Discain Project Services Ltd v. Opecrime Development Ltd [2000] Adj.L.R. 08/09

JUDGMENT (*as amended*) : HIS HONOUR JUDGE BOWSHER Q.C. TCC. 9th August 2000.

1. This is an application for summary judgement. The Claimant puts in evidence from Mr Richard Draper, solicitor, who says at paragraph 4 of his witness statement that the Claimant entered into a contract with the Defendant on or about 19th October 1998 for the design, manufacture and erection of structural steelwork balconies at Davey House, Lyon Road, Harrow. A dispute arose between the parties regarding payment, and on the 1st June 2000 the Claimant sent the Defendant a "*Notice of Adjudication*". On the same day the Claimant made a request to the Royal Institution of Chartered Surveyors seeking a nomination of an adjudicator pursuant to Section 108(1) of the Housing Grants, Construction and Regeneration Act 1996. The Adjudicator, Mr, Sutcliffe of Sutcliffe Consultants, was nominated. There being no provision in the contract for an adjudication the Scheme for Construction Contracts (England and Wales) Regulations 1998 applied.

2. Moving to paragraph 7 of Mr. Draper's witness statement, it states that the Adjudicator gave his decision on 6th July 2000 ordering that the Defendant pay to the Claimant the sum of £55,552.50 plus VAT forthwith. The Claimant's Quantity Surveyor, Schofield Lothian, wrote to the Defendant requesting payment by Wednesday 12th June 2000; however no payment has been received.

3. The Defendant put forward a witness statement from Bernard Cordell, solicitor. There are two points on jurisdiction and one point regarding natural justice. As Mr. Cordell said, since there was no scheme for adjudication in the contract the statutory scheme applied. In particular Sections 108(1), (2) and (5) are of particular relevance. Sections 109, 110 and 111 especially at sub-paragraph (1) are also relevant. The Adjudicator took a strict view of Section 111(7) in that he felt that "he' must mean the paying parry personally and could not extend to an agent. The Scheme is well known. Paragraphs 1, 2 and 7 are particularly relevant as are paragraphs 12 and 13. The Adjudicator must act extremely speedily, within 28 days, and he himself can ask for information from individuals. It is difficult to ensure that it is done in a way in which the other party sees the information at exactly the same time as it is provided to the Adjudicator,

4. Now to the first point as to jurisdiction. Can there be a dispute between the parties before the payment obligation arises? In this case the payment obligation was due on the 4th June 2000 yet the claimant's Notice of Adjudication was issued on the 1st June. However, the Adjudicator held that there was a dispute as at the 1st June. If the paying party states clearly that he will not pay on the date due for payment there is a dispute. Just as a court can give a declaration as to the future, an adjudicator can do so also. I find that there was a dispute on 1st June, 2000,

5. Now to the second point regarding jurisdiction. Clearly there must be a dispute in existence for jurisdiction to be found. It is said however that there was no dispute because the letters that were sent indicating a dispute did not come from the Defendant but from Miltonland Limited. It is submitted that the Adjudicator has made conflicting findings that there was a dispute. because (1) those letters came from an associated company and the parties would have understood them as being written on the Defendant's behalf but (2) regarding the notice of the intention not to pay under Section 111 the letters did not constitute good notice, because the section does not allow notices to be given by a party who is not party to the contract. However I am against the Defendant on this point.

6. Turning now to paragraph 5.12 of the Adjudicator's decision, he said Opecprime is part of the Comer Group of Companies and it is clear that some personnel are involved in more than one company. It is also clear that Discain were aware of this. The result was that communications which would be expected to come from Opecprime came frorn other companies such as Miltonland, and communications which would be expected to be addressed to Opecprime were addressed to other companies such as Comer Homes. In other words it is normal here for correspondence to be headed on the headed paper of a. company other than the appropriate company, but everyone would understand what company was involved in the opinion of the Adjudicator. However, when it comes to notices issued under the Act or the Scheme, there is no latitude; both the Act and the Scheme specifically refer only to notices given by a party to the contract and the Adjudicator drew a clear distinction here. Regarding the finding that the correspondence did not satisfy Section 111 of the Act if

I were sitting as an appeal judge I would differ from the Adjudicator. However, I am not sitting as a judge of appeal from the Adjudicator and his decision is binding on the parties on that matter.

7. The remaining point concerns natural justice; or, to put it another way, the danger of bias, and in relation to this point I have a great deal more concern. In **Macob Civil Engineering Ltd. v. Morrison Construction Ltd** (1999) BLR 93. Mr. justice Dyson made it plain that a mere procedural error should not invalidate an adjudicator's decision. If one looks hard enough of course one can find in many adjudications a breach of the rules of natural justice because of the speed with which things are being done. So a court should not be astute to upset a decision of adjudication on, the grounds of procedural error. What is said by Mr. Sachdeva on behalf of the Defendant, and I read from paragraphs 12 to 14 of his written submissions, is as follows:

   "*On 26th June the Applicant left a message on the Adjudicator's answering machine telling him that they needed to speak. At 5.00 p.m. the same day the Adjudicator and the Applicant had a private telephone conversation. The Applicant was concerned about the jurisdiction of the Adjudicator and in particular the validity of the Application for Payment and the Notice of Withholding, together with the issue of whether other companies had been acting as agents of the Respondent, clearly matters of central importance to the Adjudicator's decision. However, the Adjudicator did not consider it necessary for the Applicant's comments to be recorded and communicated to the Respondent. The following day (28th June) on returning from work at 7.00 p.m. the Applicant was "alarmed" to discover from a fax from the Adjudicator that he was proceeding to a decision, without the benefit of further comments from the Applicant. The Applicant immediately tang the Adjudicator and bad another private conversation. On 29th June be seat the Adjudicator what he describes as "authorities for the Adjudicator's consideration". From the fax outlined above it is submitted that there is a real danger of bias on the part of [the Adjudicator] and that the decision ought not to be allowed to stand."*

8. There was on 29th June a second fax from Mr. Hackett (on behalf of Discain) to the Adjudicator setting out some of these conversations and on 30th June the Adjudicator wrote to Mr. Hackett with a response.

9. It does seem to me there was a very serious risk of bias, and there were failures to consult with one party on important submissions which were made by the other party. It is said on behalf of the Claimant that this is irrelevant because the matter goes only to jurisdiction (that is accepted) and I am looking at the matter of jurisdiction anyway. If there has been a breach of the rules of natural justice (and I find that there has), it is submitted that it does not make any difference because the question of jurisdiction in any event is under review.

10. I find it distasteful and I cannot bring myself to enforce an adjudication which has been arrived at in that way. I do not wish to criticise the Adjudicator. I fully understand his difficulties, but he should have made sure that the other patty was involved in the discussions regarding his jurisdiction, which be failed to do. I wish to stress that I am not criticising the Adjudicator; I do understand that adjudicators have great difficulties in operating this statutory scheme, and I am not in any way detracting from the decision in cob. It would be quite wrong for parties to search around for breaches of the rules of natural justice. It is a question of fact and degree in each case, and in this case there is an issue to be tried whether the Adjudicator overstretched the rules.

11. I will not enforce the Adjudicator's decision. Leave to defend granted. Costs of today to be costs in the action. Leave to appeal refused.

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ADDENDUM TO JUDGMENT OF 9 AUGUST 2000 OF JUDGE BOWSHER Q.C.

I wish to add to the reasons given in my extempore judgment.

It is provided both by the Housing Grants Construction and Regeneration Act and the Scheme under that Act that the decision of the Adjudicator shall be binding on the parties until the dispute or difference is finally determined by arbitration or legal proceedings or by an agreement in writing between the Parties made after the decision of the Adjudicator has been given.

In many decisions of judges of the Technology and Construction Court it has been said that the decision of the Adjudicator is to be enforced even if the Court disagrees with the finding of the Adjudicator. The intention of the Act is that there is to be a speedy decision which is to be enforced speedily, right or wrong, subject to being put right, if necessary, in subsequent legal proceedings or arbitration or by agreement between the parties.

That scheme makes regard for the rules of natural justice more rather than less important. Because there is no appeal on fact or law from the Adjudicator's decision, it is all the more important that the manner in which he reaches his decision should be beyond reproach. At the same time, one has to recognise that the Adjudicator is working under pressures of time and circumstance which make it extremely difficult to comply with the rules of natural justice in the manner of a Court or an arbitrator. Repugnant as it may 'be to one's approach to judicial decision making, I think that the system created by the Housing Grants Construction and Regeneration Act can only be made to work in practice if some breaches of the rules of natural justice which have no demonstrable consequence are disregarded.

In the present case, the Adjudicator decided that letters written on the notepaper of an associated company of the defendant did not amount to good notice under section 111 of the Act. I disagree with his decision on that point, and if I were sitting as a judge of appeal from his decision, I would overturn it. Since I am not sitting as a judge of appeal from that decision, I would enforce that decision despite my disagreement with it if I were satisfied that it had been reached in a satisfactory fashion: but for the reasons given by counsel for the defendants, I am not so satisfied. If the rules of natural justice had been complied with, the Adjudicator might have reached a different decision. If he had reached his decision, different or not, after complying with the rules of natural justice, I would have enforced it. Since the Adjudicator did not comply with the rules of natural justice, and since compliance with those rules might have produced a different decision on his part, I decline to enforce his decision.

I have been writing about the rules of natural justice. The same principles will apply when the Human Rights Act 1998 comes into force.