

JUDGMENT : His Honour Judge David Wilcox : TCC. 7th November 2006

This is an application for summary judgment, and the CPR part 24 to enforce the adjudication award made by Mr Stephen Rudd on the 24th of August 2006 in respect of adjudication number two.

Background

1. The Claimants are project managers who were employed by the Defendants.
2. The project was in Bristol to carry out conversion works to office premises at 30 to 38, Baldwin Street, Bristol.
3. The claimants were engaged through the defendant's quantity surveyors, Beaufort Ellis Associates, following discussions. An agreement as to fees was concluded, which is evidenced in a letter dated 18th of February 2005. It states:-
4. *Just a line to confirm our recent meeting in the (...) your " on-site " Construction Manager's fee for your overall involvement in the above project, currently programmed for 65 weeks on-site will be 3% on the total of all the work and the prelim content of the project, which will be incentivised (I suggested 2.5% monthly on a valuation gross then 0.5% at end of satisfactory completion in a week(s) to be specified and agreed)*
5. This agreement was the forerunner to, and would be effective when the project commenced.
6. Development works on the project commenced on 3rd of May 2005. On the 11th of August 2005 the parties entered into a separate contract on the JCT Standard Form of Domestic Sub-Contract 2002 edition under which it was agreed that the Claimant would act as Construction Manager, and that the Defendant would pay the Claimant's costs, including overheads. The Defendant accepts, and it is common ground that the Fee Contract was a separate contract from the Management Contract and that the Fee Contract was purely in respect of the Claimant's profit element, whereas the Management Contract related to the Claimant's costs.
7. It is common ground that whilst the fee contract and the management contracts were separate contracts nevertheless during the course of the project works both parties approached their relationship as if there was in fact only one contract.
8. On 28th February 2006 the Defendant terminated the Claimant's retainer as Construction manager. The Defendant asked the Claimant to leave the site with immediate effect. The effect of the termination was to terminate both the Fee Contract and the Management Contract.
9. On the seventh of March 2006. The Claimant's wrote to the defendants, asserting that....." *your purported determination of the contract is a repudiatory breach of contract. We confirm that our client has accepted this repudiation and has left site .As a result our client is entitled to damages arising from your breach of contract. The measure of such damages is to put our client back in the position in which it would have been but for the breach of contract.*
10. *We enclose a schedule prepared by our client, which shows the value of these damages as £152,606.34 plus VAT £ 179,312,000. 45p.....*
11. *Our client is also entitled to its loss of profit. As you are aware, a figure of 3% has been agreed for profit based upon, initially, the Cost Plan and to be recalculated upon the final payments made to the various works contractors. The current estimated Contract Sum is £4.2 million our client is therefore entitled 3% of the figure, less the amount paid to date.....*
12. *Our client, now requires payment of the sums which the following your breach of contract now become due immediately.. We must inform you that if payment is not received by Friday 17th of March, 2006 our client will take whatever measures or proceedings it considers necessary to recover monies due.*
13. Both the letter and the schedule clearly made reference to a claim for loss of profit, which is referable to the Fee Contract.
14. Following the letter of the seventh of March 2006 the Defendant paid some sums towards the costs outstanding under management contract on the 28th of March 2006 but paid none of the management fee claimed in the letter of the seventh of March 2006.
15. Without prejudice correspondence then followed, that by consent has been edited, which indicates that whilst the parties had operated on the basis that a management fee was payable neither at that stage had appreciated that there was a separate side agreement governing the payment of the management fee representing the profit element for the Claimants. On the 27th of April 2006 Claimant's solicitors were able to remedy that omission and sent a copy of the letter 18th February 2005 to the Defendant's solicitors.
16. There after they could be no doubt that the Claimants sought payment of monies for claimed management costs and overheads, and profit referable to both the Management Agreement and to the Fee Contract.
17. On 22nd of May at 2006 the Claimants wrote to the Defendants, confirming that no payment had been received and on the 23rd of May 2006 the Defendant's solicitors confirmed that they were instructed to accept service of proceedings.
18. They can be no doubt that a dispute then existed both as to the management costs and overheads and profit claim.

19. The Claimant served two separate notices of adjudication in respect of that the Management Contract, giving rise to adjudication number one and the Fee Contract giving rise to adjudication number two.
20. Mr Stephen Rudd was appointed adjudicator, in respect of both adjudications by RICS. He considered the two referral notices served by the Claimant, one for each adjudication, and the two responses from the Defendants.
21. In respect of adjudication number two, the claim for profit there was a challenge to the jurisdiction of the adjudicator on the grounds that no dispute had arisen and that there was no contract under which any dispute could arise.
22. The first submission was repeated before this Court. It is without merit. The second was not pursued.
23. The adjudicator considered both adjudications together, but made separate awards giving full reasons for them. It was clearly good sense to consider the claims together since they arose out of the same transaction and set of facts.

The Application

24. This Application for Summary Judgment under CPR part 24 arises out of adjudication number two, of the claim for profit in respect of the Fee Contract.
25. The adjudicator on the 31st of August of 2006 ordered that the defendant pay the claimant damages of £72,848 within seven days and don't the defendant gave further damages of £21,000 on practical completion of the works or on the 30th of November 2006, whichever was a sooner date and the heir to the defendant pay at the adjudications fees and expenses in the sum of £7,417.19.
26. The defendant and has not paid any of the sums awarded to the claimant. Neither has the adjudicator been paid by the defendant submitted that
27. The defendant contends that the adjudicator lacked jurisdiction in respect of the profits claim, because of there was no dispute. I reject that submission (see paragraph 18).
28. I reiterate what was said, in *All In One Building and Refurbishments Limited and Makers UK Ltd.* 2005 EWHC 2493 (TCC), at paragraph 21
29. *it is evident that the proper approach is to adopt a rigorous and commonsense approach, bearing in mind that these issues arise in a comparatively modest construction dispute and there is no warrant for being overly technical when considering what labels are used when identifying whether and what dispute has arisen. The court must look to the substance of the claim identified and denied, and not the descriptive labels variously attached by lay persons and professionals*
30. It is contended on behalf of the Defendant that the adjudicator's award is fatally flawed, because there has been a breach of the rules of natural justice in that a vital part of the defendant's case was not considered at all by the adjudicator in relation to adjudication number two. Mr Neill submits that the adjudicator failed to deal with the Defendant's case that the Claimant's loss should be reduced or mitigated by the fees which the Claimant would have been able to earn in the period between the date of termination, the 28th February 2006 and the date of practical completion.
31. Mr Neill contrasts the approach of the adjudicator to the issue of mitigation of damage in adjudication number one with that in adjudication number two. In the first, at paragraphs 16.7.1 to 16.7.9 he considered at length, the mitigation argument in relation to overheads and costs and made a significant reduction on the basis that there could on the evidence have been earlier redeployment of resources used on site than contended for by the Claimants. Mr. Neill correctly observes that the adjudicator does not record that he gave the same consideration to the issue of mitigation in relation to the profits claim. He submits that this omission demonstrates that he did not consider this aspect of the Defendant's response.
32. Miss McCafferty accepts that the adjudicator did not expressly deal with this aspect of the Defendant's case in the second adjudication and submits that there was no obligation on the claimant to mitigate the claim which is for loss of profit. She relies upon a passage in Chitty 29th edn. at paragraph 26-103.
33. I do not accept that this supports her proposition. But in any event it is not demonstrated that this was the approach adopted by the adjudicator.
34. The reality is that the adjudicator issued two awards on the same occasion essentially considering aspects of the same transaction with common submissions as to mitigation of damages. It is unlikely that that he did not consider them in relation to both claims as he was asked to, having regard to the conscientious and careful way in which he dealt with the claims and defences as a whole.
35. What is not permissible is for this court to minutely examine the reasons for an award to see if an adjudicator might have made a mistake.
36. In *Carillion Construction Ltd v Devonport Royal Dockyard* (2005) 1 BLR 324 CA Lord Justice Chadwick said:-
The objective which underlies in the Act and the statutory scheme requires the court to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which had gone about its task is obviously unfair. It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator.... in short in the overwhelming majority of cases, the proper course for the party who is unsuccessful in an adjudication under the scheme must be to pay the amount that he has been

ordered to pay by the Adjudicator. If he does not accept the adjudicator's decision as correct whether on the facts or law he can take legal or arbitration proceedings, in order to establish the true position to seek to challenge the adjudicator's decision on the ground that he has exceeded his jurisdiction or breached the rules of natural justice ... save in the plainest cases) is likely to lead to a substantial waste of time and expense..... it is only too easy in a complex case For a party, who is dissatisfied with the decision of an adjudicator to go through the adjudicator's reasons and identify points upon which to present a challenge under the labels "excess of jurisdiction or" breach of natural justice". It must be kept in mind that the majority of adjudicators are not chosen for their expertise as lawyers. Their skills are as likely, (if not more likely to lie in other disciplines. The task of the adjudicator is not to act as arbitrator or judge the time constraints within which he is expected to operate are as proof of that. The task of the adjudicator is to find an interim solution, which meets the needs of the case.....

Where there has been any substantial waste of time and expense the Court has sufficient powers to make costs orders reflecting such abuse.

37. The Defendant finally contends that a defence of set-off was not considered by the adjudicator. Set- off could only arise if the contention of the Defendant that it was at the Claimant who repudiated the contract had substance. In great detail, the adjudicator reviewed the evidence relied upon by the defendant to support this contention, and at paragraph 16.1.10 of his award rejected all the allegations relied upon by the Defendant. There was no set- off to consider.
38. I hold that the Claimant is entitled to summary judgment as claimed.

Lynne McCafferty (instructed by Clarke Willmott) for the Claimant
Robin Neill (instructed by Lindleys) for the Defendant