

JUDGMENT : HIS HONOUR JUDGE DAVID WILCOX : 22nd February 2000.

Introduction

1. This is an application for Summary Judgment pursuant to Part 24 of the Civil Procedure Rules for the sum of £203,873.39 awarded to the claimant pursuant to decisions dated the 11 November 1999 respectively made by Mr Don Smith. He was appointed as an adjudicator pursuant to the provisions of the Housing Grants and Regeneration Act 1996 (the Act). The claims which were the subject of the adjudicator's decision were for demolition and rebuilding works undertaken by the claimant in respect of Haul Green Village, Wootton, Isle of Wight.
2. If contracts were concluded between the parties they were clearly construction contracts within the meaning of Section 104 of the Act. It is not in dispute that Part II of the Act applies in the event of a valid finding that contracts were concluded between the parties. The adjudicator decided that in relation to the first contract for demolition works that there was a concluded contract and that the defendant was personally liable by virtue of the operation of Section 349 of the Companies Act of 1995. In relation to the adjudication arising out of the development contract he also found the defendant personally liable and correctly named as the respondent in the adjudication by virtue of the operation of Section 36(c) and/or in the alternative Section 349 of the Companies Act of 1985.
3. It is contended on behalf of the defendant that no contracts were concluded relating either to the demolition works or to the building works, and accordingly the adjudicator had no jurisdiction.
4. In proceedings before the adjudicator it was never contended by the defendant that no contracts were ever concluded. The defendant accepted that it was so but maintained that the contracts were concluded between the claimant company and one of the companies with which Mr Catton was associated. Sensibly, the legal advisors representing the claimant and Mr Catton at the outset agreed that there should be the determination of a preliminary point by the adjudicator. Namely as to whether Mr Catton was personally liable under either of the contracts. In the event of findings that he was personally liable it was agreed that the adjudicator would hear each of the referred claims upon their merits. He did and made awards including costs.
5. Mr Nissan [*Nissen sic*] on behalf of the defendant argues that there was no concluded contract between the parties. It was common ground before the adjudicator that the claimant did not intend to contract with Mr Catton personally.
6. It is clear that the defendant agreed to accept the arbitrator's decision as to whether he was liable under the contracts personally.

Issues

7. Was the extent of the adjudicator's reference as to the preliminary point wide enough to include the defendant present stance? If it was, then the adjudicator having been asked the right question, it may not be material that he might have come to the wrong conclusion. In **Bouygues UK Limited v Dahl - Jensen UK Limited**, Dyson J in his judgment of the 17th November 1999, Paragraph 35 said.

"Where the adjudicator has gone outside his terms of reference the court will not enforce his purported decision. This is not because it is unjust to enforce such a decision. It is because such a decision is of no effect in law. In deciding whether a decision has been made outside an adjudicator's terms of reference, the court should give a fair natural and sensible interpretation to the decision in the light of the dispute that are the subject of the reference? There will be some cases where it is clear that the adjudicator has decided an issue that was not referred to him or her. But in deciding whether the adjudicator has decided the wrong question rather than given the wrong answer to the right question the court should bear in mind that the speedy nature of the adjudication process means that mistakes will inevitably occur, and in my view, It should guard against characterising a mistaken answer to an issue that lies within the scope of the reference as an excess jurisdiction."

8. It is necessary to consider briefly the factual background giving rise to the two agreements that were before the adjudicator. First was the demolition contract that was evidenced in writing. The letter heading was entitled:

"HAZEL GREEN VILLAGE"

FACSIMILE MESSAGE

New Road Wootton
Isle of Wright PO33 4HS
To David Norville - Nolan Davis From Steve Catton

Dear David

Please proceed with demolition work to nine units as per discussion. To include all necessary notification and permits required by local authorities.

Works to be undertaken as soon as permits granted.

Yours sincerely

Signed and Dictated In the absence of Steve Catton"

- 9 Mr Catton is his statement asserts that the business known as Hazel Green Village was operated by Hazel Green Village Management Limited. There are also the following companies that include in their name "Hazel Green".
1. Hazel Green Village Holiday Club Management Limited
 2. Hazel Green Village Holiday Club Limited
 3. Hazel Green Village Management Limited
 4. Hazel Green Owning Limited
 5. Hazel Green Village Sales Limited
 6. Hazel Green Village Enterprises Limited
 7. Hazel Green Properties Limited
 8. Hazel Green Village Properties Limited
 9. Hazel Village Members Limited
 10. Hazel Green Village Estates Limited
 11. Hazel Green Developments Limited
- 10 Mr David Norville now employed by Mr Catton, in his witness statement submitted by the defendant says '*it a correct to say I never had precise details of the limited company Hazel Green Village Management Limited. I never had the need for such. As far as I was concerned I was happy in my capacity as Divisional Director for ND, dealing with the trading of the limited company Hazel Green Village*'. Mr Catton in his statement before the adjudicator said that he was giving the instruction as managing director of Hazel Green Village Management Limited.
- 11 In relation to the second contract, that is the development contract, that too is evidenced in writing and contained in The Small Works Contract Form of the Institute of Architects and Surveyors. It is dated 25th March of 1999 and is expressed to be between Hazel Green Village, the employer and Nolan Davis Limited, the Contractor. It is signed on behalf of the contractor by Mr Norville for and on behalf of Nolan Davis Limited, and by Mr Catton as Director of Hazel Green Village Limited. It is common ground that there was no such company called Hazel Green Village Limited neither has one been in existence in the ten years preceding the search of the 9th August of 1999.
- 12 Demolition and building works were carried out by Nolan Davis pursuant to both agreements. Hazel Great Village were duly invoiced. The invoices have never been paid. It is accepted that the adjudication regime under the Scheme for Construction Contracts (England and Wales) Regulations of 1998 would apply to these agreements and that the requirements as to the formalities of the references and service were complied with.

The Extent of the Reference

- 13 The adjudicator's authority to determine issues referred to him is governed by the terms of the reference and to the extent to which the contract under its terms either express or implied gives him that authority. It can be put rather more simply, what did the adjudicator do, and was he authorised to do it? In relation to both the demolition works and the development works he held that Mr Steven Catton was personally liable.

- 14 The initiative to invite the adjudicator to settle the status of Mr Catton as a contracting party or not came from Mr Catton's Solicitors. On 12th October 1999 they wrote to the adjudicator and the letter contained the following relevant Paragraphs
- (3) *In both cases the Claimant has made Mr. Steven P Catton personally, a Respondent to the Referrals. As the writer's own correspondence makes clear (exhibited in the supporting appendices of the Claimant), the status of Mr. Catton and whether or not he is a contracting party is very much an issue.*
- (5) *On a normal 'litigation' basis we would have been asking any Court to address the status of Mr Catton as a Preliminary issue. It seems to the writer to have much merit, both on the question, of time and cost.*
- (6) *Whilst we acknowledge the timetable you have to work to, it seems to us that you as the Adjudicator have wide discretion as to how you deal with the matters now referred to you.*
- (7) *We therefore formally invite you to determine upon the contractual status of Mr Catton as a preliminary point. If you are for the claimant, then the matters can proceed, if you are for the Respondent, then the Adjudication Referral comes to a stop.*
- (8) *If you agree our approach we would respectfully suggest the sort of directions that could be given are these:*
- (a) *The respondent to be given until close of business, say 4.0Opm, Monday 18th October to make written submission in reply, but limited at this stage to the question of the contractual status of Mr Cotton.*
- (b) *You to determine upon the status of Mr Catton without any need for oral hearing or further submissions by say Thursday 21st October.*
- (c) *If you find from the question of the contractual status of Mr Catton - in favour of the Claimant, then the Respondents have until close of business on Wednesday 27th October to complete its full submissions in reply."*
- 14 Pye Consulting Group Limited acting on behalf of the claimants wrote to the adjudicator on the 13th October 1999 the following terms;
- "We have taken instructions on the suggestion that paragraph (7) and (8) of the letter dated 12th October 1999 from the Representative for the Respondent to you that the Parties submit to your jurisdiction on the question of whether Mr Catton is personally liable on the Contract under which the dispute in this adjudication had arisen."*
- 15 The adjudicator wrote to both parties on the 13th October of 1999: the relevant parts of the letter follow:
- "Both parties are in agreement that I should decide, as a preliminary issue, the contractual status of Mr Cotton and accordingly I give the following direction.*
- The Respondent shall reply to the Claimant's case as set out in paragraphs 11 to 16, and appendices of the Referral Notice, no later than 4.00pm on the 18th October of 1999. The Claimant shall if considered necessary make a submission in response no later than 4.00 pm on the 26th October of 1999. I will publish my decision on the preliminary issue no later than Friday the 2nd October of 1999."*
- 16 The submissions of the parties focused upon the operation Section 349 of the Companies Act of 1985, section 36(4) of the Companies Act of 1985 and in the Defendant's submissions it was asserted that these had been a course of dealings between the parties and that the Claimants knew the identity of the limited company with whom it was contracting both in relation to the demolition works, and the development works. They submitted in terms that the Claimant must satisfy the adjudicator that there was no mistake as to company identification for section 36(4) of the Companies Act 1985 to apply.
- Section 349(l) provides:-
- (1) *In the course of business every company shall have its name mentioned in legible characters.*
- (a) *In all business letters of the company.*
- (b) *In all its notices and other official publications.*
- (c) *In all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed on behalf of the company.*
- (d) *In all its bills of parcels, invoices, receipts and letters of credit*

Section 349(4) provides:

"(4) If an officer of a company or a person on its behalf signs or authorises to be signed on behalf of the company any bill of exchange, promissory note, endorsement, cheque or order for money or goods in which the Company's name is not mentioned as required in Sub-Section (1), he is liable to a fine; and he is further personally liable to the holder of the bill of exchange, promissory note, cheque or order for money or goods for the amount of it (unless it is duly paid by the Company)."

Section 36(4) provides:

"(4) Where a contract purports to be made by a company or person as agent for a company, at a time when the company has not been formed then subject to any agreement to the contrary the contract has effect as one entered into by the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly.

- 17 They also submitted as follows: -
- (i) Everyone understood the Employer was in fact a trading company, which had previous dealings with the Claimant (even if incorrectly identified in the contract).
 - (ii) The Claimant (through Mr Norville) know it was dealing with the same trading entity as it had dealt with before on other contract work at Hazel Green Village
 - (iii) That those parties were unconcerned as to the identity of the party contracting as Employer, providing it was a Company under the control, responsibility and direction of Mr Cotton (in his capacity as Managing Director).
 - (iv) The duties of a Managing Director are helpfully summarised by Mr Nolan in his statement. Mr Catton at all times identified himself as the Managing Director of Hazel Green Village - the trading name of the limited company.
- 18 They submitted that the definition and status of "Employer in the Contract" was an innocent mistake crying out for rectification.
19. The Claimant in its response Paragraph 13 submitted:
"... the assertion of mistake is the Respondent's - The burden of proof lies on the party who asserts. It is therefore for the Respondent to demonstrate:
(a) that there was a mistake, and
(b) which company was commonly intended by both the Parties to be the Employer. The Claimant submits that the Respondent has failed to discharge the burden which rests on him (in) either of those respects."
20. At no time did the parties argue that no contract had been concluded.
- 21 The adjudicator in respect of both disputes and on the preliminary issue asked to give reasons and gave detailed reasons for his two adjudicators as to the status of Mr Catton as a contracting party.
- 22 Mr Nissen submits that the adjudicator never considered whether the position arose on the material before him that no contract in either case had been concluded at all. He is right. It clearly never crossed the minds of those advising the parties, or the nominated parties themselves that no contracts had been concluded.
- 23 Having regard to the agreed reference to the adjudicator and the written submissions put before him it would have been open for him had there been any arguable basis on the material before him, to find that no contracts had been concluded - Mr Nissen argues that since it had not occurred to anyone there might not be any concluded agreements, the question of whether there was or was not could never have formed part of the reference to the adjudicator. I reject this submission. The parties had agreed to be bound by the adjudicator's decision as to jurisdiction. By necessary implication (had the evidence justified it) it would have been open for the adjudicator to find that in relation to one or other of the contracts relied upon by the claimants that no agreement had in fact been concluded. The more so since mistake was actively canvassed before him in the submissions of the respondent.
- 24 There is a further statement from Mr Catton before me, it neither supports nor advances Mr Nissen's argument. There is in my judgment no arguable case that the parties were in error as to the identity of

whom they were contracting with. In any event since that is a question that the parties referred to the adjudicator and having regard to his reasoned decision, which is properly within his competence, it is not for this court to go behind his decision. As I said in **A & D Maintenance and Construction Limited v Pagehurst Construction Services Limited** Judgment 23 June 1999 at Paragraph 24:

"For this court to review the adjudicator's decision - given that, he has been properly appointed under the Scheme and was considering matters arising under the contract, properly within his remit, would be to go behind the intention of Parliament that his decision should be binding. The correctness of the decision may be reviewed, revised, challenged where appropriate in subsequent arbitration proceedings or legal proceedings or by way of agreement"

- 25 Of course if the adjudicator's decision is *[not] sic* within the scope of the parties agreed reference the decision is not binding upon the parties. See also **Project Consultancy Group v Trustees of the Gray Trust** 1999, Building Law Reports, page 377.
- 26 Mr Nissen further submits that the adjudicator had no jurisdiction to make an award in respect of the claimant's costs. There is nothing in the Act which provides for an award of costs. There are cross submissions to the adjudicator relating to costs. These cross applications and arguments pursued before the adjudicator constitute material from which one can readily draw the inference that the parties had conferred upon the adjudicator the authority to give a decision as to costs. Given the existence of such evidence the submission of Mr Nissen is not well founded. The award as to costs was properly made. I adopt the approach and reasoning of His Honour Judge Peter Bowsher QC. in **Northern Developments (Cumbria) Ltd and J & J Nichol**. TCC. Judgment of 24th January 2000.
- 27 This is a proper case for Summary Judgment.
- 28 The defendant seeks a stay. The relevant grounds relate to his means. He contends that if the claimant is kept out of the money to which it is entitled, it being a financially healthy company there is no hardship occasioned to it, whereas to Mr Catton personally the consequences could be very grievous and his house *[sic]*....
- 29 Miss Randle on behalf of the claimant contends that there is no direct evidence as to the claimants financial status and contends that if the Court accedes to such an application it drives a coach and horses through the adjudication scheme. I agree. It would frustrate Parliaments intention. I refuse a stay.