

Neutral Citation No: [2020] NIQB 56

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Ref: HOR11296

ICOS No: 18/125312

Delivered: 07/08/2020

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

COMMERCIAL DIVISION

BETWEEN:

FLEXIDIG LIMITED

Plaintiff

v

M&M CONTRACTORS (EUROPE) LIMITED

Defendant

**David Dunlop QC (instructed by Tughans, Solicitors) for the Applicant
Robert McCausland (instructed by McIlldowies, Solicitors) for the Respondent**

HORNER J

Introduction

[1] This dispute arises out of a sub-contract between the plaintiff and the defendant whereby the defendant engaged the plaintiff to carry out the excavation and reinstatement works for the installation of ducts in footpaths, verges and carriageways (“the Works”) to permit Virgin Media (“Virgin”) to install fibre optic cables in those ducts in respect of a project known as “Project Lightning” in Louth where the defendant was employed by Virgin.

[2] The Contract comprised, inter alia, the defendant’s own bespoke contract terms and conditions (“the Conditions”) and the Department for Transport’s Code of Practice, 3rd Edition, April 2010, New Roads and Street Works Act 1991 – Specification for the Reinstatement of Openings in Highways (“HAUC”).

[3] There are three issues to be raised before this court. They are:

- (i) The plaintiff's application to enforce the award of the Adjudicator in the sum of £184,516.23 plus accrued interest making a total sum of £193,146.29 in proceedings No: 2018/84823 ("Issue 1");
- (ii) The plaintiff's application for its costs to be paid by the defendant following the defendant's unsuccessful application to enforce a separate Adjudication in which the plaintiff agreed to pay £12,679.52 plus interest and adjudication fees into court by agreement. This is the subject of legal proceedings 2018/125312 ("Issue 2");
- (iii) The defendant's proceedings 2020/000924 which seek declaratory relief in respect of an award by the adjudicator in the sum of £223,597.21 plus VAT in favour of the plaintiff. This has been the subject of an award by the High Court in England and Wales ("TCC") which ruled it had jurisdiction. That decision has been appealed to the Court of Appeal and a decision is awaited ("Issue 3").

Legal Principles

[4] It is important to set out the legal principles to which this court must have regard in exercising its jurisdiction.

[5] In his Final Report Sir Michael Latham set out his recommendations as to adjudication at paragraph 9.14:

"9.1 I have already recommended that a system of adjudication should be introduced within all the Standard Forms of Contract (except where comparable arrangements already exist for mediation or conciliation) and that this should be underpinned by legislation. I also recommend that:-

1. There should be no restrictions on the issues capable of being referred to the adjudicator, conciliator or mediator, either in the main contract or sub-contract documentation.
2. The award of the adjudicator should be implemented immediately. The use of stake holders should only be permitted if both parties agree or if the adjudicator so directs.
3. Any appeals to arbitration or the courts should be after practical completion, and should not be permitted to delay the implementation of the award, unless an immediate and exceptional issue arises for

the courts or as in the circumstances described in (4)

...

4. Resort to the courts should be immediately available if a party refuses to implement the award of an adjudicator. In such circumstances, the courts may wish to support the system of adjudication by agreeing to expedite procedures for interim payments.
5. Training procedures should be devised for adjudicators. A Code of Practice should also be drawn up under the auspices of the proposed Implementation forum."

[6] It was these recommendations which gave birth to mandatory adjudication in the form of the Housing Grants Construction and Regeneration Act 1996 which came into effect on 1 May 1998.

[7] In *Macob Civil Engineering Limited v Morrison Construction Ltd* [1999] BLR 93 the defendant argued that for an award to be enforceable under the Act, an adjudicator's decision had to be both a lawful and valid decision. In rejecting this argument Dyson J said:

"It will be seen at once that, if this argument is correct, it substantially undermines the effectiveness of the scheme for adjudication. The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a **provisional interim basis**, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement: ... It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an **intervening provisional stage in the dispute resolution process**. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved." (Emphasis added)

[8] In *AMEC v Whitefriars* [2004] EWCA Civ 1418 Dyson LJ said at paragraph [22]:

“The purpose of the scheme of the 1996 Act is now well known. It is to provide a speedy mechanism for settling disputes in construction contracts on a **provisional interim basis**, and requiring the decisions of adjudicators to be **enforced pending final determination of disputes** by arbitration, litigation or agreement.” (Emphasis added)

[9] In *Bouygues (UK) Limited v Dahl-Jenson (UK) Limited* [2000] BLR 49 Dyson J said at paragraph 35:

“It is inherent in the scheme that injustices will occur, because from time to time, adjudicators will make mistakes. Sometimes those mistakes will be glaringly obvious and disastrous in their consequences for the losing party. The victims of mistakes will usually be able to recoup their losses by subsequent arbitration or litigation, and possibly even by a subsequent adjudication.”

[10] Further, in *Bouygues (UK) Limited v Dahl-Jenson (UK) Limited* the Court of Appeal in England and Wales supported Dyson J in enforcing an award which was made in error but where the adjudicator had asked the right question. Both Buxton and Chadwick LJ made it clear that because the adjudicator had asked the right question, the mere fact that he may have come up with a wrong answer, did not affect his jurisdiction and did not prevent the summary enforcement of his decision.

Factual Background

[11] The background to the present dispute can be seen be summarised briefly as follows:

- (a) The defendant, a power, telecoms, civil engineering and infrastructure contractor based in Belfast.
- (b) The plaintiff is a grounds works and civil engineering contractor based near Louth in Lincolnshire, England.
- (c) On 9 March 2017 the parties entered into a sub-contract whereby the plaintiff was engaged to carry out excavations and re-instatement works for the installation of ducts in footpaths, verges and carriageways in respect of the Virgin project known as Project Lightning where the defendant was engaged as a main contractor by Virgin.
- (d) The defendant says the plaintiff commenced work in February 2017 and left the site sometime in early 2018. The plaintiff claims it is due money for the

work it has carried out. The defendant claims that the plaintiff has failed to complete the works which it was contractually obliged to do so, that the works it did carry out were done so defectively and that the plaintiff has been guilty of over measuring and that there has been an overpayment.

[12] The award made by the adjudicator on 16 August 2018 determined that £184,216.13 was due and owing by the defendant to the plaintiff. There was evidence filed by two well-known accountants in this jurisdiction, Nicola Niblock and James Neill about the financial strengths and weaknesses of the plaintiff. I concluded that there was expert evidence which satisfied me at that time that if the sum of £185,000 was paid out then it would be difficult for the plaintiff to repay that sum to the defendant should the defendant succeed in a forthcoming adjudication. I therefore required the money to be paid into court and placed a stay of enforcement until a further adjudication had taken place. The money was eventually paid into court.

[13] The defendant applied to enforce an adjudication award in its favour in action number 2018/125312. This was resisted successfully by the plaintiff except for the sum of £12,679.52 which was admitted by the plaintiff to be due and owing. I determined that the adjudication award was wrong in law and unenforceable. I also concluded that an estoppel operated which prevented the defendant from relying on the original adjudication award. The court was also critical of some of the evidence led by the defendant.

[14] In action number 2020/000924 the defendant has issued a writ on 3 January 2020 seeking declaration that the adjudicator who had awarded the plaintiff £223,597.21 plus VAT in a further adjudication was acting outside his jurisdiction. Proceedings were issued in London and the defendant argues that the English court did not have jurisdiction to enforce the adjudication award. The TCC ruled it did have jurisdiction, the adjudicator was not acting outside his jurisdiction and that the defendant had to pay £223,597.21 together with interest, the adjudicator's fees and costs of £35,960.00 within 9 days. This order is, I understand, under appeal. The plaintiff claims the writ should be struck out as an abuse of process but there is no application before me for this relief.

[15] I draw attention to the following matters:

- (i) The stay granted on the judgment given in favour of the plaintiff was pending the decision of a further adjudication then being conducted by Dennis Baldwin. This adjudication has completed and an award was made.
- (ii) The court refused to enforce an adjudication award in favour of the defendant requiring the plaintiff to pay £462,456.50 save for the sum of £12,675.52 which was paid into court by agreement. The issue of costs remains outstanding.

- (iii) There was then a further adjudication award which determined that the defendant was liable to pay the sum of £223,597.21 plus VAT to the plaintiff. The plaintiff has enforced this award in England and Wales.

[16] In the present proceedings before me there are a number of factual matters which are in dispute. It is not possible for me to resolve them without hearing oral testimony. The defendant made no complaints whatsoever about the financial solvency of the plaintiff in the proceedings before the TCC in England. No accountant's evidence has been filed before me by the defendant and the evidence that is available from Mr Alan Nesbitt of Forrester Boyd Accountants suggested there is no substance to the allegations that the plaintiff would be unable to repay the money that is £184,516.23, interest and costs which it is entitled to receive pursuant to the adjudication award. He further suggests that the criticism of the plaintiff had been made by someone who had not understood the plaintiff's accounts and may be deliberately intending to mislead the court. I find, on the evidence before me, that complaints from the defendant about the plaintiff's solvency, or lack of it, to be without substance.

[17] There is evidence, and I put it at no more than that, that the work to remedy any of the alleged defects of the plaintiff has been carried out successfully by the plaintiff especially given the satisfaction of both Virgin and the Employer.

[18] Further, there is some evidence before me that the defendant may have altered invoices to exaggerate the losses which it claims to have suffered due to the actions of the plaintiff. I am unable to reach a concluded view on this.

[19] These issues between the parties which include, double-counting, the extent of and value of any defective work and the balance of what is due between the plaintiff and the defendant can all be the subject of further adjudication(s). That is how the adjudication process works.

Conclusion

[20] The final determination of who owes what to whom can only be determined either in court before a judge or else at an arbitration before an arbitrator after the certificate of practical completion has been issued. Of course, it can also be achieved by mutual agreement. However, it is not the role of the court at the present time to "nit-pick" and interfere with adjudication awards made in good faith by adjudicators unless there is a very good reason, which can include:

- (a) want of jurisdiction; and
- (b) breach of the rules of natural justice.

[21] If the adjudicator has made an error or if a claim has not been made by either party, it can be remedied either at a further adjudication, or ultimately when the proceedings are finally litigated either in court or at an arbitration.

[22] I had determined that there should be a stay until the further adjudication award in respect of proceedings 2018/84823. That adjudication has now taken place and the award has been made. I can see no good reason for the stay to remain in place given there is no objective evidence of the plaintiff's inability to repay any money it receives at a later date should it be on the losing side of a further adjudication award. I do not consider the court's refusal to enforce the further adjudication award to be a good reason to maintain the stay.

[23] The issue of whether or not there has been double-counting, a matter on which this court is not equipped to reach a concluded view, is an issue that can be determined at a further adjudication, if the defendant so wishes.

[24] The normal rule is that costs follow the event. My provisional view is that the plaintiff should be entitled to the costs it incurred in defeating the defendant's claim to enforce the adjudication decision in proceedings 2018/125312. However, I will give the parties an opportunity to file written submissions within 7 days of this judgment before I reach a final conclusion.

[25] Further, it is not normally the job of this court to challenge the jurisdiction of the High Court in England and Wales. If, jurisdiction has been wrongly assumed at first instance, then that is a matter for the Court of Appeal in England and Wales to rule on in due course. If inaccurate and/or misleading information has been placed before the Court by either party's solicitor, then this can be drawn to the attention of the Court.

[26] In respect of the issues before this court:

- (a) Issue 1. I remove the stay on the judgment. I will hear the parties remotely on Monday 17th August on the issues of further interest and costs, if the parties cannot reach agreement. Any skeleton should be filed by 14th August.
- (b) Issue 2. I will hear the parties remotely on the issue of what costs order should be made in action number 2018/125312 on Monday 17th August. Again any skeletons should be filed by 14th August.
- (c) Issue 3. The enforcement of the adjudicator's award of £223,597.21 in favour of the plaintiff is a matter that has been ruled upon by the High Court in England and Wales. The Court of Appeal in England and Wales will shortly decide, inter alia, whether or not the court does have the necessary jurisdiction. This court declines to intervene until the Court of Appeal in England and Wales has given judgment.