Neutral Citation No. [2014] NIQB 110

Ref: **WEA9336**

Judgment: approved by the Court for handing down

*(subject to editorial corrections)**

Delivered: **26/6/2014**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

____

QUEEN'S BENCH DIVISION (COMMERCIAL)

____

MEL DAVIDSON CONSTRUCTION

Plaintiff

-v-

NORTHERN IRELAND HOUSING EXECUTIVE

Defendant

____

WEATHERUP J

[1] The plaintiff claims summary judgment in relation to an Adjudicator's decision of 14 February 2014 by which he awarded the plaintiff contractor £53,440.28 as interest calculated on the sum of £1,168,829, which sum had been paid by the defendant to the plaintiff further to a decision of the Adjudicator dated 15 March 2013. Ms Danes QC appeared on behalf of the plaintiff and Mr Lockhart QC appeared on behalf of the defendant.

[2] The grounding affidavit indicates that in June 2004 the parties entered a Response Maintenance Repair Services contract in respect of NIHE housing in the Portadown district. Similar contracts were entered into in respect of three other districts namely Banbridge, Lurgan and Brownlow and Armagh. A dispute arose between the parties concerning the recalculation and application of an annual percentage adjustment for inflation which was called Percentage A uplift. The dispute was referred to adjudication, this being the first adjudication in which the Adjudicator gave his decision on 15 March 2013 by which he ordered the defendant to recalculate the Percentage A uplift and to pay the appropriate sum to the plaintiff.

[3] On receipt of the decision on 15 March 2013 the plaintiff's representatives wrote to the solicitor for the defendant requesting that NIHE calculate the Percentage A uplift in accordance with the Adjudicator's decision and pay the amount due with interest. In reply the defendant's solicitor stated that none of the contracts made provision for the payment of interest, neither the referral notice nor the decision of the Adjudicator made any reference to the payment of interest and that interest would not be paid. Accordingly, payment of the recalculated Percentage A uplift was made to the plaintiff on 3 April 2013 and interest was not included.

[4] New solicitors were engaged on behalf of the plaintiff and on 9 October 2013 they wrote to the defendant's solicitor referring to the Late Payment of Commercial Debts Interest Act 1998 as being applicable to the contracts and seeking payment of interest. The defendant replied acknowledging that in principle the 1998 Act applied to the contracts but stating that there had been no claim for statutory interest in the adjudication and that to seek such payment was in breach of the common law principle of issue estoppel or alternatively that, as there had been a failure to make a claim for that sum for a period of four years, this was a significant omission and that statutory interest should not apply. The result was the second reference to adjudication.

[5] In the second reference to adjudication the defendant set out two grounds of response. The first was that, pursuant to paragraph 9(2) of the Scheme for Construction Contracts in Northern Ireland, the Adjudicator should resign as the dispute was the same or substantially the same as that which had previously been referred to adjudication and a decision had been taken in that adjudication. Secondly, relying on the principle of issue estoppel, the defendant claimed that the plaintiff was prevented from bringing the claim for interest as the claim for interest should have been brought in the first adjudication. The Adjudicator did not accept either of the defendant's two grounds and made the award of interest to the plaintiff. The defendant did not pay the amount of interest awarded by the Adjudicator and the plaintiff issued the present proceedings to enforce the Adjudicator's decision.

[6] The defendant filed a replying affidavit from Peter Craig, the Senior Procurement Manager, and he stated that the defendant did not accept any liability in respect of interest. He referred to the initial correspondence in relation to interest and to the payment on 3 April 2013 of the sum due on foot of the decision in the first adjudication, which sum was paid without the inclusion of interest; stated that it was not until 9 October 2013, some six months later, that the new solicitors referred to entitlement to statutory interest; stated that the response to this correspondence was instructive in that the plaintiff's solicitors made the case that their clients had no right to interest until it was first established that they were entitled to the Percentage A uplift, the obvious inference being, according to the defendant, that a claim for interest had been omitted in error and the plaintiff's representatives were trying to cure the defect; thus the defendant contended that a later application should not be used to make good the shortcomings in an earlier application for adjudication when the two disputes were substantially the same; the defendant was said to be entitled

to be protected from having to face the expense and trouble of successive adjudications on the same or substantially the same dispute; the mischief to be addressed was the abuse of the process by successive adjudications where there had been obvious negligence, inadvertence or omission in respect of an earlier adjudication and the subsequent adjudication was being used to make good earlier shortcomings.

[7] The Scheme for Construction Contracts in Northern Ireland at paragraph 9(2) refers to the Adjudicator not dealing with decisions which are the same or based on the same or substantially the same facts as were previously dealt with in an earlier adjudication.

[8] The defendant's argument at the hearing is captured at paragraph 14 of the defendant's skeleton argument where it is stated that the Adjudicator must ask, not merely whether interest was included in the relief previously sought, but whether interest should have been claimed where such a claim arose out of the same or substantially the same issue which had already been determined. On that approach inadvertence and omission remained relevant and a respondent in an adjudication was entitled to be protected from having to face the expense and trouble of successive adjudications. The defendant relied on estoppel as the ground on which such repeated claims should be resisted. On the particular facts of the present case the defendant also contended that there was an issue about what was called 'further estoppel' relating to the circumstances in which the plaintiff delayed the response to the initial rejection of the claim for interest before bringing forward a later claim in respect of interest.

[9] It is necessary to determine what issue was dealt with by the Adjudicator in each of the two adjudications.

[10] The first adjudication –

The notice of referral described the dispute as follows:

> "A dispute has arisen between the parties concerning the recalculation and application of an annual percentage adjustment for inflation contained within the contract. The percentage is referred to in the contract as Percentage A."

The Adjudicator was asked to decide a number of matters which included:

> "(xiii) That MDC are entitled to have Percentage A recalculated and paid in accordance with clauses A20/18.5 and A20/18/6 on the anniversary dates of the date of tender of the

contract from June 2009 through to June 2012 inclusive.

(xiv) The Adjudicator is asked to order NIHE to calculate Percentage A in accordance with clause 18.5 and apply it in accordance with clause 18.6 to the work done from June 2009 to September 2012 inclusive."

The Adjudicator stated at paragraph 2.05 of his decision:

> "For the avoidance of doubt I have not been asked to decide the quantum of any revision that might be necessary to Percentage A or any effect such adjustment might have upon the value of the work carried out by MDC post May 2009."

[11] The second adjudication -

The notice of referral set out the second dispute in these terms:

> "A dispute has arisen between the referring party and the responding party concerning whether interest should be paid to the referring party."

The redress sought on this occasion included:

> "(1) The respondent party shall pay to the referring party the sum of £53,440.28 in respect of interest due up to 3 April 2013 or such other sum as the Adjudicator shall decide."

The Adjudicator at paragraph 4.18 of the second decision stated:

> "It is a matter of fact that the issue referred to me in Adjudication No. 1 concerned MDC's entitlement to further recalculations of Percentage A. The question of MDC's entitlement to interest did not form part of the dispute described in the Notice of Adjudication served by MDC in Adjudication 1, nor was interest sought as a remedy in that adjudication. The mere fact that MDC could have requested interest as part of the remedy which it sought in Adjudication 1 but did not was not sufficient to clothe me with the jurisdiction to decide the question of interest in that adjudication. In Adjudication 1 I had no

> jurisdiction, either express or implied, to decide the matter
> of interest and I was not asked to do so."

[12] The issue of successive adjudications has been dealt with in a number of cases. I refer to just two such cases. Quietfield Limited v Vascroft Contractors Limited (2006) EWCA Civ. 1737 is a decision of the Court of Appeal in England and Wales. Vascroft made two specific applications to the architect for extensions of time. The first in a letter dated 2 September 2004 and the second in a letter dated 22 April 2005 intimating a claim for loss and expense. It should be noted that construction contracts usually permit repeated notices for extension of time and this entitlement is different to the entitlement to apply for adjudication. The dispute over Vascroft's claim for extension of time on the basis of the matters set out in the two letters was referred to adjudication. The Adjudicator was explicitly requested to decide that Vascroft's were entitled to an extension of time which revised the date of completion. The Adjudicator found that Vastcroft had failed to discharge the burden of proof on entitlement to an extension of time.

[13] In the second adjudication Quietfield claimed to be entitled to liquidated and ascertained damages for Vascroft's delay in the completion of the works. On this occasion Vascroft submitted a document described as Appendix C which set out further grounds and submissions for extension of time. The Adjudicator decided that he was not able to have regard to the matters in Appendix C because he was bound by the decision in the first adjudication. He considered that Vascroft's defence to the claim for liquidated damages was seeking to rely for a second time on the same matters that they had relied on unsuccessfully in the first adjudication, although based on different material.

[14] The Judge at first instance found that the dispute identified in the first adjudication was the architect's failure to grant an extension of time in response to Vascroft's application in the two letters and the Adjudicator's decision in the first adjudication was based principally on the two application letters. In the second adjudication the contractor relied on Appendix C, which was found to be a far cry from the two application letters. It was said to be regrettable that Appendix C had not been advanced in the first application. However the Judge concluded that Vascroft's claim for extension of time as set out in Appendix C was substantially different from the claim for extension of time which was advanced, considered and rejected in the first adjudication.

[15] On appeal, the grounds included the contention that the scope of the first adjudication should be construed as embracing all claims for extension that might have been made and that there was nothing in Appendix C that could not have been put forward in the first adjudication. In response May LJ at paragraph 28 stated –

> "Certainly; but the question is whether matters in Appendix C
> were put forward in the first adjudication."

May LJ answered that question at paragraph 37 –

> "In the result, in my judgment both the dispute referred for adjudication and the dispute which the adjudicator decided in the first adjudication was Vascroft's disputed claims for extension of time in the two letters. Since Vastcroft's Appendix C in the [later] adjudication identified a number of causes of delay which did not feature in the two letters and was substantially different from the claims for extension of time which were advanced, considered and rejected in the first adjudication, the adjudicator was wrong in the [later] adjudication not to consider Appendix C.

[16] Dyson LJ made comments on estoppel which are echoed in the defendant's approach to the present case. Referring to paragraph 9(2) of the Scheme he stated -

> "46. This is the mechanism that has been adopted that protects respondents from having to face the expense and trouble of successive adjudications on substantially the same dispute. There is an analogy here, albeit an imperfect one, with the rules developed by the common law to prevent successive litigation over the same matter: see the decision about Henderson and Henderson (1843) 3 Hare 100, abuse of process and cause of action and issue estoppel by Lord Bingham of Cornhill in Johnston v Gore Wood and Co (a firm) [2002} 2 AC 1, 30H-31G.
>
> 47. Whether dispute A is substantially the same as dispute B is a question of fact and degree….
>
> 48. Where the only difference between disputes arising from the rejection of two successive applications for an extension of time is that the later application makes good shortcomings in the earlier application, an adjudicator will usually have little difficulty in deciding that the two disputes are substantially the same.

[17] The other case to which I will refer is Birmingham City Council v Paddison Construction (2008) EWHC 2254 (TCC), a claim for loss and expense arising out of delay in the completion of the contract works. Paddison referred a dispute to adjudication and the Adjudicator decided that Paddison was entitled to an extension of time and should receive liquidated and ascertained damages as well as a sum in respect of variations. A second reference to adjudication was made in respect of extension of time. Her Honour Judge Frances Kirkham sitting as a deputy High Court Judge concluded -

> "28. …. Here, however Paddison's claim for loss and/or expense in both adjudications were made on precisely the same grounds, namely based on an extension of time for completion of 119 days. And, as I have indicated earlier, the material on which Paddison relies is essentially the same as between the two adjudications.
>
> 29. In my judgment the circumstances here are as described by Dyson LJ in Quietfield: this is a case where Paddison sought to make good in the second adjudication the shortcomings in their claim in the first adjudication. I conclude that the dispute regarding loss and/or expense consequent upon delayed completion is the same or subsequently the same in both adjudications."

[18] In the present case the first question is whether the claim made in the second adjudication was the same or substantially the same as that made in the first adjudication. In that event paragraph 9(2) of the Scheme precludes the Adjudicator from reaching a decision on the dispute and requires resignation. I am satisfied that the circumstances in the present case are such that the claims made in each adjudication were not the same or substantially the same. In the first adjudication the claim was in respect of entitlement to Percentage A. In the second adjudication the claim was in respect of entitlement to interest on the sum calculated as due further to the finding of entitlement to Payment A.

[19] The defendant contends that where there has been a finding that the claims made in successive adjudications are not the same or substantially the same, as I have found in the present case, the question becomes whether the claim made in the second adjudication was such that it could and should have been made in the first adjudication so as to preclude that claim being raised in the second adjudication.

[20] The defendant seeks to present that argument on the basis of estoppel, following Dyson LJ's comments in Quietfield where he drew a parallel between the approach taken in paragraph 9(2) of the Scheme for adjudication and the common law on abuse of process and cause of action and issue estoppel. Dyson LJ recognised that the analogy was imperfect. In the context of paragraph 9(2) of the Scheme it does not appear to me that Dyson LJ was proposing that an Adjudicator should not decide a referral where a party could have or ought to have raised the same issue in a previous adjudication. He found that it was sufficient to dispose of the appeal to conclude that the subject of the first adjudication was substantially different from the dispute that was the subject of the later adjudication. It is apparent from the judgment of May LJ that he considered that the question was not whether the same claim could have been brought on the earlier occasion but whether the later claim had been put forward in the earlier adjudication.

[21] Has the Adjudicator discretion to refuse to decide the case in the second adjudication, if he forms the opinion that the claim ought to have been made in the first adjudication? I think not. I see nothing in the nature of the Scheme which permits the Adjudicator, in such circumstances, to refuse to decide a matter referred for decision. The Scheme requires the Adjudicator to decide a claim if it possible for him to do so. There are instances where an Adjudicator has been unable to make a decision, possibly because the material presented is not sufficient to permit the decision to be made. That is not this case.

[22] Further the defendant relies on what is described as 'further estoppel'. By that the defendant relies on the period of six months that elapsed from the defendant's refusal of the claim for interest before the plaintiff's new solicitors advanced the claim for interest. The defendant contends that it was thought that, by the refusal to pay interest when the initial payment was made, the plaintiff had accepted that interest was not payable. Therefore the argument is that the plaintiff is estopped from claiming interest by reason of the delay. This amounts in effect to the defendant's reliance on inactivity as a representation, namely that the plaintiff's failure to object to the refusal of the payment of interest when the initial sum was paid, amounts to a representation that the plaintiff was content with that outcome and therefore is estopped from raising the matter the claim for interest subsequently.

[23] Such a representation must be clear or unequivocal. Inaction is usually equivocal. A delay in asserting a contractual right within time limits would not usually result in the loss of the right. Here there was a lapse of six months when the plaintiff changed solicitors. I am satisfied that the plaintiff's delayed response did not amount to a representation that results in estoppel of the plaintiff from raising the claim for interest.

[24] Accordingly I am against the defendant in relation to their grounds for resisting summary judgment of the Adjudicator's decision of 14 February 2014. The plaintiff has judgment for the sum of £53,440.28.