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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **5/11/2019**

19/049576

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

BRENNAN ASSOCIATES, THE MULHERON PARTNERSHIP, IVAN SCOTT ASSOCIATES, GILLESPIE & CUMMINGS AND SAFETY PROFESSIONALS T/A THE INTEGRATED DESIGN TEAM

Plaintiffs;

and

THE BLOODY SUNDAY TRUST

Defendant.

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HORNER J

INTRODUCTION

[1] Brennan Associates, The Mulheron Partnership, Ivan Scott Associates, Gillespie & Cummings and Safety Professionals t/a The Integrated Design Team ("the Plaintiffs") entered into a contract ("the Contract") on or about 10 February 2013 with The Bloody Sunday Trust ("the Defendant") for the provision of design and project management services in connection with the development of an extension to an existing museum known as the Museum of Free Derry at 55 Glenfada Park, Derry. The Plaintiffs now seek to enforce an adjudication award dated 25 January 2019, relating to the provision of those services in the sum of £266,913.59 exclusive of VAT. This comprised of £210,379.78 for fees, £23,623.35 interest on those fees, £24,660.46 being the Plaintiffs' costs and £8,250 being the adjudication costs. The Defendant refuses to pay the award and has defended this application for summary judgment under Order 14 of the Rules of the Supreme Court (Northern Ireland) 1980, arguing, inter alia, that the Plaintiffs are guilty of fraud and that an accurate reconciliation would result in a payment to it.

Miss Rowan BL and Mr Orr QC with Mr Coyle BL appeared for the Plaintiffs and Defendant respectively. They provided detailed and carefully thought through oral and written submissions for which the court is grateful.

FACTS

[2] The Plaintiffs are a single purpose consortium of construction professionals. They carry out work from 4 Daly's Park, Altnagelvin, Londonderry. The Defendant is a registered charity and is responsible for the redevelopment of the Museum of Free Derry which "was and is a pivotal location for the events which took place on Bloody Sunday on 30 January 1972".

[3] The re-development of the Museum is funded almost exclusively by public sector funders. The court was told that the Defendant was advised by the CPD, the Government Procurement Division, which is part of the Department of Finance. The Defendant claims that at all times it has acted in compliance with the Department's advice and the advice of the Project Board which was set up to manage the re-development project. The Project Board includes representatives of all funders and all the relevant Government Departments. The moving force behind the Defendant is Tony Doherty, who is Chairman of the Defendant. He is a journalist by occupation and the court was told he has little experience of the construction industry.

[4] The Contact between the Plaintiff and the Defendant dated 10 February 2013 was in the form of the RIBA Standard Conditions of Appointment for a Consultant 2010 Edition published by the Royal Institute of British Architects. Sub-clause 9(1) of the Agreement provided that either party could refer any dispute arising under the Contract to adjudication and the Project Data provided that the nominator of the adjudicator would be the Royal Institute of British Architects ("RIBA"). On or about 17 August 2017 the Plaintiffs issued a fee account (No.28) for the sum of £252,279.33. The Defendant failed to respond to the account within 28 days pursuant to clause 5.14 of the Contract. It also failed to issue a Payment Notice pursuant to clause 5.15 of the Contract.

[5] On 19 December 2018 the Plaintiffs gave notice to refer the dispute about the fees due under fee account number 28 to adjudication pursuant to the Construction Contracts (Northern Ireland) Order 1997, as amended ("the Order") and the Scheme for Construction Contracts in Northern Ireland (Regulations) NI 1999 as amended ("the Regulations").

[6] The dispute was referred to adjudication and the issues for the Adjudicator were –

(a) The amount, of any, payable by the Defendant to the Plaintiffs in respect of the Plaintiffs' Fee Account No.28 submitted on 17 August 2017;

(b) the amount of interest, if any, payable in respect of any sum found to be due to the Plaintiff by the Defendant;

(c) the costs of the adjudication.

[7] Mr George Brennan of Brennan Associates represented the Plaintiffs. The Defendant was represented by its Chairman, Mr Tony Doherty. The Adjudicator appointed by the RIBA was Mr Ron Moody, who is well-known and experienced in this field. He received the Referral Notice together with all exhibits on 21 December 2018. By consent he extended the Defendant's time to respond to 16 January 2019 and gave his decision on 1 February 2019 after considering the Plaintiffs' reply to the response.

[8] Under the Contract the Plaintiffs' fees were calculated at 10.5% of the construction costs plus various sums for attendance at meetings etc. It was the Plaintiffs' case that in May 2014 a revision of the fee stated in the Contract was negotiated and agreed between the parties in order to accommodate a cap of £115,102.40 on the funding of professional fees imposed by the Project Funders. This provided the sum of £32,958.10 already paid to the Plaintiffs up until February, was deemed to be in respect of services provided by the Plaintiffs in taking the Project up to the RIBA Stage D. Further work, taking the Project from RIBA Stage E to RIBA Stage L, would be charged at the reduced fee of 8.5% of the construction costs plus a further 1% of the construction costs for the provision of project management services not included in the original Contract. It was further agreed that any difference between the total fees and the cap imposed by the Project Funders would be paid direct to the Defendant.

[9] The Plaintiffs claim £210,279.78 including VAT for additional fees as they related to –

(a) Variations required by the Defendant.

(b) Design and management services provided by the Plaintiffs in connection with items of work procured by the Plaintiffs outside the main Contract and additional time expended on the project as a consequence of the prolongation of the construction works on site beyond the date fixed for completion, that is 4 April 2016 for reasons beyond the Plaintiffs' reasonable control.

[10] On 22 September 2017, the Plaintiffs suspended performance of their work because of the failure of the Defendant to pay the amount due. The Defendant took possession of the ground floor of the building on 19 February 2017 and the first floor on 15 June 2017, just prior to the official opening of the building. Completion of the "works" on the Contract has not yet been certified as a consequence of the Plaintiffs' suspension of the performance of their services.

[11] The Plaintiffs claimed to the Adjudicator that the additional fees are due and rely on the technical provisions of the Contract and the Order 1997. The Defendant contended that, inter alia, the fees are excessive, not based on contractual rates, are duplicated elsewhere in fees already paid to the Plaintiffs and are in respect of delays for which the Defendant is, at least, partially responsible. Further, the Defendant claims that the Plaintiffs failed to exercise reasonable skill, care and diligence in performing their obligations under the Contract. It is further alleged that these breaches have resulted in the Defendant incurring additional costs of over £98,000 and it is now at risk of losing £120,000 of funding should the Works not be completed within a reasonable time.

[12] As a consequence the Defendant claimed to be entitled to –

(a) Completion of the Services to RIBA Stage L at no further costs to the Defendant and within 4 months of the Adjudicator's decision;

(b) The Plaintiffs should bear the additional costs of £98,079.60 alleged to have been incurred by the Plaintiffs; and

(c) The Plaintiffs should indemnify the Defendant against the loss of future funding that the Defendant might suffer as a consequence of the actions and/or failures of the Plaintiffs.

THE ADJUDICATOR'S DECISION

[13] The Adjudicator found that it was a construction contract for the purposes of the Order and is subject to the "amended Order and where appropriate those of the amended Scheme": see 6.06 of his Decision.

[14] In his decision the Adjudicator notes that the Defendant complained that:

(a) The fees of the Plaintiff were excessive;

(b) They were not based on contractual rules;

(c) They were duplicated elsewhere in fees already paid by the Defendant to the plaintiff;

(d) They are in respect of delay for matters in respect of which the Plaintiff bears at least part of the responsibility;

(e) The Defendant failed to exercise a necessary degree of skill, care and diligence.

[15] The Adjudicator, made it clear that:

(a) While there may be a dispute as to the overvalue of the Plaintiff's account this was not the dispute referred to him; and that

(b) The only dispute he was asked to resolve was the dispute concerning the failure on the part of the Defendant to pay the notified sum in respect of the account number 28 issued on 17 August 2017.

[16] There had been no payless notice served by the Defendant which is a statutory mechanism by which "a party otherwise due to make a payment may withhold such payment" see Coulson on Construction Adjudication (4th Edition) at 3.33 and *Strathmore Building Services Limited v Greig* [2001] 17 Const LJ 72. A payless notice must be issued within the requisite time to be effective: see Article 9A of the Order and Clause 5.15 of the Agreement. The Adjudicator said at 6.029 of his award: "(the Defendant) could have protected its position regarding the value of IDT's account and its own counterclaim by the simple expedient of serving a compliant payment notice and/or a payless notice but it did not. Consequently I find that notified summons in respect of IDT's fee account number 28 is at some stage therein due i.e. £210,279.78, exclusive of VAT, and that such sum should have been paid by BST to IDT not later than 15 September 2017".

[17] It is clear from the affidavit of Mr Doherty and from the submission made to the court that:

(a) His primary defence on behalf of the Defendant appears to be that the Defendant is a registered charity and should be given additional leeway especially as he was a journalist who had volunteered for the role of Chairman and had no construction law experience;

(b) The complaints of, inter alia, overcharging, excessive fees, breach of professional obligations, delay and completion of the work were all issues that arose during the adjudication;

(c) The failure to serve a payless notice was due to his lack of knowledge and/or naivety in construction law matters.

[18] I should make it perfectly clear at this stage while any lack of expertise on how to conduct an adjudication or run a construction dispute may elicit sympathy from the court to that party's plight, it does not constitute a defence. Nor does it permit the court to alter the rules for summary judgment under Order 14.

RELEVANT LEGAL PRINCIPLES

[19] The Order provides that the decision of an adjudicator is binding "until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for this or the parties otherwise agree to arbitration) or by agreement": see Valentine on General Law of Northern Ireland at Article 7.

[20] It is also important to note that if an adjudicator's decision has resulted in an overpayment there is a cause of action for that overpayment whether in contract or as a restitutionary claim: see *Aspect Contractors (Asbestos) Limited v Higgins Construction Plc* [2015] (UKSC) 38.

[21] An application for summary judgment under Order 14 will be defeated if there is a reasonable doubt about the Plaintiff's entitlement to judgment or that serious questions of fact or law are involved; see Valentine on Civil Practice in the Supreme Court at 11.49 and 14/4/49 of the Supreme Court Practice (1999) Vol 1 for further discussion.

[22] The object of adjudication has been described by Dyson J in *Macob Civil Engineering Limited v Morrison Construction Limited* [1999] BLR 93 as "plain". He said:

> "The intention of Parliament in enacting the Act … 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 …."

[23] The adjudication procedure most certainly does not involve the final determination of any litigant's rights, unless that is the wish of those litigants. Furthermore, the Court of Appeal in England and Wales has repeatedly emphasised that adjudicators' decisions must be enforced, even if they result from errors of procedures, fact or law: e.g. see *Bouygues (UK) Limited v Dahal-Jensen (UK) Limited* [2001] All ER Comm 1041. Indeed, in *Carillion Construction Limited v Devonport Royal Dock Yard* [2005] EWCA Civ 1358 Chadwick LJ in the Court of Appeal said:

> "[85] The objective which underlies the [Construction] 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. … 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. …"

[24] The Commercial Hub in Northern Ireland has made it clear that it is sympathetic to the adjudication regime and its Practice Direction ensures that

adequate court time will be made available to ensure that adjudication awards can be enforced promptly.

[25] The ways in which an adjudication award can be challenged are limited. In *Sherwood and Casson Limited v MacKenzie*, HHJ Thornton QC set out five propositions which he considered captured the approach of the courts to the 1996 Act (the equivalent to our Order). They are:

> "(1) A decision of an adjudicator whose validity is challenged as to its factual or legal conclusions or as to procedural error remains a decision that is both enforceable and should be enforced.
>
> (2) A decision that is erroneous, even if the error is disclosed by the reasons, will still not ordinarily be capable of being challenged and should, ordinarily, still be enforced.
>
> (3) A decision may be challenged on the ground that the adjudicator was not empowered by the Act to make the decision because there was no underlying construction contact between the parties or because he had gone outside his terms of reference.
>
> (4) The adjudication is intended to be a speedy process in which mistakes will inevitably occur. Thus, the court should guard against characterising a mistake in answer to an issue, which is within an adjudicator's jurisdiction, as being an excess of jurisdiction. Furthermore, the court should give a fair, natural and sensible interpretation to the decision in the light of the disputes that are the subject of the reference.
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> (5) An issue as to whether a construction contract ever came into existence, which is one challenging the jurisdiction of the adjudicator, so long as it is reasonably and clearly raised, must be determined by the court on the balance of probabilities with, if necessary, oral and documentary evidence."

These five principles have been cited with approval by Sir Murray Stuart-Smith in the decision of the Court of Appeal in England and Wales in *C and B Scene v Isobars* [2002] BLR 93.

[26] An adjudication award can also be challenged on the basis that it is the product of a fraud, but such a defence can only be relied on in certain circumstances. These were formulated by Akenhead J in *S G South Limited v King's Head Cirencester LLP* [2010] BLR 47 as follows:

> "(20) … (a) Fraud or deceit can be raised as a defence in adjudications provided that it is a real defence to whatever the claims are; obviously it is open to parties in adjudication to argue that the other party's witnesses are not credible by reason of fraudulent or dishonest behaviour.
>
> (b) If fraud is to be raised in an effort to avoid enforcement or to support an application to stay execution of the enforcement judgment, it must be supported by clear and unambiguous evidence in argument.
>
> (c) A distinction has to be made between fraudulent behaviour, acts or omissions which were or could have been raised as a defence in the adjudication, and such behaviour, acts or omissions which neither were nor could reasonably have been raised but which emerged afterwards. In the former case, if the behaviour, acts or omissions are in effect adjudicated upon, the decision without more is enforceable. In the latter case, it is possible that it can be raised, but generally not in the former."

This approach was approved by the Court of Appeal's decision in England and Wales in *Speymill Contracts Limited v Eric Baskind* [2010] (EWCA) Civ 120.

[27] It is important to appreciate that there must be clear and unambiguous evidence of fraud and such fraud should be raised during the adjudication, if there is evidence of it. In *Grandlane Developments Limited v Skymist Holdings Limited* [2019] EWHC 747 (TCC) Jefford J emphasised this at paragraph [93]:

> "In short, there is no clear and unambiguous evidence of fraud in this case. In any case, I would have accepted Mr Selby QC's submission that fraud, as a defence to the claim in the adjudication, **could and should have been raised in the adjudication**." (Emphasis added)

[28] A discussion of what constitutes fraud can be found in *Odyssey Cinemas Limited v Village Theatres Three Limited and Sheridan Millennium Limited* [2010]

NICA 25 at paragraphs [15] and [16]. Girvan LJ giving the judgment of the Court of Appeal said:

> "**The meaning of fraud in law**
>
> [15] *Derry v Peek* [1889] 14 AC 337 is the locus classicus, setting out the grounding legal principles applicable in actions for fraud. It clearly established that if fraud is to be proved a plaintiff must show that a false representation has been made knowingly or without belief in its truth or made recklessly without caring whether it is true or false. While the fact that a false statement is made without reasonable grounds for believing it to be true may be evidence pointing to fraud it does not necessarily amount to fraud. If the maker of the statement honestly believes it to be true it is not a fraudulent misrepresentation and it does not render the person making it liable in an action for deceit. Lord Bramwell pointed out at 552 that it is necessary to avoid confusing unreasonableness of belief as evidence of dishonesty and unreasonableness of belief as of itself a ground of action. Lord Herschell stated the position thus at 369:-
>
> > '**I think there is here some confusion between that which is evidence of fraud and that which constitutes it. A consideration of the grounds of belief is no doubt an important matter in ascertaining whether the belief was readily entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable grounds for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges . . . A man who forms his belief carelessly, or is unreasonably credulous, may be blameworthy when he made a representation on which another is to act, but he is not, in my opinion, fraudulent in the sense in which the word was used in all the cases from *Pasley v Freeman* down to that**

> **with which I am now dealing . . . Even when the expression fraud in law has been employed, there has always been present and regarded as an essential element, that the deception was wilful because the untrue statement was known to be untrue or because belief in it was asserted without such belief existing.'**

[14] In *Angus v Clifford* [1891] 2 Chancery 449 Bowen LJ at 471 said:-

> **'The old direction, time out mind, was this – did the Defendant know that the statement was false, was he conscious when he made it that it was false, or if not, did he make it without knowing whether it was false and without caring? Not caring, in this context did not mean not taking care, it meant indifference to the truth, the moral obliquity which consists in a wilful disregard of the importance of truth and unless you keep it clear that that is the true meaning of the term you are constantly in danger of confusing the evidence from which the inference of dishonesty in the mind may be drawn – evidence which may consist in a great many cases of gross want of caution – with the inference of fraud or of dishonesty itself which has to be drawn after you have weighed all the evidence.'**

Lindley LJ at 469 stressed that an action of this kind cannot be supported without proof of fraud, an intention to deceive and that it is not sufficient that there is blundering carelessness, however gross, unless there is a wilful recklessness by which is meant a wilful shutting of one's eyes.

[16] As Devlin J pointed out in *Armstrong v Strain* [1951] 1 LTR at 871 the conclusion to be drawn from the authorities is that for a court to make a finding of fraud it must make a finding of conscious

> knowledge and dishonesty. Devlin J went on to point out that what is required is conscious knowledge, whether it is called mens rea, a wicked mind or a dishonest purpose. Where there is a division in thought processes between different agents and between the principal and the agent there is no way of combining the minds of an innocent principal and an innocent agent so as to produce a dishonest intent."

In this case Mr Orr QC for the Defendant has relied on wilful recklessness on the part of the Plaintiffs as constituting the fraud or deceit.

DISCUSSION

[29] As I have recorded the Defendant in this case relies exclusively on fraud on the part of the Plaintiff to defeat the claim for summary judgment on the adjudicator's award. I gave the Defendant the opportunity to serve a defence signed by Mr Orr QC who appears with Mr Coyle for the Defendant unambiguously alleging fraud on the part of the Plaintiff. Fraud is a very serious allegation to make about anyone, especially a construction professional whose reputation in most cases will have been the product of many years of tireless industry. I would have expected Senior Counsel to sign a defence alleging fraud and/or deceit against the Plaintiffs if the Defendant was truly serious about making such a case: see 9.06 of Civil Practice in the Supreme Court and Rule 14 of the golden rules of pleading.

[30] In this case no defence has been served alleging fraud signed by Senior Counsel. The skeleton argument submitted on behalf of the Defendant alleges that "the expert evidence generated on behalf of the Defendant is redolent of an award procured by fraud and deceit. There will be a counterclaim in addition for breach of contract and professional negligence."

[31] The phraseology is ambiguous but one thing is certain, to date there has been no pleading denying that the Plaintiff is entitled to judgment because the award made by the adjudicator was declared by "fraud and deceit".

[32] The complaints levelled against the Plaintiffs include:-

(a) Seeking payment for work done but for which there were no instructions;

(b) Claiming fees in respect of work that they did not do;

(c) Advancing claims for fees in respect of work they did not complete;

(d) Seeking payment for work it did not execute in accordance with its "obligations under disappointment (sic) with no deductions in respect of any inadequacy of the work undertaken either by individual members of the Plaintiff, or collectively". Basically, the claim being made against the Plaintiffs is that they have overcharged for the work that they did and/or failed to carry out their work with reasonable care and diligence. These claims are commonly found in construction disputes. They do not normally amount to fraud or deceit, although in extreme cases they can.

[33] In the present case there is no satisfactory pleading of fraud and/or deceit. More importantly there is no clear and unambiguous evidence of fraud. It seems quite clear that the Defendant's failure to serve a "payless notice" for whatever reason, has forced the Defendant to make these unconvincing claims of fraudulent misconduct on the part of the Plaintiffs. Further these claims of overcharging etc could and should have been made to the Adjudicator if he was to take them into account in his award. The Defendant's cross claims will now have to be considered in a separate adjudication in due course. There can be little doubt that one day there will have to be a final reckoning. Whether this takes place at a further adjudication or a trial or an arbitration or in the context of alternative dispute resolution is entirely a matter for the parties. But one thing is clear, this adjudication is not the proper vehicle as presently constructed for the Defendant to make its claims of overcharging and breach of obligations etc.

[34] The court has no hesitation in giving judgment to the Plaintiffs for the following reasons:

(i) There is "no clear and unambiguous evidence" of fraud. Allegations of overcharging, excessive fees etc. do not without more constitute deceit. There is no credible evidence put forward that the Plaintiffs acted recklessly in making the claims they did.

(ii) It is no defence to an application for summary judgment for an adjudication award to claim that it is a consequence of the lack of legal training of the Chairman and/or the Board of Directors of the organisation. While the court has every sympathy for those involved in charitable work and an admiration for their motives, it is their responsibility to ensure that they have the necessary legal advice to enable them to obtain the best result for their charity. It is not for the court to apply different rules to ease their predicament.

(iii) The issues which have been raised during this Order 14 application could have been raised **and should have been raised** during the adjudication if the Defendant had been properly advised. The expert's report which the Defendant obtained somewhat tardily from Mr Gibb, months after the adjudication, only serves to highlight those matters

which could and should have been raised during the adjudication. No satisfactory explanation has been provided as to why issues of, for example, overcharging could not have been raised during the adjudication.

(iv) The proper way to proceed for the Defendant in the circumstances which were or should have been known at the time of the adjudication was for the Defendant to serve a payless notice at the time. This was not done. The Defendant cannot escape the consequence of this omission by making a case for fraud so lacking in substance and so very late in the day.

[35] Of course the Defendant is entitled to try and recover from the Plaintiffs any sum which it can prove is due to it in any further adjudication or proceedings. Indeed, at the end of the contract there will, as I have said, have to be reconciliation whether in court or in an arbitration or by a compromise agreement. But in the meantime, the defendant is obliged to discharge the adjudication award made by Mr Moody.

CONCLUSION

[36] In the circumstances I find that the Plaintiffs are entitled to summary judgment for the full sum claimed. The Defendant has been unable to raise an issue or question to be tried or persuade the court that there is some other reason why there should be a plenary trial.

[37] I will hear the parties on the issue of costs after they have had time to digest this judgment.