Neutral Citation Number: [2024] EWHC 2629 (TCC) Case No: HT-2024-000181

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

The Rolls Building 7 Rolls Buildings Fetter Lane, London EC4A 1NL

Date: 17 September 2024

Before:

MR ADRIAN WILLIAMSON KC
(Sitting as a Deputy High Court Judge)

- -

Between:

ESSENTIAL LIVING (GREENWICH) LIMITED	**Claimant**
- and -	
CONNEELY FACADES LIMITED	**Defendant**

- -

MR MATHIAS CHEUNG (instructed by **Taylor Wessing LLP**) for the **Claimant**

MR DAVID SAWTELL (instructed by **Taylor Walton LLP**) for the **Defendant**

- -

Approved Judgment

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR ADRIAN WILLIAMSON KC:

1. By this application the claimant, whom I will refer to as "Essential", seeks summary judgment against the defendant, which I will refer to as "Conneely". The application is to enforce an adjudication decision of Mr Peter Aeberli dated 19 April 2024.

2. Conneely resists enforcement on the basis that the decision was arrived at in breach of the requirements of natural justice. This is expressed as follows in their skeleton argument at paragraph 2:

   "CFL submits that at an early stage in the conduct of the Adjudication, the Adjudicator made a determination about the strength of CFL's case in his ruling on an application for disclosure that would lead a fair-minded and informed observer to conclude that there was a real possibility that he had pre-determined the case, and hence that he was biased."

3. I should, therefore, begin by setting out the legal requirements relevant to this sort of natural justice objection in the context of adjudication.

4. The starting point is the well-known test for apparent bias as summarised at paragraphs 2 and 3 of the speech of Lord Hope in Helow v Secretary of State for the Home Department [2008] 1 WLR 2416 and paragraphs 35 and 36 of the judgment of Sir Terence Etherton C in Resolution Chemicals v Lundbeck [2014] 1 WLR 1943. In summary, the question is whether the fair-minded and informed observer would conclude that there was a real possibility that the decision-maker was biased.

5. This test needs to be applied in the context of the rough and temporary justice which characterises adjudication.

6. In particular, the following relevant points emerge from the authorities.

   (1) Adjudication decisions should be enforced summarily unless there is a serious breach of the rules of natural justice (see the decision of the Court of Appeal in Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2006] BLR 15 at [52] and [85][87]).

   (2) Such breach must take "a material difference to the outcome" (see the judgment of Constable J in Home Group Ltd v MPS Housing Ltd [2023] BLR 474 at [50].

   (3) However, the courts should approach complaints about alleged breaches of the rules of natural justice in adjudication with a degree of scepticism (see Carillion at [52] and Home Group at [50]).

   (4) The adjudicator is not an arbitrator or a judge but has to carry out "onerous duties" because "adjudication is a rough and ready process carried out at great speed" (see the decision of the Court of Appeal in Lanes Group Plc v Galliford Try Infrastructure Ltd [2012] BLR 121 at [60].

7. What then are the facts of the present case which are said to constitute a serious breach of the rules of natural justice and which are said to have led to a material difference to the result?

8. By a trade contract dated 14 June 2017, Essential engaged Conneely to carry out the design, construction, coordination and commissioning of rainscreen cladding, curtain walling, glass doors and glass screen works at a development at Greenwich Creekside.

9. On 2 February 2024, Essential issued a notice of intention to refer a dispute to adjudication. This related to a claim for declarations to the effect that the Corium brick slip cladding system, designed and installed by Conneely, was defective. The notice included a claim to recover costs of circa £1 million.

10. Following service of the referral on 9 February 2024, on 16 February Conneely's solicitors sought disclosure of an adjudication decision of Dr Mastrandrea dated 22 July 2019 and the associated expert reports in that adjudication. The adjudication in question was between Essential and another trade contractor. I refer to those documents collectively as "the Mastrandrea materials".

11. The basis for this application was set out in a further email from the solicitors dated 19 February 2024. They said essentially that the Mastrandrea materials supported Conneely's case that the defects complained of in the present adjudication were occasioned by breaches of contract by other parties and were not due to workmanship failures on the part of Conneely. They also said that the Mastrandrea materials would support Conneely's case that Essential was seeking double recovery of costs.

12. On 20 February 2024, the adjudicator, necessarily proceeding at high speed and with very limited submissions, rejected the disclosure application. He said this, with emphasis supplied:

> "Given that, as Essential says, Mr Mastrandrea's Decision, thus the submissions and expert reports in his Adjudication, predates the first appearance of the defect, detaching buff coloured brick slips at the corners of columns, by several months, and Elements and Conneely's work packages were different, I am not persuaded that any payments made to Essential pursuant to that Decision would have concerned the defects at issue in this Adjudication. <u>The suggestion of double recovery is fanciful</u>, thus provides no basis for disclosing Mr Mastrandrea's Decision, expert reports served in this Adjudication or 'all other submissions (including but not limited to the Referral, Response and Reply', the later request being, in any case, too vague to be justified.
>
> Neither am I persuaded that the documents sought by Conneely should be disclosed because relevant to DBC's assertions about possible causes of the detaching brick slips at issue in this Adjudication. The balconies are located in areas of green glazed slip tiles, albeit as shown in Appendix B1 of Mr Hubbard's Report, in certain areas, they abut the brick slip clad columns, at issue in this Adjudication, although not the corners from which brick slips have dislodged.
>
> Since, as apparently noted in the DBC report, Conneely was involved in removing/replacing brick slips as part of the balcony remedial works, had it considered that the balcony works, or the matters, such as water ingress, that DCB highlights, could have affected the buff coloured brick slips, it would have been aware of these at the time or whilst Conneely was working on site and, if so, Conneely should be in a position to give witness evidence about this in this Adjudication, more so since these possibilities appear to have been raised with DCB.

The mechanisms by which such factual matters could cause corner buff coloured brick slips to become dislodged from columns would not have been considered in Mr Mastrandrea's Decision or in the expert reports or submissions provided to him, since this had not yet occurred; thus his Decision and those reports are irrelevant in the Adjudication. These are matters for Conneely's experts to address by Response to Referral in this Adjudication, if so advised.

If, in doing so, Conneely considers that there is specific factual evidence relevant to those expert matters that only Essential has access to, it should identify this, with an explanation of why it is relevant to those matters, by response to Referral. Essential can then address this in its Reply and, if necessary, I can do so in the LoI."

13. I consider that this was a perfectly appropriate disposal of the disclosure application. It came nowhere near a breach of the rules of natural justice, let alone a serious breach. Nor was the adjudicator predetermining any substantive or even procedural points. The door was left firmly ajar on both the substance of the dispute and the need for disclosure. I will return to the issue of predetermination later in this judgment. However, in my view, the adjudicator was quite entitled to regard the disclosure application as "fanciful" given that the adjudication in front of Dr Mastrandrea preceded in time by some substantial amount the emergence of the defects, the subject matter of the present adjudication.

14. The adjudication proceeded and the adjudicator drew up a very detailed "list of issues and observations" on 25 March 2024. At paragraphs 77 to 79 he said this:

"77. In my letter of the 20th February 2024, I started in the context of submissions on its request for disclosure that 'The suggestion of double recovery is fanciful', a statement that concerned quantum, not liability, thus did not concern any of the matters, such as defects and delays caused by other parties, in in particular, by Elements, which DBC says materially contributed to the manifestation of defects in the brick slip cladding sometime safter practical completion. Contrary to what Essential suggests in its submissions I did not express any concluded views about such contentions or, contrary to what Conneely suggests in paragraph 24 of its note of the 22nd March 2024, about causation, and in particular whether there was evidence that Elements' works caused the Defects in the Corium Cladding. Rather, I stated that these were 'matters for Conneely's experts to address by Response to Referral in this Adjudication, if so advised.

78. As for my comment, in respect of quantum that 'The suggestion of double recovery is fanciful', since expressed by procedural ruling in the context of Conneely's disclosure application, not in my Decision or in any final decision as to the substantive issues in dispute, I am able and, of course, willing not re-consider it in the light of evidence adduced by Conneely. To that end, Conneely should:

78.1 Identify where evidence of double recovery in respect of the sums awarded to Essential by Mr Mastandrea in 2019 due to defects in Element's work at issue in Essential v. Elements and in respect sums by claimed by Essential in this Adjudication in respect of the Defects, all incurred from 2020 onwards, is to be found in its witness statements and expert reports, specifically that of Mr Conway: and/or

78.2 why, if such is so, it considers that whether or not there is double recovery of quantum is relevant to whether matters, such as defects and delays caused by other

parties, in in particular, by Elements, which DBC says materially contributed to the manifestation of defects in the brick slip cladding sometime after practical completion.

79. Having considered Conneely's renewed, but significantly narrower and more focused request for disclosure by its note of the 22nd March 2024, I direct that, as it requests, Essential should disclose, if such exists, any evidence adduced in Mr Mastrandrea's Adjudication that defective work by Element affected the sequencing of the works and/or the structural loading on the structure of Block A and/or Block B, and/or of changes in structural loading or structural design of Blocks A and/or Block B resulting from defective work by Elements prior to or whilst Conneely's works were undertaken, including but not limited to balcony structural strengthening works."

15. Once more, this demonstrates that the adjudicator was giving Conneely every opportunity to pursue its substantive case and was not predetermining any issues. Furthermore, the adjudicator acceded, in part, to Conneely's request for disclosure of the Mastrandrea materials.

16. Indeed, Conneely, on 5 April 2024, produced a further document which stated as follows, at paragraph 39:

"Conneely has only now been able to see the material from the Adjudicator in the Essential Living v Elements case. Based on the details of the quantum award that are visible, Conneely does not consider that Essential Living as double counted this claim. However, Conneely does not have full sign [I think that should be 'sight'] of all of the relevant materials, and reserves the right to make this assertion elsewhere, in another adjudication or litigation."

17. Thus, insofar as one could say that Conneely had put forward in the February correspondence a basis for the disclosure of the Mastrandrea materials, it was that Essential were seeking to make a double recovery. However, on sight of the Mastrandrea materials, Conneely expressly abandoned this argument. It follows that any breach of natural justice (and there was none) did not make a material difference to the outcome.

18. The adjudicator issued his decision on 19 April 2024. It is a very full and careful document. Mr Cheung, counsel for Essential, took me through it in some detail. I am satisfied by his submissions that the adjudicator fairly and thoroughly considered the issues before him. However, for reasons which will appear, I do not consider it is necessary for me to analyse the decision in greater detail. In short, the adjudicator did not by his February ruling predetermine any issue ultimately concluded in his April decision.

19. I turn in that context to the issue of predetermination. It is apparent from authorities such as Miller and Another v Health Service Commissioner for England [2018] PTSR 801 and H1 and Another v W and Others [2024] EWHC 382 (Comm) that there may be cases where a decision-maker reaches a firm and immovable conclusion at an early stage in proceedings and before hearing the losing party's case fully set out. But that is not this case. In my judgment, the adjudicator proceeded carefully and fairly throughout, giving Conneely every chance to put its case forward.

20. I therefore reject the natural justice challenge for the following reasons:

(1) The adjudicator's ruling of 20 February was not a breach of the rules of natural justice, let alone a serious breach. He gave the parties a full opportunity to address him. Having done so, he was not convinced of the merits of the application. He was quite entitled to describe Conneely's position in this regard as "fanciful".

(2) The adjudicator at every stage left the door fully open to Conneely to pursue both the Mastrandrea materials and the causation and double recovery points.

(3) If there were a breach of the rules of natural justice, it did not make a material difference to the outcome. In fact, Conneely abandoned the double recovery point in any event.

(4) There was no predetermination. Conneely have not been able to point to any issue decided against them in the decision upon which the adjudicator had previously expressed a concluded or even a firm view.

21. Essential also submit that any natural justice objection was waived by Conneely because, on 14 May 2024, they paid the adjudicator's fees without reservation of their position.

22. The relevant law in this respect has recently been summarised by Mr ter Haar QC in Platform Interior Solutions Ltd v ISG Construction Ltd [2020] EWHC 945 (TCC), 90 ConLR 212 at [49]-[56]. In short, payment of an adjudicator's fees by a losing party may amount to an election to treat the decision as valid. However, as a matter of policy, the court should do nothing to discourage payments to adjudicators for their work.

23. In the present case, Conneely had complained in its response of 27 February 2024 that the adjudicator had acted in his 20 February ruling in breach of the rules of natural justice. Indeed, on 20 March 2024 they requested the adjudicator to resign on this basis.

24. In those circumstances, it does seem to me that the payment of the adjudicator's fees without reservation did amount to a waiver of the natural justice objection now sought to be put forward. Conneely were well aware of the objection they had previously made and yet they paid the fees without reservation.

25. Conneely could have paid whilst explicitly maintaining their natural justice objection. That course would have dealt with Mr ter Haar's concern that adjudicators should be paid whilst keeping the natural justice objection alive. Such a course would also have covered the point made by Mr Sawtell, counsel for Conneely, that the adjudicator was threatening to issue a statutory demand in support of his fees claim.

26. For all these reasons, I reject Conneely's arguments and hold that Essential is entitled to summary judgment as claimed.

27. I will hear counsel on any consequential matters.

28. (See separate transcript for continuation of proceedings)

29. It does seem to me that this is an appropriate case for indemnity costs, essentially for two reasons. Firstly, because unmeritorious points have been raised, which has caused

the considerable delay in payment of the sums due, and a half day and now a full further court day, and, secondly, although this is not a point which Mr Cheung has urged but does seem to me to be relevant, that the defendant has chosen to make an attack upon the way in which this very experienced adjudicator went about his duties, which seems to me to have been wholly inappropriate.

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(This Judgment has been approved by the Judge.)

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2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Tel No: 020 7067 2900. DX: 410 LDE
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Web: www.martenwalshcherer.com