Neutral Citation Number: [2017] EWHC 1066 (TCC)

Case No: HT-2017-000063

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/05/2017

Before :

HIS HONOUR JUDGE MCKENNA

- -

Between :

Dawnus Construction Holdings Limited	**Claimant**
- and -	
Marsh Life Limited	**Defendant**

- -
- -

Crispin Winser (instructed by **Douglas-Jones Mercer Solicitors**) for the **Claimant**
Michael Curtis QC (instructed by **Silver Shemmings LLP**) for the **Defendant**

Hearing date: 4th May 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE MCKENNA

His Honour Judge McKenna:

Introduction

1. This is an application dated 10th March 2017 by the Claimant, Dawnus Construction Holdings Limited, for summary judgment for the enforcement of an adjudication decision given by Mr Peter Collie, a barrister practising from 3 Paper Buildings ("the Adjudicator"), on 6th March 2017 (revised on 9th March 2017) ("the Decision") in which the Adjudicator directed the Defendant, Marsh Life Limited, to pay the Claimant the total sum of £1,038,018.30 plus VAT. The Adjudicator also directed the Defendant to pay his fees and expenses in the sum of £43,597.00 plus VAT.

2. The Defendant has failed to pay the sum ordered either to the Claimant or indeed to the Adjudicator and the Claimant claims the contractual sum awarded together with ongoing interest. The total amount due as at the date of the hearing is £1,249,674.50 (inclusive of VAT and interest).

3. The Claimant's application is supported by two witness statements filed by Philip Graham, the Claimant's solicitor, dated respectively 10th March and 21st April 2017. The Defendant for its part relies on a witness statement dated 13th April 2017 from William James Marsh, a director of the Defendant company.

4. At the hearing, the Defendant sought to defend the application on the grounds of a failure by the Adjudicator to apply the rules of natural justice as a result of an alleged failure to consider and deal with defences put forward by the Defendant in what has been described as the SSE Cable and Winter Works loss and expenses claims, leading counsel for the Defendant having abandoned all but those arguments from the plethora of criticisms of the Decision made by Mr Marsh in an unnecessarily long and discursive statement.

5. The Claimant for its part took an initial point and submitted that the court did not need to deal with the merits of the breaches of natural justice challenge because of the existence of a threshold defence to the Defendant's challenge in the light of an invitation by the Defendant to the Adjudicator to revise his Decision on various grounds, including the alleged breaches of natural justice. In short, by inviting the Adjudicator to correct errors in the Decision under the slip rule it was said that the Defendant was accepting the validity of the Decision and thereby electing to forego any opportunity it might otherwise have had to challenge the decision, there having been no general reservation of rights.

6. That raised an important point of principle and, for that reason, having informed the parties that I would enter summary judgment for the Claimant, I reserved judgment.

Factual background

7. The Defendant is a special purpose vehicle which was set up to develop a site known as the Lifeboat Quay in Poole. By a JCT 2011 Design & Build Contract dated 25th July 2014 ("the Contract") the Defendant engaged the Claimant to design and build a hotel together with retail and restaurant units on the site ("the Project"). The Contract price was approximately £6.9 million. The works started in September 2014 and the original completion date was 13th July 2015.

8. The Project suffered from various delays including, for the purposes of this application, the discovery of an incorrectly placed electricity cable belonging to SSE which led to the imposition of an exclusion zone over part of the site and impeded the progress that the Claimant was able to make until the cable had been re-routed. The delays caused by the SSE Cable issue pushed weather sensitive works into the winter which caused further delays.

9. In November 2016, by which stage the Project was effectively complete and a number of commercial tenants had moved in, the Contract was terminated in disputed circumstances.

10. Various disputes have arisen between the parties and there have been a total of four adjudications, the fourth of which, a referral, it is to be noted, by the Defendant to the Adjudicator, sought a valuation of the account upon termination and is the one with which this court is concerned.

11. It is fair to say that Mr Marsh's statement is long and detailed and as counsel for the Claimant submitted, strays well beyond the proper ambit of a statement in opposition to a claim for the enforcement of an adjudication decision. The thrust of Mr Marsh's evidence is that he is aggrieved by the substance of the Adjudicator's decision. However, as I have indicated, by the time of the hearing of the Claimant's application, the ambit of the Defendant's attack on the Adjudicator's decision had been focused much more narrowly to the SSE Cable and Winter Working loss and expense claims.

12. The Adjudicator issued his Decision on 6th March 2017 following which both parties made submissions to him inviting him to correct alleged errors in the Decision. On 7th March 2017 the Claimant invited the Adjudicator to correct a mathematical error which had the effect of increasing the net sum payable to the Claimant, whilst on 8th March 2017 the Defendant invited the Adjudicator to revise his Decision based on various matters, including the alleged breaches of natural justice, which form the subject matter of their opposition to the application for summary judgment. In his email of 8th March 2017, after quoting paragraphs 96.1, 96.2, 96.5 and 96.7 of the Decision (reproduced below) Mr Silver (the Defendant's solicitor) wrote as follows:

"This we believe to be a slip. At no time did Marsh Life argue that Dawnus was not entitled to an extension of time. As in the Referral, within its Reply Marsh Life maintained that Dawnus was entitled to an extension of time for the SSE Delay Event, and that this was a relevant event being the carrying out by a Statutory Undertaker of Work Pursuance of its Statutory Obligations in relation to the Works. Marsh life argued, however, that there was no relevant matter entitling the recovery of loss and expense for such an event. Further, it was Dawnus who argued that the event was not a delay associated with the carrying out by a Statutory Undertaker of Work Pursuance of its Statutory Obligations in relation to the Works no doubt recognising that such event was not a relevant matter."

Similar comments apply to Delay Event 3 Winter Working Effect in that Marsh Life maintained that this was a relevant event being the carrying out by a Statutory Undertaker of Work Pursuance of its Statutory Obligations in relation to the Works.

In that you decided in favour of Marsh Life at paragraph 96.7 and that both the Delay Event 2 and Delay Event 3 were the carrying out by a Statutory Undertaker of Work

Pursuance of its Statutory Obligations in relation to the Works we believe you have made slips in including sums for loss and expense in the Scott schedule whereas you had intended to include nil monies against both.

Further you have allowed for the recovery of O/H and Profit for such period whereas again we believe you intended to include nil monies for such periods.

We, therefore, ask that you correct these slips."

13. On 9th March 2017 the Adjudicator produced a revised decision correcting the mathematical error and increasing the net sum payable to the Claimant from £972,050.30 to £1,038,018.30. At the same time he rejected the points raised by the Defendant.

Approbation/Reprobation

14. The doctrine of election prevents a party from "approbating and reprobating" or "blowing hot and cold" in relation to an adjudicator's award. The point was made by Dyson J, as he then was, in *Macob Civil Engineering Limited v Morrison Construction Limited* (1999) BLR 93 at 99 as follows:

"What the defendant could not do was to assert that the decision was a decision for the purposes of being the subject of a reference to arbitration but was not a decision for the purposes of being binding and enforceable pending any revision by the arbitrator…once the defendant elected to treat the decision as one being capable of being referred to arbitration, he was bound also to treat it as a decision which was binding and enforceable unless revised by the arbitrator."

15. In *Shimizu Europe Limited v Automajor Limited* [2002] BLR 113, albeit obiter, HHJ Richard Seymour QC said as follows:

"26. Although it is not strictly necessary to do so in the light of the conclusions which I have already expressed, I should like to comment on the alternative case put forward by Mr. Constable, that even if Mr. Haller had exceeded his jurisdiction in making the Award, any right which there would otherwise have been to raise objection on behalf of Automajor had been waived by making part payment of the sum awarded by Mr Haller and/or by inviting him to correct the Award…"

29. In my judgment it cannot be right that it is open to a party to an adjudication simultaneously to approbate and to reprobate a decision of the adjudicator. Assuming that good grounds exist on which a decision may be subject to objection, either the whole of the relevant decision must be accepted or the whole of it must be contested. It may, of course, be important correctly to characterise what constitutes a decision of the adjudicator. It is likely that, to be relevant for the purposes now under consideration, a decision will be the answer to a question referred to the adjudicator, rather than a conclusion reached on the way to providing such an answer…

30. In the present case Mr. Haller's error, if such it was, was committed in the cause of reaching a conclusion as to how much was due to Shimizu. It was not a decision on a separate question which had been referred to him. In my judgment by inviting Mr. Haller to correct the award under the slip rule Berwins on behalf of Automajor

accepted that the award was valid. It is true that in its letter to Mr. Haller dated 6 November 2001 Berwins asserted that the Award contained an error which went to Mr. Haller's jurisdiction, but, if that were right, it would follow that the Award, or the relevant part of it, was a nullity. There will be nothing to correct. I accept the submission of Mr Constable that the invitation to Mr. Haller to correct the Award under the slip rule is only consistent with recognising it as valid. I also accept the submission of Mr. Constable that by paying part of the sum the subject to the Award Automajor elected to treat the Award as valid. Otherwise there was no need to pay Shimizu anything, and it was not appropriate to do so. Consequently, had it been necessary to do so, I should have held that Automajor had elected to forego any opportunity which it might otherwise have had to object to the Award."

16. In *Laker Vent Engineering v Jacobs* [2014] EWHC 1058 (TCC) there were three separate challenges; two of which were as to jurisdiction and one was as to consistency, which was at least in part an allegation of breach of natural justice. Ramsey J decided, with some hesitation, that a party could rely on a general reservation of jurisdiction when inviting an adjudicator to make corrections under the slip rule but, importantly at paragraph 98, he concluded that in respect of the non-jurisdictional challenge, namely inconsistency, it was not covered by the general reservation such that the defendant was precluded from challenging the decision having sought to rely on the decision for the purposes of the application to correct under the slip rule.

17. The Defendant for its part sought to draw a distinction between expressly and impliedly acknowledging that the Adjudicator had jurisdiction and challenging the Decision on the basis of the rules of natural justice, such that in the instant case, whilst it might be that by inviting the Adjudicator to exercise his powers under the slip rule, the Defendant had thereby waived or elected to abandon its right to challenge enforcement on grounds of jurisdiction it had not done so on the different ground of a breach of the rules of natural justice. Furthermore, it was said that the only way of sensibly reading the section of Mr Silver's email relating to the SSE Cable and Winter Working delay was that he was identifying a natural justice failure by the Adjudicator to deal with the Defendant's defence to those claims and, implicitly, that if the Adjudicator did not make the correction then the Defendant would challenge the Decision.

18. To my mind the distinction which the Defendant seeks to draw is conceptually unsound and contrary to the authorities. It presumes that there is a clear distinction between excess of jurisdiction and breach of the rules of natural justice when, in reality, there is often no such clear distinction, with challenges frequently being framed in the alternative (*Pilon v Breyer* [2010] EWHC 837 (TCC) at paragraph 19 being such an example.) In both cases the effect is that the Decision is said to be a nullity. The Defendant could have, but did not, expressly reserve its right to pursue a claim of breach of the rules of natural justice when inviting the Adjudicator to make corrections under the slip rule. In the absence of so doing, having regard to all the circumstances of the case, by inviting the Adjudicator to exercise his powers under the slip rule, in my judgment the Defendant waived or elected to abandon its right to challenge enforcement of the Decision since it had thereby elected to treat the Decision as valid. It cannot be right that in such circumstances it is open to a party to an adjudication simultaneously to approbate and to reprobate a decision of the

Adjudicator. Assuming that good grounds exist on which a decision may be subject to objection, in the absence of an express reservation of rights, either the whole of the relevant decision must be accepted or the whole of it must be contested. It follows in my judgment that the Defendant is now precluded from challenging the Decision and the Claimant is entitled to succeed in its application for summary judgment.

19. If I am wrong about that I turn now to deal with the substantive arguments raised as to breach of the rules of natural justice albeit briefly.

The relevant principles

20. The relevant principles were recently summarised by Coulson J in *Hutton Construction v Wilson Properties* [2017] EWHC 517 (TCC) at paragraph 3 as follows:

"The starting point, of course, is that, if the adjudicator has decided the issue that was referred to him, and he has broadly acted in accordance with the rules of natural justice, his decision will be enforced: see Macob Civil Engineering Limited v Morrison Construction Limited [1999] BLR 93. Adjudication decisions have been upheld on that basis, even where the adjudicator has been shown to have made an error: see Bouyques (UK) Limited v Dahl-Jensen (UK) Limited [2000] BLR 522. Chadwick LJ summarised the principal reason for this in Carillion Construction Limited v Devonport Royal Dockyard Limited [2006] BLR 15: "the need to have the 'right' answer has been subordinated to the need to have an answer quickly.""

21. Coulson J continued as follows at paragraph 37:

"Finally, it is appropriate to stand back and to consider the ramifications of all this. The adjudicator's decision ran to 73 closely-typed paragraphs. It was the product of an adjudication which lasted from 11 October to 15 November 2016. I have only seen some of the documents relating to the adjudication but they fill more than one file. It cannot be right, absent any consent from the claimant, to let the defendant shoehorn into the time available at the enforcement hearing the entirety of that adjudication dispute. Such an approach would mean that, instead of being the 'de facto' dispute resolution regime in the construction industry, adjudication would simply become the first part of a two-stage process, with everything coming back to the court for review prior to enforcement. That is completely the opposite of the principles outlined in Macob, Bouyques and Carillion and cannot be permitted."

22. The authorities have consistently emphasised that, for a breach of natural justice to be a bar to enforcement, the breach must be "plain", "significant", "causative of prejudice" or "material". In *Cantillon v Urvasco* [2008] BLR 250 Akenhead J considered the earlier authorities and summarised the applicable principles as follows at paragraph 57:

"*From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases:*

a) It must first be established that the adjudicator failed to apply the rules of natural justice;

b) Any breach of the rules must be more than peripheral; they must be material breaches;

c) Breaches of the rules will be material in cases where the adjudicator has failed to bring the attention of the parties a point or issue which they ought to have given the opportunity to comment upon which it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.

d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves the question of degree which must be assessed by any judge in any case such as this.

*e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment on or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of **Balfour Beatty Construction Company Ltd v The Camden Borough of Lambeth** was concerned comes into play. It follows that, if neither party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto."*

The challenge

23. It is common ground that the cause of the SSE Cable delay was the discovery of the high voltage cable under the Site resulting in the Works being suspended. The Winter Working delay was the knock on effect. Initially the Claimant sought an extension of time for the delay on the basis that the delay was caused "by the carrying out by a Statutory Undertaker of work in pursuance of its statutory obligations in relation to the Works." However, in the fourth adjudication, the Claimant sought loss and expense for both delay events on the ground that the regular progress of the Works had been affected by a Relevant Matter either, "changes and any other matters or instructions which under these Conditions are to be treated as, or, requiring, a change" (Clause 4.21.1), or "delay in receipt of any permission or approval for the purposes of Development Control Requirements necessary for the Works to be carried out or proceed, which delay the Contractor has taken all practicable steps to avoid or reduce" (Clause 4.21.4).

24. The Defendant's defence to the claim for loss and expense in respect of the SSE Cable delay, put forward for the first time in its reply in the adjudication, was that the delay was not caused by either of the above matters but that instead it was caused by the carrying out by a Statutory Undertaker of work in pursuance of its statutory obligations in relation the Works. That is to say that it was a Relevant Event under Clause 2.26.7, but that it was not a Relevant Matter under Clause 4.21, with the result that the Claimant was not entitled to loss and expense. This was a very significant departure from the position it had adopted previously.

25. The Claimant's response, in its Rejoinder, argued in the alternative that the loss and expense payable had been agreed, that the Defendant was estopped by convention and /or representation from resiling from its agreement that loss and expense was payable and /or contending that there was no entitlement and in any event it was a Relevant Matter under the Contract.

26. Similarly, so far as the Claimant's claim for loss and expense in relation to the Winter Working claim was concerned, the Claimant's claim was that the cause of the delay was any impediment prevention or default whether by act or omission by the Employer or any Employer's person so that the Claimant was entitled to recover the loss and/or expense under Clause 4.21.5. The Defendant's defence was that the cause of the delay was again the carrying out by a Statutory Undertaker of work pursuant to its statutory obligations in relation to the Works, and that this was a Relevant Event under Clause 2.26 but not a Relevant Matter under Clause 4.24, so that again the Claimant was not entitled to recover loss and/or expense.

The Decision

27. At paragraph 51 of the Decision, the Adjudicator dealt with the SSE Cable loss and expense claim and at sub-paragraph 3 he indicated as follows:

"*For the same reasons as I decided the extension of time I decide that the Claimant have an entitlement to loss and expense.*"

28. In other words, in order to find the reasons why the Adjudicator decided that the Claimant was entitled to loss and expense it is necessary to look at that part of his decision that related to the claim for an extension of time.

29. The Adjudicator dealt with extensions of time at paragraph 89 and following of the Decision and at paragraph 96 he concluded as follows:

Delay Event 2 SSE Cable Resequencing

"96.1 The parties appear to have agreed that this caused a 15 week delay to the Works.

96.2 However, in the Reply Marsh Life raised an argument that the event did not entitle Dawnus to any extension of time or loss and expense because SSE are not strictly statutory undertakers.

96.3 Before considering the argument, it is worth noting that even on Marsh Life's version of facts. A cable belonging to SSE was discovered to have encroached onto the site unbeknown to either party or SSE. The cable was actually located where excavation and piling was to occur. Marsh Life admit that this fact delayed the project by 15 weeks and caused delay and disruption. If Dawnus had not resequenced the Works to split the site to proceed on the part of the site that would not thereby be affected by the cables, the delay would have been 35 weeks. The facts are set out in a document dated 14 April 2016 by Mr Rowe to Marsh Life.

96.4 On that basis, an extension of time was agreed of 15 weeks and loss and expense applied for.

96.5 However, in the Reply in this adjudication Marsh Life seek to argue that SSE are not statutory undertakers and so as Dawnus cited work by Statutory Undertakers as the grounds for their entitlement no such entitlement arises.

96.6 Dawnus point out that Marsh Life accepted the delay was their responsibility and if this delay was not caused by Statutory Undertakers then the discovery of a cable preventing Dawnus from working as SSE banned them from working within three metres of the cable under statutory powers as an Electricity distributor under the Electricity Act 1989.

96.7 I reject Marsh Life's argument. SSE are an Electricity Distributor under the Electricity Act 1989 and as such are a Statutory Undertaker for the purposes of the Contract. If I am wrong about this I would have decided that Dawnus were entitled as the Employer had imposed obligations in relation to the specific order the Works had carried out per Clause 4.21.1 and 4.21.4.

96.8 Marsh Life agreed the extension of time and cannot now deny the extension. As such I decide that Dawnus are entitled to 15 weeks extension of time."

Discussion

30. What is said on behalf of the Defendant, based on a close analysis of the pleadings before the Adjudicator, is that if there has been, as it is submitted there has been, a failure to consider a defence properly put forward on the Defendant's behalf, that is a plain breach of the rules of natural justice and that the breach is plainly material as it goes to a very substantial part of the overall award. The Adjudicator simply failed to deal with the Defendant's defence that the cause of the delay was the carrying out by a Statutory Undertaker of work pursuant to its statutory obligations in relation to the Works and that it was a Relevant Event under Clause 2.26 but not a Relevant Matter under Clause 4.24.

31. True it is that at paragraph 96.5 the Adjudicator misunderstood the nature of the Defendant's argument. That is not, however, the end of matters. It has to be borne in mind that what the Adjudicator was specifically asked to determine was the issue of loss and expense and, properly analysed, that is exactly what he did. The Defendant argued that contractually there was no entitlement to loss and expense and it is plain from his Decision that the Adjudicator rejected that argument and concluded that the Claimant was indeed entitled to loss and expense as the SSE Cable delay was a Relevant Matter by virtue of Clause 4.21.1 and/or 4.21.4. He says as much in paragraph 96.7. The Defendant may not like that conclusion but to my mind it is stuck with it.

32. So far as the Winter Working delay is concerned the Defendant's complaint is founded on the wording of paragraph of 103.1 of the Decision which is in these terms:

"Dawnus claim loss and expense for the delays. Marsh Life do not dispute the entitlement but do dispute the proof of loss."

33. It is common ground that this paragraph too is inaccurate in that the Defendant did dispute the Claimant's entitlement to loss and expense on the basis that the true cause of the delay was the carrying out of a work by a Statutory Undertaker which although

a Relevant Event was not a Relevant Matter. Again it is said that, in breach of the rules of natural justice, the Adjudicator failed to deal with a defence properly put, but instead dealt with a defence which was never raised.

34. However, properly analysed, the Adjudicator accepted the Claimant's contention that there was a contractual entitlement to the Winter Working claim which was not a discrete standalone delay event. It stood or fell with the Claimant's ability to seek loss and expense in respect of the SSE Cable delay. Having found that the Defendant was liable to pay loss and expense in respect of the SSE Cable delay the Adjudicator rejected the only defence raised and again, as it seems to me, the Defendant is stuck with that conclusion.

Disposal

35. It follows in my judgment that the Claimant is entitled to summary judgment.

36. I trust that the parties will be able to agree the terms of an Order which reflects the substance of this judgment including costs.

37. If there are any outstanding issues then the parties are asked to file and serve short skeleton arguments identifying the outstanding issues and their respective arguments in respect of them, to be served 24 hours prior to the date fixed for the handing down of this judgment.

38. Finally I would like to take this opportunity to thank both counsel for all their assistance in this application.