by his daughter.
4. The work in question went reasonably well until the two men fell out towards the end of the contract. This falling out was largely over the question of the value of the work and as to what sum, if any, remained for payment by Mr Markham-David. After somewhat desultory attempts to settle this dispute, the parties had an angry parting of the ways on the doorstep of Mr Markham-David's house on a Sunday afternoon in November 1999. Evidently, Mr Rhode had turned up, unannounced, on the doorstep in order to discuss his outstanding claim and an angry scene developed which culminated in the police being called. On their arrival, they invited Mr Rhode to leave Mr Markham-David's house and advised him not to return.
5. There was no direct contact between the two men thereafter for many months. Mr Rhode stated in evidence that he did try to telephone Mr Markham-David from time to time in this period but never got an answer. It is unlikely that he telephoned very often since he stated that he had used Mr Markham-David's mobile number but, so he also stated, he never was put through to his message or answering service. This suggests that he did not phone Mr Markham-David since, as is common knowledge, most mobiles have such a service and Mr Markham-David confirmed in evidence that his mobile did have one. Thus, had Mr Rhode telephoned him, he would have obtained Mr Markham-David's message service.
6. At some stage, in early 2001, Mr Rhode went to see a firm of claims' consultant quantity surveyors called Castons who advised him to claim the outstanding unpaid balance of his account from Mr Markham-David in an adjudication. Since there was no adjudication clause in the contract between the two men, Mr Rhode had to resort to his statutory right to an adjudication which was available to him since the contract was a construction contract that was evidenced in writing.
7. On 30 March 2001, some sixteen months after the breakdown of their relationship, a letter was sent on Mr Rhode's behalf by Castons to Mr Markham-David enclosing an adjudication notice. The letter was sent special delivery to the address in Hamilton Road, Salisbury, Wiltshire where Mr Markham-David had been living at the time that the men's contractual relationship broke down. According to Mr Markham-David's evidence, he had moved away from that address some thirteen months earlier, in February 2000, to another address in Salisbury and he had never received Castons' letter. Since this is a material fact, I make it clear that I accept that evidence and I find that Mr Markham-David left his daughter's house in Hamilton Road, Salisbury and moved into a different house nearby in February 2000. Mr Markham-David did not leave a forwarding address with the Post Office or with the new tenants at Hamilton Road once they had subsequently moved into his daughter's house. In consequence, Mr Markham-David never received any letter from Mr Rhode, Castons or the adjudicator concerning the adjudication in the period between February 2000 and sometime after the delivery of the adjudicator's decision.
8. Castons applied to the ACA an adjudication nominating body, for the appointment of an adjudicator who appointed an adjudicator. The adjudicator, once appointed, apparently sent to Mr Markham-David, to the same address in Hamilton Road, Salisbury by special delivery a letter informing him of his appointment and he included a copy of Mr Rhode's adjudication notice in the letter. This letter was returned to the adjudicator by the Royal Mail since it had not been signed for when the postman had attempted to delivery it. The adjudicator then wrote to Mr Rhode stating: *"As you are aware, we have sent various documents to Mr Markham-David by special delivery including a notice to refer matters to adjudication dated 30 March 2001. As Mr Markham-David has not signed for any special delivery letters, the Royal Mail have returned this letter to ourselves, the sender. We believe in accordance with [section 115(4) of the [HCGRA] that effective service upon Mr Markham-David has taken place."*
7. The only evidence of service or attempted service of the adjudication notice or other documents relating to the adjudication upon Mr Markham-David was what was to be found in that letter. Apparently, in the light of what

the adjudicator stated in his subsequent decision, the adjudicator had, following his nomination by the ACA which had followed Castons' application for a nomination, attempted to send a copy of his terms and conditions to Mr Markham-David by fax on 4 April 2001 but had been informed that there were no fax facilities available. The decision did not state who had informed the adjudicator off that fact or the circumstances in which he was so informed. However, according to his decision, he then sent a copy of his terms and conditions by special delivery on 5 April 2001 to the Hamilton Road, Salisbury address that he had been given by Castors as Mr Markham-David's address.

8. It would appear from the terms of a letter written by Castons to the adjudicator on 17 April 2001 that this special delivery letter was returned undelivered. The adjudicator also stated in his decision that he wrote to Mr Markham-David again on 10 April 2001, at the same time as he wrote an identical letter to Mr Rhode, asking whether Mr Markham-David was a residential occupier of the premises that were the subject-matter of the dispute. It is not clear, because he does not deal with this in his decision, whether any further letter was sent to Mr Markham-David. In particular, he makes no reference to whether or not he sent a copy of his decision to Mr Markham-David despite the relevant adjudication rules requiring a copy to be sent by the adjudicator to each party to the adjudication.

Issues

9. The principal issue that arises for determination in this action is whether the adjudication was started at all and whether a valid and enforceable decision was ever given by the adjudicator. These issues arise because Mr Markham-David never received the notice of adjudication, the notice by the adjudicator announcing his appointment, any subsequent communication from the adjudicator or the decision of the adjudicator. Such communications to him as the adjudicator sent out never arrived because he had moved away from his Hamilton Road address that he had occupied during the period when Mr Rhode was carrying out his work under the contract and had acquired a new address. A secondary issue arises if I find that the adjudication was both validly started and validly concluded by an enforceable decision. This second issue is as to whether the adjudication was conducted in accordance with minimum standards of fairness and natural justice given the lack of any engagement in the process by Mr Markham-David. If these minimum standards were not followed, the decision would not be enforceable.

Validity of Adjudication Proceedings

10. The HCGRA provides, in section 115(4), that:
 - (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, ...**it shall be treated as effectively served. ...*
 - (6) *References in this Part to a notice or other document include any form of communication in writing and references to service shall be construed accordingly."*
11. The question for me to determine is whether the adjudication notice initiating the adjudication can be taken to have been served in accordance with this statutory provision. Mr Markham-David fairly accepts that the notice was apparently served at his last known principal residence but that "service" was by way of a special delivery. The letter enclosing the notice was returned to the sender, Castons, by the Post Office. This is clear from their subsequent assertion that there had been an attempt to deliver the notice which had failed because Mr Markham-David had not signed for the special delivery letter so that the Royal Mail had returned it to themselves as its' sender. It follows that the letter was never left at Mr Markham-David's last known principal residence because the postman, when he arrived on the doorstep and failed to get an answer to his knock or ring, took the letter away undelivered and it was eventually returned to its sender.
12. Mr Markham-David contended, on the basis of that factual background, that there had never been any service because it was never: "*delivered by post*" as required by section 115 of the HGCRA. Mr Rhode contended that what happened was sufficient to constitute delivery by post because, at the very least, a notification by way of a card had been left at the relevant address inviting the occupier, presumably Mr Markham-David since he was the addressee of the letter, to come and pick up the letter from the Post Office.
13. In my judgment, it is not sufficient to constitute delivery by post to send the document by a special delivery which is then returned by the Post Office to the sender on the grounds that the recipient had not signed for the document. If the letter had been left at the address and then later picked up and taken away, or if a card had been left at the address and the addressee then went to the Post Office and picked the letter up or if Mr Markham-David had answered the door and the postman had asked him to sign for the letter and he then declined to sign and it was taken away, or even left behind, by the postman, it is arguable that the letter had been delivered. However, there is no evidence of anything like that having occurred.
14. The only inference that I can draw from the evidence adduced at the trial is that the postman attempted to deliver the letter by taking it to Mr Markham-David's last known principal residence. The postman then tried to

obtain a signature for the letter from someone in the house but failed to get an answer so that he then took the letter back to the Post Office having left a card at the address. No-one then tried to collect the letter from the Post Office so it was eventually returned to the sender. In consequence, there was no delivery by post of this letter and the adjudication proceedings were invalid since they were never served on Mr Markham-David in a way sanctioned by the HGCRA.

Unfairness

15. I will briefly consider the alternative basis for Mr Markham-David's objection to enforcement, namely that the proceedings were conducted so unfairly that the decision may not be enforced on that ground. Essentially, the contention is that the adjudicator must take reasonable steps to try and ensure that it comes to Mr Markham-David's attention that the adjudication was taking place so as to allow him an opportunity, if he wishes, to participate in the adjudication.
16. The facts are very unusual in this case because the adjudicator made very little attempt to engage Mr Markham-David in the proceedings or to keep him informed as to the progress of the adjudication. It is clear from the evidence that the adjudicator only sent two letters to Mr Markham-David's last known principal residence. The first attempt was by fax in a letter dated 4 April 2001 which notified the parties of his nomination. The second was the special delivery letter dated 5 April 2001 enclosing a copy of his standard terms and conditions of appointment. He was informed, presumably by Castors, that Mr Markham-David did not have fax facilities and the second letter was returned to the adjudicator by the Post Office undelivered. When the adjudicator learnt that neither the adjudication notice nor his terms and conditions had not been delivered to the address he had been given as Mr Hamilton's principal residence, he asked Castors to send further copies of the adjudication notice, notice of appointment and the terms and conditions of appointment to Mr Markham-David which they did by first class post enclosed with a letter dated 10 April 2001.
17. There is no evidence whether this letter was ever delivered to the address in Hamilton Road, Salisbury. On the assumption that the letter was delivered there by pushing it through the letter box or by handing it to one of the new residents, it never came to Mr Markham-David's attention.
18. In my judgment, it is insufficient for the adjudicator, having learnt that Mr Markham-David had not been served with the adjudication notice or the notification of his appointment and terms and conditions, merely to ask the claiming party's representative to send further copies of these documents to the last known principal residence of the responding party a few days after the adjudication had purportedly started and then to take no further steps to ascertain whether the documents had been validly served and then to cease to serve any further documents on the responding party. It is incumbent on the adjudicator to take reasonable steps to ensure that an adjudication has been validly started by trying to establish where the responding party is resident, that the appropriate documentation has been validly served and brought to the attention of the responding party. If necessary, the adjudicator should use registered or personal delivery using a process server. The adjudicator can, if he wishes, use the claiming party as his agent for these purposes and to arrange for the delivery to be effected by that party or its agent but he must satisfy himself that the claiming party has succeeded in effecting delivery. The adjudicator made no attempt to ensure that the address given to him by Castors was the last known residential address of Mr Markham-David or that the adjudication notice and all subsequent directions and his decision were also validly served on him. In consequence, the procedure adopted was so unfair as to fatally compromise the validity of the proceedings if they had been validly started, despite my contrary decision on the first issue.

Conclusion

19. The adjudication was never validly started due to the non-service of the adjudication notice on Mr Markham-David in accordance with the HGCRA and, in any event, it was invalidated by the obvious and significant unfairness in the way that the proceedings were conducted. Mr Rhode's claim to enforce the adjudicator's decision fails and is dismissed with costs.