

JUDGMENT : MR. JUSTICE COULSON: TCC. 13th March 2008

1. In many ways, this is another in a lengthening list of disputes in which a building employer has failed to make payment to a contractor and, having taken a number of jurisdiction points unsuccessfully before the Adjudicator, then fails to pay the sum awarded by the Adjudicator and subsequently fails to comply with the orders of the court relating to enforcement. I acknowledge that, during the adjudication, most of the work on the defendant's side was carried out by Mr. Jason Mencer, a director of the defendant company, rather than by solicitors. However, during the enforcement proceedings, when no steps have been taken by the defendant to comply with any of the orders of the court, the defendant has been represented by solicitors. No explanation has been given for their non-compliance. Yesterday those solicitors wrote to the claimant's solicitors to say that they were coming off the record and that Mr. Jason Mencer would appear today in person.
2. The defendant is a development company, as its name suggests. It appears that the two relevant directors are Jason Mencer and his father. As individuals, they occupy two adjoining properties at 47 and 49 Allendale Avenue in Finchley ("the properties"). Jason Mencer is the owner of one of them. In July 2007 the defendant company engaged the claimant to carry out groundworks, including foundation works, and drainage works at the properties. The work was carried out. The defendant maintained that it had paid the claimant all that it was entitled to. The claimant, however, contended that it was entitled to further sums and so commenced adjudication proceedings.
3. Following an adjudication in which both parties took an active part (the detail of which I shall return to later) the Adjudicator produced a written decision. The decision was dated 16th November 2007. He concluded that an additional sum of £14,126.91 was due from the defendant to the claimant. He also found that the defendant was obliged to pay his fees in the sum of £3,588.21 plus VAT. That makes a total of £18,343.06 together with VAT on that fee element.
4. The defendant did not pay the sum awarded by the Adjudicator. Unsurprisingly, therefore, the claimant commenced enforcement proceedings in the Technology and Construction Court. On 15th February 2008 I provided a timetable by which the parties would exchange any evidence and submissions that they had leading up to a hearing, to take place today, of the application for summary judgment. Unhappily, as indicated above, there has been no response to those directions from the defendant, and certainly no attempt to comply with my orders. Accordingly, today, the claimant seeks the £18,343.06 together with the VAT on the fee element, and interest at £245.23.
5. The proper procedure for the court to adopt in these circumstances, as in all applications to enforce an Adjudicator's decision, is first to look at any points that have been taken as to the Adjudicator's jurisdiction. If the Adjudicator did not have the necessary jurisdiction then the decision is a nullity. If, on the other hand, the Adjudicator did have the necessary jurisdiction, then the court should go on to consider – if it is raised any suggestion that the Adjudicator acted unfairly. If the court concludes that the Adjudicator did have jurisdiction and had not acted unfairly then the court is obliged to enforce the decision of the Adjudicator: see for example, *Bouygues (UK) Ltd. v Dahl-Jensen (UK) Ltd.* [2000] BLR 522 and, more recently, *Carillion Construction Limited v Devonport Royal Dockyard Limited* [2005] EWCA Civ 1358.
6. In the adjudication, the defendant took two jurisdiction points. The first was to the effect that the work being carried out by the claimant was not a construction operation in accordance with section 105(2)(d) of the **Housing Grants (Construction and Regeneration) Act 1998**. I have explored that argument this morning with Mr. Mencer. It seems to me that it is impossible to sustain. The claimant here was engaged to carry out groundwork and drainage work at the properties. Those were plainly construction operations under section 105(1)(a) of the Act. The exemption at section 105(2)(d) relates to offsite manufacture or delivery of building components or plant. That was simply not something which the claimant in this case was engaged to do. The exemption is therefore irrelevant.
7. Mr. Mencer did refer to the fact that the claimant was engaged (or could be said to have been engaged) to carry out works preparatory to landscaping. However, even if that were a fair categorisation of the work being done by the claimant, such work was expressly *included* within the meaning of construction operations pursuant to section 105(1)(e) of the 1998 Act. Accordingly, so it seems to me, there is nothing in the first point that the works being carried out by the claimant were outside the 1998 Act.
8. The second jurisdiction point had a little more substance. The defendant argued that it was (or should be deemed to be) a residential occupier and that therefore the contract was exempt by operation of section 106(1)(a) of the **Housing Grants (Construction and Regeneration) Act**. However, on analysis I consider that the difficulties with that argument are overwhelming.
9. First, the defendant is a company. It is difficult to imagine how a company could ever be a *residential* occupier; a company might occupy premises for commercial purposes, but the use of the word "residential" seems to me to convey a requirement that, for the exemption to bite, a real person must be living in – residing in – the house or flat in question. In those circumstances I simply do not see how the defendant company could be a residential occupier. The exemption therefore does not apply in any event.
10. Secondly, the defendant company was engaged in property development, at least according to its name and the evidence before the Adjudicator. That was, apparently, its stated purpose. That would therefore appear to

negate the suggestion that the work was being carried out by or on behalf of a residential occupier. Certainly that was the conclusion that the adjudicator reached.

11. Thirdly, the defendant company was not, as a matter of fact, the registered owner of the properties. One was owned by Mr. Jason Mencer, as an individual. There is some suggestion that the defendant was the registered owner of the other property, rather than Mr. Mencer's father, but there was no evidence of that and it was contrary to the findings of the Adjudicator. In one sense, that merely creates further confusion and means that I should place even more emphasis upon the identity of the contracting parties.
12. As to that, Mr Mencer might well have been in a better position if he had been the party contracting with the claimant. However, when the claimant originally started the adjudication, it named Mr. Mencer in person as the respondent. He was quick to point out that at no time had he contracted with the claimant directly. He said that the contract was between the claimant and the defendant company. On the documents that I have seen, he was right to do so. As a result, the first adjudication was abandoned and the second adjudication was started in the right company name. Therefore it seems to me that Mr. Mencer cannot now argue that his (possible) status as a residential occupier should or could affect the dispute resolution provisions of the contract to which he was not a party, and in respect of which he had no formal status or role. If the defendant company was a party to the contract, then he was not, so his possible status as a residential occupier is irrelevant.
13. Accordingly, for those reasons I consider that the residential occupier exemption under the 1998 Act does not apply to the defendant company and the Adjudicator therefore had the necessary jurisdiction to reach the decision that he did. I find that the Adjudicator was right to reach that same conclusion.
14. That brings me on to the question of fairness. A point made by Mr. Mencer before me this morning was that, although he had had the opportunity to put in submissions to the Adjudicator, he had been obliged to do that in a very short space of time, when he had not been able to take advice from all those from whom he would have wanted to seek assistance. In addition, he said, there were communication problems during the adjudication, such that he felt he did not always receive the relevant documentation.
15. I take that latter point first. It is plain that there were communication problems. The Adjudicator dealt with those expressly at paragraphs 3.4 to 3.9 of his decision. It appears that the Adjudicator was of the view that at least some of those problems were self-inflicted by the defendant. For example, he points out at paragraph 3.4 that all the communications had been served on the defendant's company registered address because they had no fax and no e-mail, and that the claimant (and indeed the Adjudicator himself) often had to leave voicemail messages as a consequence. The Adjudicator did note, however, that the defendant had the benefit of advice from solicitors.
16. In addition the Adjudicator noted that, although the defendant did not comply with his original timetable, he granted them further time and they were able to put in submissions dealing with the points in issue. That was confirmed to me this morning by Mr. Mencer. It seems clear from reading those paragraphs that the Adjudicator properly took on board the communication issue but, since he was given a set of submissions by the defendant dealing with the points in dispute, he was entitled to go on and deal with the substantive matters in dispute.
17. The other point taken by Mr. Mencer, that is to say the question of the speed with which he was obliged to produce information, is, I am afraid, a complaint often heard on adjudication enforcement applications. It is an inherent feature of adjudication that the Adjudicator is obliged to produce his decision quickly. That means he has to put pressure on the parties to ensure that they provide the necessary information to him just as promptly. Adjudication does not work if the parties take too long to provide information to the Adjudicator. The corollary of that is that parties often feel under pressure to do things more quickly than they would like. However, as I have said, that is simply an inevitable consequence of the adjudication process.
18. In those circumstances it seems to me that, not only did the Adjudicator have the necessary jurisdiction, but there is no question of unfairness or any breach of the rules of natural justice. That therefore means that, in accordance with the authorities cited above, I ought to enforce the decision of the Adjudicator.
19. Mr. Mencer pointed out that the defendant company had a number of points that it wanted to make against the claimant and was in the course of preparing a claim. I made it plain that, of course, the defendant was perfectly entitled to bring claims against the claimant, including a claim that the claimant has been overpaid. None of that, however, affects the defendant's obligation to make payment now to the claimant in accordance with the Adjudicator's decision. That decision is temporarily binding, and the fact that it might one day be challenged by the defendant, as Mr. Mencer has indicated it will be, does not detract from the obligation to pay the sums awarded.
20. Accordingly, I give judgment in the amount claimed, namely £18,343.06, together with the VAT element on the fees and interest of £245.23. Thus the total judgment sum is £18,928.19

MR. JAMES THOMPSON (instructed by Messrs. IBB Solicitors) for the Claimant
MR. JASON MENCER appeared In Person for the Defendant