



Case No: HT/2016/000192

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2016] EWHC 3901 (TCC)**

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 16 August 2016

BEFORE:

MS FINOLA O'FARRELL, QC
(Sitting as a Deputy Technology and Construction Court Judge)

BETWEEN:

J & M RESURFACING LIMITED

Claimant

- and -

ORBITAL SITE SERVICES LIMITED

Defendant

REPRESENTATION not provided

JUDGMENT
(approved)

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1. THE DEPUTY JUDGE: This is an adjudication enforcement and summary judgment application by the claimant against the defendant pursuant to Part 24 of the Civil Procedure Rules to enforce the decision of Mr Matthew Bastone dated 12 October 2015.
2. The defendant resists enforcement of the decision on the grounds that under the contract the defendant was to pay the claimant 33 per cent at the outset, 33 per cent on completion of the works and 34 per cent 30 days after completion. The defendant's case is that the works were not complete, as found by the adjudicator, and therefore the sums that were claimed in the adjudication simply were not due. It follows that the adjudicator made a mistake in deciding that, despite the contract being that the second and third invoices would not fall to be due until the works were complete, instead decided to deduct the cost of the remedial works from the invoice's claim and award the balance to the claimant.
3. The factual background to this matter is that on 20 February 2015 the parties entered into a contract under which the claimant agreed to carry out road surfacing and marking works to an access road and car park at Broadstairs Retail Park, Margate Road in Kent, for a fixed price of a lump sum of £45,885. The contract was contained in or evidenced by the defendant's supply subcontractor's order dated 10 February 2015, which was agreed and signed by the claimant on 20 February 2015. The payment terms set out in that order were 33 per cent at the start of the project, 33 per cent on completion of the project and 34 per cent at 30 days following the completion of the project following the works being signed off by the client.
4. The contract contained at clause 17 of the terms and conditions an adjudication agreement, namely that both parties have a right to adjudication over any contractual dispute, the timetable for which will be as set out in the Construction Act and the adjudicator will fulfil all duties set out in this Act. The parties going to adjudication will deposit £1,000 towards the costs pending the adjudicator's findings and division of his costs. The adjudicator will be as stated for the main contract or nominated by the RICS. In April 2015 there was a further order on the same terms and conditions issued by the defendant in respect of pothole repairs to the car park.
5. The works were carried out in about March and April 2015 but disputes arose as to the claimant's claim for payment and the defendant's claim that the works were incomplete and defective.
6. On 2 September 2015 the claimant served a notice of adjudication in respect of its claim for payment for the balance of sums due in respect of the works carried out. The adjudicator nominated by the RICS was Mr Matthew Bastone. The referral notice was served by the claimant on 7 September 2015. The response was served by the defendant on 22 September 2015 and the reply was served by the claimant on 1 October 2015. On 6 October 2015 the adjudicator visited the site to carry out an inspection of the works which was attended by both parties, following which the parties were given an opportunity to make further submissions. Time for the adjudicator's decision was extended by seven days as recorded in paragraph 9 of his decision.

7. On 12 October 2015 the adjudicator issued his decision, in which he determined that the claimant was entitled to the following sums: firstly, the invoices claimed less a deduction in respect of incomplete and defective works including VAT at £26,635.54; interest and statutory compensation at £943.61; and then finally, the adjudicator's fees and expenses plus VAT, £7,983.75; a total of £35,562.90. The adjudicator's decision was not satisfied by the defendant and the claimant today seeks to enforce that decision.
8. It is conceded by Mr Christensen for the claimant that the sums set out in the Particulars of Claim are incorrect in that VAT has been added to the principal sums twice, and therefore the sums claimed today are: £26,635.54 in respect of the principal sum ordered by the adjudicator; interest in the sum of £943.61; adjudicator's fees and expenses plus VAT, £7,983.75, together with VAT on the adjudicator's fees of £1,596; plus interest from 12 October 2015 (that is the date of the decision to today), £1,597.53; a total of £38,757.18.
9. The claimant's submission today before the court is simple. It is that the adjudicator decided the dispute referred to him, the court should enforce the adjudicator's decision, it is binding on the parties (at least on an interim basis) and any disputes as to the correctness whether in fact or in law in respect of his decision is a matter for another day.
10. The defendant's submissions are that this decision should not be enforced because the adjudicator made an error of law that is plain on the face of the decision. The error is that, as recognised by the claimant in the witness statement in support of this application at paragraph 8, it is common ground that the contract provided for staged payments, namely 33 per cent at the outset (which sum was paid) and that the balance was due on completion and after completion of the works. It is common ground that (as found by the adjudicator) the works were incomplete and defective as set out in paragraph 27 of the decision. Therefore, the sums claimed were not due because the works were not complete. The adjudicator's decision is wrong on its face. This is one of those rare cases where the court should take into account that the discrete issue of law was simply wrong and not enforce the decision on that basis.
11. The relevant law is uncontroversial. In Carillion Construction Ltd v Devonport Royal Dockyard [2006] BLR 15 the Court of Appeal considered a helpful summary of the principles on the enforcement of adjudicators' decisions set out by Jackson J (as he then was) at first instance in that case. The principles were:
 - “1. The adjudication procedure does not involve the final determination of anybody's rights (unless all the parties so wish).
 2. The Court of Appeal has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedure, fact or law ...
 3. Where an adjudicator has acted in excess of his jurisdiction or in serious breach of the rules of natural justice, the court will not enforce his decision ...

4. Judges must be astute to examine technical defences with a degree of scepticism consonant with the policy of the 1996 Act. Errors of law, fact or procedure by an adjudicator must be examined critically before the Court accepts that such errors constitute excess of jurisdiction or serious breaches of the rules of natural justice ...”

12. Chadwick LJ at paragraph 52 of the judgment stated:

“We do not understand there to be any challenge to those general principles. They are fully supported by the authorities, as the judge demonstrated in his judgment.”

13. At paragraph 53 Chadwick LJ also went on to consider further propositions which had been stated by the judge and were approved, including:

“If the adjudicator's analysis of the facts or the law was erroneous, it may follow that he ought to have considered the evidence in question. The possibility of such error is inherent in the adjudication system. It is not a ground for refusing to enforce the adjudicator's decision.”

14. Both parties have addressed me on the extracts of the judgment of Chadwick LJ at paragraph 85, in which he states that:

“The objective which underlies the Act and the statutory scheme requires the courts 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 he has gone about his task is obviously unfair. It should be only in rare circumstances that the courts will interfere with the decision of an adjudicator.”

15. In this case it is said by the defendant that this is one of those rare cases where the court should interfere on the grounds of a patent error of law.

16. The dispute that was referred to the adjudicator was the claim by the claimant for payment in respect of works carried out in accordance with the second and third and final invoices for the full lump sum. That was the issue that was determined by the adjudicator. He identified the relevant question at paragraph 10 of his decision. He considered the defences put forward by the defendant including the argument that there was no entitlement to any further payment until the works had been completed satisfactorily. Those points were identified at paragraphs 18, 19 and 50 of the decision. The adjudicator took into account the defendant's evidence as to the incomplete and defective state of the works, accepting at paragraph 27 of his decision that the works were not complete and had not been carried out to a high standard. He made an assessment of the costs of the remedial works which he deducted from the sums due to the claimant.

17. In this case there is no allegation that there has been an excess of jurisdiction or a breach of the laws of natural justice, and therefore there are no grounds on which the

enforcement can be resisted. Therefore enforcement will be ordered and judgment will be given in the sum of £38,757.18 as set out in the revised calculation produced by the claimant today.