FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 19
CA75/20

Lord President
Lord Menzies
Lord Woolman

OPINION OF THE COURT

delivered by LORD WOOLMAN

in the Reclaiming Motion by

HOCHTIEF SOLUTIONS AG AND OTHERS (THE FORTH CROSSING BRIDGE CONSTRUCTORS)

Pursuers and Respondents

against

MASPERO ELEVATORI S.p.A

Defender and Reclaimer

Pursuers and Respondents: Borland QC, Manson; Pinsent Masons LLP
Defender and Reclaimer: MacColl QC; Addleshaw Goddard

15 February 2021

Introduction

[1] The Queensferry Crossing is a major road bridge across the Firth of Forth. It opened to traffic on 30 August 2017. The pursuers formed an unincorporated joint venture to act as the main contractors. The consortium designed and constructed the bridge.

[2] The bridge is a cable-stayed deck supported by three 200m high towers. By means of a subcontract dated 26 July and 20 August 2012, Maspero Elevatori S.p.A undertook to design, manufacture, and install a lift in each tower.

[3] The consortium became concerned about the slow progress of the subcontract works. It voiced its disquiet to Maspero. The parties met to discuss matters on 24 July 2018 at Maspero's factory in Como, Italy. Each side had counsel present.

[4] At the meeting the parties agreed several measures to expedite the progress of the lift works. They included alterations to personnel, prices and completion dates. The signed minutes of the meeting recorded these details ("the Como agreement").

[5] The revised arrangements, however, did not resolve matters. The consortium remained unhappy about progress. It served a notice of termination on Maspero dated 15 November 2018, at the same time claiming payment of the cost of redoing the lift works.

[6] Maspero refused to make payment, contending that the notice of termination was invalid.

Adjudication

Chronology

[7] The consortium referred the dispute to adjudication, which took place over two months in the summer of 2020:

9 June	notice of adjudication	the consortium
12 June	notice of referral	the consortium
17 June	conference call	all parties
5 July	response	Maspero

14 July	reply	the consortium
24 July	rejoinder	Maspero
12 August	decision	the adjudicator

The notice

[8] In the notice of adjudication the consortium referred to specific parts of the Como agreement and continued (para 5.7):

> "The Subcontract was varied pursuant to [the consortium's] letter dated 29 June 2018 and the Variation Order dated 24 July 2018, copies of which are appended to this Notice."

[9] By "Variation Order" it meant the minutes of the Como meeting. The consortium asked the adjudicator to order Maspero to make payment of £1.8 million plus interest.

Referral

[10] Three days later the consortium issued the notice of referral, which set out the claim in more detail. It alleged that Maspero had breached specified parts of the Como agreement under reference to the minutes of the meeting.

Response

[11] Maspero's response contained a comprehensive defence rebutting every aspect of the claim. It contended that the minutes of the Como meeting were clearly "not a Variation Order" (para 0.34) and thus "outwith the scope of this adjudication" (para 0.35). But Maspero also founded on the Como agreement as part of its defence. It laid the slow progress of the lift works at the consortium's door (para 9.37):

> "The delays and difficulties encountered in the execution of the works agreed upon on 24 July 2018 are due solely to [the consortium], the inadequacy of the construction part erected by [it] and the experience, and behaviours, of [its] technical installers."

Reply

[12] The consortium was uncertain whether Maspero was making a jurisdictional challenge. It called for clarification.

Rejoinder

[13] Maspero answered that call as follows:

> "1.71 Maspero confirms that its position is that the Adjudicator has jurisdiction to determine the contract put before him in the Notice of Adjudication, and Referral Notice. That contract is the Subcontract.
>
> 1.72 Given only one dispute, under one contract, can be determined by the Adjudicator, it follows that the terms of the [Como] agreement, and any associated dispute from that contract, cannot be determined in this adjudication.
>
> 1.73 Maspero requests that the Adjudicator determine the dispute before him, under the Subcontract. Maspero's position is that the Subcontract was not validly terminated. Any disputes under the [Como] agreement, cannot be determined in this adjudication. Maspero fully reserves its rights and pleas in relation to the [Como] agreement".

[14] The first sentence of para 1.73 is reflected in the "redress" chapter of the rejoinder, where Maspero invited the adjudicator to refuse to grant the orders sought by the consortium (para 9).

Adjudicator's decision

[15] The adjudicator proceeded with his task and issued a decision. He determined that the termination was valid and that Maspero was therefore obliged to pay the sums sought. In reaching his conclusions, the adjudicator determined (a) that the Como agreement fell

within the scope of the adjudication, and (b) that it constituted a variation of the subcontract as "that it is consistent with business common sense" (para 11.20).

Commercial action

[16] Maspero did not accept the decision of the adjudicator. It declined to make payment. The consortium then raised the present action of enforcement. In its defences, Maspero contended that the adjudicator had exceeded his jurisdiction by wrongly taking into account the Como agreement. It invited the court to reduce the decision *ope exceptionis*.

[17] A debate took place before the commercial judge. He concluded that the defence was irrelevant and granted decree *de plano* in terms of the conclusions of the summons: see his opinion dated 17 December 2020 ([2020] CSOH 102). In summary he held that: (i) the Como agreement fell within the scope of the adjudication; (ii) it varied the subcontract; (iii) Maspero had not validly challenged jurisdiction, and (iv) in any event, if there was a valid challenge, it came too late.

Reclaiming motion

[18] Maspero now reclaims. We are grateful to senior counsel for their powerful and concise submissions. They renewed the arguments advanced at first instance. At the end of the hearing we upheld the decision of the commercial judge. We now set out our reasons for concluding that he did not err in law.

General

[19] We begin by putting the rival contentions in context. By the late twentieth century construction disputes had run into significant problems. They often became mired in

complex, lengthy and expensive proceedings. That inhibited cash flow, the lifeblood of the industry.

[20] The Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act") introduced adjudication as a speedier, cheaper means of dispute resolution. The procedure resulted in a binding, provisional decision. But it left a disgruntled party with a remedy. It could opt for a full blown litigation or arbitration on the merits. Importantly, the adjudicator's decision regulated the position unless and until it was altered or reversed.

[21] The court developed its approach to adjudicators' decisions in a line of cases: *Gillies Ramsay Diamond* v *PJW Enterprises Ltd* 2004 SC 430; *Carillion Construction Limited* v *Devonport Royal Dockyard Ltd* [2006] BLR 15; *Charles Henshaw & Sons Ltd* v *Stewart & Shields Ltd* [2014] CSIH 55; *Ground Developments Ltd* v *FCC Construction* [2016] EWHC 1946.

[22] From that jurisprudence we derive these central propositions:

- the court will only interfere in the plainest of cases
- it is chary of technical defences
- if the adjudicator has answered the right questions, his decision will be binding, even if he is wrong in fact or law
- The court will, however, intervene if the adjudicator: (a) was not validly appointed, (b) acted outside his jurisdiction, (c) did not comply with the rules of natural justice, or (d) provided inadequate reasoning.

The issues

[23] Mr MacColl's submission falls into the second category. He argues that the Como agreement constituted a collateral bargain. Accordingly, the adjudicator exceeded his jurisdiction by taking it into account.

[24] Mr MacColl maintains that this issue was squarely before the adjudicator, either because (i) Scots law does not require a party to make a jurisdictional challenge, or (ii) Maspero did make such a challenge.

[25] Mr Borland advances several counter arguments. First, the Como agreement was within the scope of the adjudication. Second, Maspero did not make a jurisdictional challenge. Third, any challenge came too late. Fourth, this court should not consider the merits of the dispute. Fifth, the adjudicator's decision was in any event correct.

1 Scope of the Adjudication

[26] An adjudicator can only determine matters which have been validly referred for his determination. The scope of the dispute is delineated by the initiating documents. In *Ballast plc* v *The Burrell Co (Construction Management) Ltd* 2003 SLT 137 at para 19, the Lord President (Cullen) stated that:

> "It is important to recognise that the powers of the adjudicator, if categorised as a question of jurisdiction, are focused by the dispute set out in the notice of adjudication and subsequently 'amplified' … by the referral notice".

[27] We add this rider. The scope of an adjudication also includes any ground founded upon by the responding party: *Construction Centre Group Ltd* v *Highland Council* 2002 SLT 1274 at para 19 per Lord Macfadyen. It would be patently unfair if an adjudicator was precluded from looking at the lines of defence.

[28] Clause 19.2.1 of the conditions allows either party to trigger an adjudication if "a dispute or difference arises under this subcontract". Mr MacColl contends that "subcontract" does not embrace the Como agreement. On his analysis the parties entered into a collateral bargain in Como. As a result, it fell outside the dispute referred by the consortium.

[29] We reject that construction as being unduly narrow and artificial. The wording of clause 19.2.1 is modelled on the 1996 Act, which grants parties to a construction contract the right to refer "a dispute arising under the contract" for adjudication: section 108(1). Lord Briggs has stated that the statutory words should receive a broad construction: *Michael J Lonsdale (Electrical) Ltd v Bresco Electrical Services Ltd (in liquidation)* [2020] Bus LR 1140, at para 41.

[30] Approaching clause 19.2.1 in the same manner, we pose this question. What did the parties, as reasonable commercial parties, intend to be covered by the contractual wording? In our view they wished variation disputes to be included in any adjudication. After all, clause 9.3.3 of the subcontract allows for variations. It seems inherently unlikely that they intended there to be multiple adjudications.

[31] Further, both parties relied on the Como agreement in their written documents. The consortium made that plain from the outset. Maspero founded on it as a line of defence.

[32] One can test matters by looking at the dispute from another angle. Could the adjudicator have reached a meaningful decision by exclusively looking at the subcontract? The answer is no. He had to rule on the Como agreement in order to decide whether the termination was valid and payment due. It was a key element of the dispute.

2 Is a challenge required?

[33] Mr MacColl contends that Scots law does not require a formal challenge. An adjudicator either has jurisdiction or he has not. If the parties did not confer jurisdiction upon him then his decision is invalid.

[34] We reject that argument for the reasons given by Coulson LJ in *Michael J Lonsdale (Electrical) Ltd* v *Bresco Electrical Services Ltd (in liquidation)* [2019] Bus LR 3051, at para 91:

> "… the purpose of the 1996 Act would be substantially defeated if a responding party could, as a matter of course, reserve its position on jurisdiction in general terms at the start of an adjudication, thereby avoiding any ruling by the adjudicator or the taking of any remedial steps by the referring party; participate fully in the nuts and bolts of the adjudication, either without raising any detailed jurisdiction points, or raising only specific points which were subsequently rejected by the adjudicator (and the court); and then, having lost the adjudication, was allowed to comb through the documents in the hope that a new jurisdiction point might turn up … in order to defeat the enforcement of the adjudicator's decision at the eleventh hour."

[35] Although the UK Supreme Court reversed that decision on unconnected grounds, it did not disturb this aspect of the Court of Appeal's reasoning.

3 Did Maspero make a valid challenge?

[36] Maspero undoubtedly queried jurisdiction. But the critical question is whether it made its challenge "appropriately and clearly" (*Coulson LJ* para 92). Such a threshold test is required, because the adjudicator and the referring party must be given an opportunity to assess whether the challenge is a good one. No purpose is served by continuing with a flawed adjudication.

[37] We hold that Maspero did not clearly state its position. In the response and the rejoinder it did not (i) expressly use the term "jurisdiction", or (ii) ask the adjudicator to resign. Instead it adopted the opposing stance. It continued to participate in the adjudication and relied on the Como agreement in seeking redress.

[38] Even if the rejoinder can be construed as a clear challenge, it was not an appropriate one. It came too late. A look at the timetable makes that obvious. Maspero did not mention jurisdiction at the conference call on 17 June. By 24 July 2020 the procedure was over half-way through and Maspero remained an active participant in the process.

4 Did the adjudicator's decision bind the parties?

[39] For the reasons we have outlined, the adjudicator had to decide the scope of the dispute. Had he not determined the variation issue, he would have failed to exhaust his jurisdiction.

[40] A case with similar facts provides a useful illustration: *Supablast (Nationwide) Ltd* v *Story Rail Ltd* [2010] EWHC 56 (TCC). One month after the parties entered into a subcontract, they met and agreed to add a new repair element to the works. A dispute arose about the final account. One party argued that the subcontract had been varied. It relied on the minutes of the meeting. The other argued for two contracts. The adjudicator held that there had been a variation.

[41] Akenhead J noted that disputes about variations are common and continued (para 29):

> "Generally, an adjudicator properly appointed under the original contract between the parties to the adjudication will have jurisdiction to determine whether or not particular work was or was to be treated as a variation under or pursuant to that original contract."

[42] We are satisfied that the adjudicator in the present case did have jurisdiction. The parties were therefore bound by his decision on this point, whether it was right or wrong.

5 Was the subcontract varied?

[43] Mr MacColl submits that the adjudicator reached the wrong decision on variation. We decline to answer this point. That is because we agree with Mr Borland that this contention trespasses into the merits of the case.

[44] We would, however, offer these observations. (a) The parties went to Como for a specific purpose. (b) They each had a legal representative in attendance. (c) The signed

minutes record the precise details of their agreement. (d) Those minutes cannot be understood or construed without reference to the subcontract. (e) The minutes comply with the requirement of the subcontract conditions that the variation be in writing - clause 9.3.3 and 1.1(nn).

Conclusion

[45] For these reasons, we refuse the reclaiming motion and adhere to the interlocutor of the commercial judge dated 17 December 2020.