Neutral Citation No: [2018] NIQB 95	*Ref:* HOR10791
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* 06/12/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

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Between:

FD LIMITED

Plaintiff

and

MM LIMITED

Defendant

_____

HORNER J

Introduction

[1] In this application, which has been keenly contested, the plaintiff seeks summary judgment in respect of an Adjudicator's award of £184,516.13 (inclusive of VAT) together with accrued interest at £3,455.25 at the date of the Adjudicator's decision, 16 August 2018, and thereafter interest at £44.23 per day.

[2] The defendant has raised three different grounds of defence to this application. They are:

(a) Lack of jurisdiction.

(b) Breach of the rules of natural justice.

(c) In any event there should be a stay put on any judgment in favour of the plaintiff because of its parlous financial position and its inability to repay any award if the defendant succeeds in an imminent adjudication in which it claims by way of counterclaim/set-off the sum of just over £1.5million.

Background Information

[3] The plaintiff is a private limited company whose main business is the carrying out of construction and civil engineering works specialising in power, telecoms and infrastructure.

[4] The defendant engaged the plaintiff on a sub-contract to carry out the excavation and reinstatement for the installation of ductwork in footpaths, verges and carriageways ("the Works") to enable VM, the main contractor, to install fibre-optic cables in those ducts on a project known as "PL". Work was commenced by the plaintiff as sub-contractor on 6 February 2017 at which date it is alleged, without contradiction, that the contract was formed.

[5] The sub-contract complies with the Housing Grants, Construction and Regeneration Act 1996 Construction Act 1996 (as Amended). Clause 28 of the sub-contract's condition states:

> "(1) Where the Housing Grants, Contracts and Regeneration Act 1996 applies to the sub-contract, either party shall have the right to refer a dispute arising under the sub-contract to adjudication at any time."

[6] The plaintiff applied for payment on 27 April 2018 of a sum of £425,543.32 which he claims had fallen due under the sub-contract. On 5 July 2018 the plaintiff applied to the Institute of Civil Engineers ("ICE") for the selection of an Adjudicator. Mr David Whyte ("the Adjudicator") accepted the nomination from the ICE on 6 July 2018.

[7] The defendant challenged the Adjudicator's jurisdiction on 18 July 2018 on three grounds:

(a) The sub-contract adjudication procedure had not been followed;

(b) The referral of multiple disputes;

(c) The crystallisation of the dispute.

[8] On 20 July 2018 the Adjudicator made his non-binding decision concluding that the challenges did not prevent him from dealing with the adjudication. He concluded the sub-contract adjudication provisions had been followed. He did not accept multiple disputes had been referred to adjudication. He said, "valuation disputes inevitably contain differences in opinion over contract rates as well as quantities and contract interpretation and, in such cases, it would not be possible for an adjudication to deal with the dispute referred without coming to a view on other disputed matters." There was a clear crystallisation of a dispute in connection with Application 62 namely what was due to the plaintiff in respect of that application.

[9] The Adjudicator gave his decision on 16 August 2018. He concluded that a total of £184,516.13 was due and owing to the plaintiff in respect of Application 62.

[10] The plaintiff then issued Order 14 proceedings which came on for hearing initially on 3 October 2018. An affidavit was filed by Kara Anderson of the defendant's solicitors on 12 October 2018. An amended Order 14 summons was filed on 16 October 2018. There was a further affidavit from the plaintiff's solicitors on 17 October 2018 and a second affidavit was filed by the defendant's solicitor on 2 November 2018. A replying and final affidavit on behalf of the plaintiff was served on 6 November 2018.

[11] At this stage the case was also made that the plaintiff was technically insolvent and that it would be unable to repay the adjudication award if it was found subsequently at the trial, but more particularly at the hearing of the imminent adjudication brought by the defendant in respect of the plaintiff's defective workmanship, that the plaintiff owed substantial damages to the defendant. A report was filed by Ms Nicola Niblock, Accountant, of ASM. This provoked a response from Mr James Neill, Accountant of HNH. These reports were followed by a meeting of the experts on 16 November 2018 with the minutes then being filed in court.

[12] Both counsel made helpful submissions, both oral and written, on the issues to which this summary judgment application gave rise.

THE ARGUMENTS

The case put forward by the defendant for not paying.

[13] The defendant complains that there is a lack of jurisdiction because the plaintiff has referred multiple disputes to adjudication. No dispute had crystallised because the dispute as to the "terms of the contract" was only formally raised for the first time during the adjudication and as such the defendant was deprived of the opportunity to set out its position on these claims and "thereby cause a dispute to exist before referral". The defendant argued that the Adjudicator had acted in breach of the rules of natural justice by not carrying out an appropriate assessment of the evidence adduced by each party. Finally, the defendant claimed that if judgment was given then it should be stayed because of the precarious financial position of the plaintiff and the existence of a counterclaim/set-off by the defendant against the plaintiff in the sum of just over £1.5m which is the subject of an imminent adjudication.

The plaintiff's case for enforcing the adjudication award

[14] The plaintiff's response is that the multiple disputes defence is without merit. The Adjudicator had to examine the issue of payment due in respect of

Application 62 and it was therefore necessary for him to study the contractual background to that dispute. The plaintiff contended that the rates in the Rate Card should be measured on one basis with the defendant arguing for a different basis.

[15] The suggestion that there was no crystallisation of a dispute given the defendant's refusal to pay upon Application 62 was without merit.

[16] There was no substance to any claim there was a breach of the rules of natural justice. The instigation of a further adjudication by the defendant should not act as a brake to the enforcement of the present award. The allegation of impecuniosity was not made out and in any event the plaintiff's financial position is no different from what it was when it entered into the sub-contract with the defendant.

DISCUSSION

[17] The Scheme for Adjudication Northern Ireland is set out under the Construction Contracts (Northern Ireland) Order 1997. The equivalent statute in England and Wales is the Housing Grants, Construction and Regeneration Act 1996. The legislation in both jurisdictions requires adjudicators' decisions to be immediately enforceable. In Levolux v Ferson [2003] EWCA Civ 11 the Court of Appeal in England and Wales said at paragraph 7:

> "The scheme provided by section 108 was explained by Dyson J in Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93 at paragraph 24.
>
> 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 decision of Adjudicators to be in force pending the final determination of disputes by arbitration, litigation or agreement: see section 108(3) of the Act and paragraph 23(2) of Part 1 of the Scheme. The timetable for adjudications is very tight (see section 108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (section 108(2)(e) of the Act and paragraph 12(a) of Part 1 of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (section 108(2)(f) of the Act and paragraph 13 of Part 1

> of the Scheme). He may, therefore, conduct an entirely inquisitorial process, or he may, as in the present case, invite representations from the parties. 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."

In Bouygues v Dahl-Jensen [2000] BLR 522 Buxton LJ at paragraph [2] described section 108 as being:

> "To enable a quick and interim, but enforceable, award to be made in advance of what is likely to be complex and expensive disputes."

Chadwick LJ said in giving judgment in the same at paragraph [26]:

> "The purpose of those provisions is not in doubt. They are to provide a speedy method by which disputes under construction contracts can be resolved on a provisional basis. The adjudicator's decision, although not finally determinative, may give rise to an immediate payment obligation. That obligation can be enforced by the courts. But the adjudicator's determination is capable of being reopened in subsequent proceedings. It may be looked upon as a method of providing a summary procedure for the enforcement of payment provisionally due under a construction contract."

[18] The position in Northern Ireland is the same. In Sutton Services International Ltd v Vaughan Engineering Services Ltd [2013] NIQB 33 Weatherup J at paragraph [2] stated:

> "The structure of the adjudication system introduced by the Construction Contracts (Northern Ireland) Order 1997 (as amended) was to introduce a speedy mechanism for settling disputes in construction contracts by an industry expert on an interim basis pending final determination by

> arbitration, litigation or agreement. The Adjudicator was to reach a decision in 28 days and the award was to be paid in the meantime pending final resolution. Enforcement of an award is by legal proceedings where the plaintiff may apply for summary judgment, which will generally be granted save for the defendant establishing one of the limited grounds that are now recognised for resisting such judgment."

[19] Grounds upon which the defendant relies in resisting this application for summary judgment are:

(i) The Adjudicator had insufficient jurisdiction due to the referral of multiple disputes ("Ground 1").

(ii) The dispute brought before the Adjudicator had not properly crystallised between the parties ("Ground 2").

(iii) There was a breach of natural justice because the Adjudicator did not fairly consider the submissions of both sides before reaching a decision ("Ground 3").

(iv) If judgment was given in favour of the plaintiff then it should be stayed in the interests of justice ("Ground 4").

GROUND 1

[20] The defendant complains that the Adjudicator erred in determining that he had sufficient jurisdiction to proceed due to the referral of multiple disputes by the plaintiff in the Notice of Adjudication dated 5 July 2018. It is claimed that in the Notice of Adjudication the following separate and distinct disputes were referred to him. These were:

(i) Whether the defendant altered the terms of the sub-contract?

(ii) Whether any such alteration would entitle the plaintiff to seek damages from the defendant?

(iii) Whether the plaintiff would be entitled to charge an additional rate for certain trench widths?

(iv) Whether the plaintiff is entitled to the sum of £428,426.21 pursuant to Application 62.

[21] The plaintiff does not dispute that it is unable, without the consent of the defendant, to send multiple disputes to adjudication. The plaintiff said that there

was only one dispute sent to arbitration and that was the issue of payment due to the plaintiff by the defendant in respect of Application 62. That is clearly set out in paragraph 26 of the Notice of Adjudication. In order for the Adjudicator to resolve the dispute of what was due in respect of Application 62 the Adjudicator had to establish the sub-contract terms so he was able to apply the rates within the Rate Card to calculate the payment which was due to the plaintiff for work done. Both parties submitted witness statements to the Adjudicator to explain to him the nature of the oral discussion between the parties thus providing the Adjudicator with assistance in determining the terms and conditions of the sub-contract. The plaintiff submitted that the rates in the Rate Card should be measured in one particular way. The defendant claimed that a different approach should be taken.

[22] In Witney Town Council v Beam Construction (Cheltenham) Limited [2011] EWHC 2332 Akenhead J considered the relevant authorities on this issue and set out the following principles at paragraph [38]:

> "(i) A dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted.
>
> (ii) A dispute in existence at one time can in time metamorphose in to something different to that which it was originally.
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> (iii) A dispute can comprise a single issue or any number of issues within it. However, a dispute between parties does not necessarily comprise everything which is in issue between them at the time that one party initiates adjudication; put another way, everything in issue at that time does not necessarily comprise one dispute, although it may do so.
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> (iv) What a dispute in any given case is will be a question of fact albeit that the facts may require to be interpreted. Courts should not adopt an over legalistic analysis of what the dispute between the parties is, bearing in mind that almost every construction contract is a commercial transaction and parties cannot broadly have contemplated that every issue between the parties would necessarily have to attract a separate reference to adjudication.
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> (v) The Notice of Adjudication and the Referral Notice are not necessarily determinative of what the true dispute is or as to whether there is more than one

> dispute. One looks at them but also at the background facts.
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> (vi) Where on a proper analysis, there are two separate and distinct disputes, only one can be referred to one adjudicator unless the parties agree otherwise. An adjudicator who has two disputes referred to him or her does not have jurisdiction to deal with the two disputes.
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> (vii) Whether there are one or more disputes again involves a consideration of the facts. It may well be that, if there is a clear link between two or more arguably separate claims or assertions, that may well point to there being one dispute. A useful if not invariable rule of thumb is that, if disputed claim No 1 cannot be decided without deciding all or parts of disputed claim No 2, that establishes such a clear link and points to there being only one dispute."

[23] I have no doubt that the plaintiff in this case referred only one dispute to adjudication. However the resolution of that dispute involved a series of claims and issues concerning the contractual terms in force between the parties and in particular the specification which was agreed to apply to ground works being undertaken by the plaintiff. I agree that the Adjudicator was asked to consider Application 62 and in particular what was due to the plaintiff for work it had carried out under this particular Application.

[24] In my view the dispute that was referred to the Adjudicator, was the plaintiff's entitlement to payment under Application 62. The Adjudicator did not lack jurisdiction on the basis that he was required to resolve multiple disputes. There was only one dispute referred to him.

GROUND 2

[25] The defendant claims that the dispute had not crystallised because the dispute as to the "terms of the contract" was only formally raised for the first time at the adjudication. I have no doubt that a dispute had crystallised in this case. The dispute which had crystallised between the plaintiff and the defendant was the defendant's obligation to pay the claim made under Application 62. The defendant was denying any liability to make a payment and was disputing the contractual terms relied upon by the plaintiff in calculating the sums due to it. As Coulson J said at paragraph [16] in St Austell Printing Company Ltd v Dawnus Construction Holdings Ltd [2015] EWHC 96 "… the crystallisation argument is almost never successful". In these circumstances the argument has no merit.

GROUND 3

[26] The case made by the plaintiff that there has been a breach of natural justice has but the barest of bones. It seems to proceed on the basis that because the defendant considers the Adjudicator's decision on Application 62 to be manifestly wrong, then he cannot have adequately considered the defendant's submission.

[27] Breaches of natural justice are fact specific. Limited assistance can be gained from looking at the facts of other cases. However, there are important principles to be taken into account. In Wiseman v Borneman [1971] AC 297 the House of Lords said:

> "Natural justice requires that the procedure before any tribunal which is acting judicially should be fair in all the circumstances, and I would be sorry to see this fundamental principle generate into hard and fast rules."

It will be noted that the proper application of the rules to an inquisitorial process are especially uncertain: see, for example, McKerr v Armagh Coroner [1990] 1 All ER 865 at 869. The authorities make it clear that there has to be a "serious breach" of the rules of natural justice in an adjudication process, before an adjudicator's decision will be declared invalid and unenforceable. Mrs Justice Carr said in Stellite Construction Limited v Vascroft Contractors Limited [2016] EWHC 792 (TCC) that it is "a rare case where there has been a breach of the rules of natural justice in adjudications.

In AMEC v Whitefrairs [2004] EWCA Civ 1418 Lord Dyson said at paragraph [22]:

> "It is easy enough to make challenges of breach of natural justice against an adjudicator. 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. The intention of Parliament to achieve this purpose will be undermined if allegations of breach of natural justice are not examined critically when they are raised by parties who are seeking to avoid complying with adjudicators' decisions. It is only where the defendant has advanced a properly arguable objection based on apparent bias that he should be permitted to resist summary enforcement of the adjudicator's award on that ground."

[28] It is clear that the defendant does not like the Adjudicator's decision and has complained, inter alia, that it is contradictory. However, the fact that the Adjudicator has preferred the case put forward by the plaintiff to the case put forward by the defendant does not begin to establish a breach of natural justice. There is no merit in this ground.

GROUND 4

[29] The court has asked to stay the judgment on the basis of the plaintiff's deteriorating finances and/or an imminent adjudication hearing of the defendant's counterclaim/set off. There are reports from two different accountants. There has been precious little agreement reached between the accountants. The limited conclusions I draw from the reports and their meeting are as follows. The sub-contract was commenced in February 2017. The plaintiff is significantly worse of today. The plaintiff has made a loss on its recent contracts. It is now in an overdrawn cash position which represents a deterioration in its financial position. The profile of its creditors demonstrate that they have become older. The plaintiff has had to enter into a payment arrangement to settle its PAYE arrears. The fact that the plaintiff has been deprived of £185,000 does not provide a complete explanation for its present financial difficulties. I am not in a position to resolve the issue as to whether the plaintiff can pay its debts as they fall due but I do harbour real doubts as to its ability to repay the full sum if there is an adverse result in the forthcoming adjudication. If the judgment sum is paid out and spent by the plaintiff in satisfying its debts it will be difficult for the plaintiff to pay the defendant should the defendant succeed in the forthcoming adjudication.

[30] In Equitix ESI CHP (Wrexham) Limited v Bester Generacion [2018] EWHC 177 (TCC) Colson J stated at paragraph [61]:

> "5.1 **The Law**
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> I summarised the law relating to stays of execution in adjudication enforcement cases as long ago as 2005 in Wimbledon Construction Company 2000 Limited v Vago [2005] EWHC 1086 (TCC). Where I said at paragraph [26]:
>
> > '[26] In a number of the authorities which I have cited above the point has been made that each case must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering

a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:

(a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

(b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

(c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations (a) and (b) firmly in mind (see AWG).

(d) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see Herschell).

(e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see Bouygues and Rainford House).

(f) Even if the evidence of the claimant's present financial position

> suggested that it is probable that he would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:
>
> (i) The claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made; or
>
> (ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see Absolute Rentals)."

[31] I have taken those matters into account, the reports of the accountants and the minutes of their meeting. I am satisfied that the plaintiff is in some financial difficulty and will probably be unable to repay the judgment sum if it loses the forthcoming adjudication unless it sets it aside and ring fences it. In those circumstances I find the approach taken by Weatherup J in Rodgers Contracts (Ballynahinch) Limited v Merex Construction Limited [2012] NIQB 94 to be the one I should adopt here. He noted as here at paragraph [23]:

> "In the present case I am satisfied that the plaintiff is in financial difficulties and would probably be unable to repay the money if the plaintiff is unsuccessful in the Arbitration and that in such circumstances a stay of enforcement would usually be granted. I am further satisfied that the two circumstances where a stay would not usually be granted do not arise, namely the plaintiff's financial position is not as it was at the time that the contract was entered into and further, the plaintiff's financial position is not due in any significant part to the failure to pay the amount of the Adjudicator's award. In the circumstances, a stay of enforcement should be granted."

In that case he concluded that it would be appropriate to give a judgment for the plaintiff in the amount claimed together with interest but to stay the enforcement of the judgment under the inherent jurisdiction of the court on the basis that it should be a condition of the stay that the amount due on foot of the judgment should be paid into court within 21 days. In the present case I consider that it would be

appropriate to require the amount on foot of the judgment to be paid into court within 14 days and a stay imposed pending the outcome of the forthcoming adjudication.

CONCLUSION

[32] In the circumstances, I give judgment for the full amount claimed together with interest. There will be a stay of 14 days to allow the money to be paid into court. I will also hear the parties on the issue of costs when they have had time to consider the judgment.