



Neutral Citation Number: [2012] EWHC 241 (TCC)

Case No: HT-12-05

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 21/02/2012

**Before:**

**MR JUSTICE EDWARDS-STUART**

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**Between:**

**BERRY PILING SYSTEMS LIMITED**

**Claimant**

**- and -**

**SHEER PROJECTS LIMITED**

**Defendant**

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**Mr John Denis-Smith** (instructed by **Goldkorn Mathias Gentle Page LLP**) for the **Claimant**  
**Miss Alexandra Bodnar** (instructed by **Contract and Construction Consultants Ltd**) for the  
**Defendant**

Hearing dates: 2 February 2012  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**MR JUSTICE EDWARDS-STUART**

## Mr Justice Edwards-Stuart:

### Introduction

1. This is an application for summary judgment by the Claimant ("Berry") to enforce a decision of an adjudicator, Mr J E Price, made on 30 November 2011 by which he awarded the sum of £20,459.89 (plus any applicable VAT) to Berry within 7 days. The application is resisted on the ground that the decision was reached as a result of a material breach of natural justice, with the result that the decision is not enforceable. Alternatively the Defendant ("Sheer") seeks an order that any judgment is stayed pending the outcome of a reference by Sheer of the same dispute to arbitration.
2. More specifically, the two issues are:
  - (1) Whether the adjudicator reached a conclusion about Sheer's counterclaim wholly or partly on the basis of an argument that was raised for the first time by the adjudicator in the Decision itself.
  - (2) Alternatively, if Berry is entitled to summary judgment, whether enforcement of the judgment should be stayed on the ground that by reason of its financial circumstances Berry may be unable to repay the amount if Sheer is successful in the arbitration.

### The facts

3. By a contract in writing, the precise terms of which are not material, Sheer engaged Berry, as a sub-contractor, to carry out secant piling and associated works at 15 Tregunter Road, London SW10. The contract sum was about £160,000. The works began on 20 January 2011 but soon fell into delay.
4. One of the problems that occurred during the work was leakage of water through the piles. Following a dispute about Berry's entitlement to payment under the contract, which arose at least in part out of Sheer's allegation that Berry was responsible for 11 weeks of delay, Berry referred the dispute to adjudication claiming some £78,000.
5. For the purposes of this judgment, I need not say any more about the facts and can go straight to the relevant parts of the adjudicator's Decision.
6. Under the heading "Sheer's Claims Against Berry for Delays", the adjudicator recorded Sheer's contention that a delay of 11.6 weeks had been caused by:

"Water seeping into Sheer's excavations.  
2 Piles missing.  
1 Pile having a gap at high level."
7. In relation to the first of these complaints, Sheer had alleged that there was a running stream of water into the excavation caused by Berry's bad workmanship. In relation to this the adjudicator said, at paragraph 4.061:

"Berry contends that it is not responsible for any effects of the seepage of water because in its quotation of 22 October 2010 it made Sheer responsible for any dewatering that may be required."

8. After referring to Sheer's allegations in relation to the causes of delay, the adjudicator said the following:

- “4.066 However, Sheer does not detail the alleged effects on the programme.
- 4.067 At paragraph 4.1, 4.4, 4.5, 6.1.6 and 6.1.7 of the Response and in the Counterclaim at paragraphs 1, 2.2, and 3.1 Sheer makes further reference to delays to Sheer's work caused by Berry.
- 4.068 There is some support of (sic) Sheer's claims against Berry for delays at Documents 17 and 18 and at Tab 7 of the Response.
- 4.069 However, [Sheer] has failed to provide any proper analysis of the alleged delays to its works caused by Berry.
- 4.070 There is no information as to how Berry actually affected the Completion Date of Sheer's work and not even the simplest attempt at any critical path analysis or even a simple narrative explaining how Berry actually critically affected Sheer's progress.
- 4.071 Sheer has not addressed the issue raised by Berry at paragraph 3.4, page 5, that it was working below the water table level and that Berry stated that Secant piling would not prevent seepage and ingress of water and that the Contract made [Sheer] responsible for dewatering.
- 4.072 Berry has failed to prove to what extent, if any, Sheer caused critical delays to the completion of Sheer's work.
- 4.073 Having watched the video with the Response of the flow of water through the piles I note that it was significant at one particular leak. *There appears to be no reason why that water could not have been directed to a storage tank from which it could be pumped away without flooding the excavations or developing (sic) Sheer's work.*
- 4.074 Sheer has failed to proven (sic) that Berry caused any critical delays to the completion of Sheer's work.”

I should explain that in the two places where I have shown “Sheer” in square brackets the adjudicator had actually written "Berry". Both parties accepted that these were obviously clerical errors and that I should read the relevant paragraphs as corrected. Since the error formed part of his reasons, but not of the decision itself, I consider that the parties were right to do so.

9. Miss Alexandra Bodnar, who appeared for Sheer, submitted that the point made by the adjudicator in paragraph 4.073 (which I have emphasised in italics in the extract from the Decision quoted above) was one that had not been raised with the parties and was one on which he based his decision, if not wholly at least in part. Since it was one

that was obviously material to the decision, she submitted, the adjudicator should have raised it with the parties before basing his conclusion on it: his failure to do so was a material breach of natural justice.

10. Attractively and ingeniously though it was put, I reject this argument. It is quite clear to me that Sheer's claim for delay failed because the adjudicator concluded that it had not provided any proper analysis of the delays and, in consequence, it had not proved that matters for which Berry was contractually responsible had caused critical delay to the works.
11. In addition, he appears to have regarded Sheer's failure to challenge Berry's argument that the contractual responsibility for dewatering rested with Sheer as an implicit acceptance of it. In my judgment, he was perfectly entitled to do so and to conclude, as it appears he did, that Berry's argument was correct. If this is so, then this was a further reason for rejecting Sheer's claim for delay based on the leakage through the piles.
12. It is not quite clear to me why the adjudicator referred to the video showing the leakage, which I was told had been produced by Sheer, but it seems that he was just making the point that even if the leakage had been the contractual responsibility of Berry, any potential delay resulting from it could have been avoided by directing the water to a storage tank. However, in the light of the conclusions that he had already reached this was irrelevant.
13. In these circumstances I do not need to go on and consider in any detail the extent to which any breach of natural justice might have been material. However, I can deal with the point shortly. If the adjudicator's suggestion about the ability to direct the leaking water to a storage tank had formed part of his reasons for reaching his conclusion, it would not have made any material difference to the outcome since he had already concluded in the preceding paragraphs that Sheer had failed to demonstrate that any default by Berry had caused critical delay to the works. It would simply have amounted to an additional reason for reaching a conclusion for which he had already found ample justification.
14. Accordingly, Sheer's challenge to the application for summary judgment fails. I now turn to the question of a stay.

### **The application for a stay of execution**

15. As I have already mentioned, Sheer has referred the same dispute to arbitration. I am told that it is claiming in excess of £150,000. The reference was made on 12 December 2011, some six weeks after the adjudicator's Decision. Unless the parties have specifically agreed otherwise, an adjudicator's decision is binding on them unless and until the dispute in respect of which it was made has been finally determined by litigation or arbitration. The fact that there may be separate litigation or arbitration on foot about the same issues does not affect the successful party's right to have the adjudicator's Decision enforced. It therefore formed no part of Miss Bodnar's submissions that the existence of the reference to arbitration could form the basis of any challenge to the application for summary judgment.

16. It is also clear that when a court is considering a party's ability to repay a sum awarded by way of summary judgment, or when considering a party's ability to meet an award of costs in the context of an application for security for costs, the position must be considered at the time when the award (or costs) might have to be repaid (or paid). I did not understand this to be controversial.
17. This exercise involves the court making an informed estimate as to when it is likely that a judgment will be given that would result in the relevant liability arising. In the present case that means predicting the date on which the arbitrator is likely to issue his award. So far as I am aware, the arbitrator has not yet been appointed: at any rate, no hearing date has been fixed. In these circumstances, the court is forced to embark on some experience based speculation. Doing the best I can, I consider that for the purposes of considering this application for a stay Berry's financial position must be considered as at some 12 to 18 months from now. I would have thought it most unlikely that a dispute such as this one - fairly straightforward though it is - would be heard and determined by arbitration in less than 12 months. I think it is more likely to take about 18 months.
18. Berry's most recent published accounts, for the year ending 30 June 2010, show that it suffered a loss of £115,245. The credit rating agency, Dun and Bradstreet, places it in the high risk category.
19. However, management accounts were produced by Berry for the 12 month period ending 30 June 2011 and for the 6 month period ending 30 December 2011, each of which showed a modest profit for the period of the order of £18,000 and £13,500, respectively. Mr Berry, the company's managing director, made a witness statement in which he said that Berry was still trading and had a full order book. In addition, he said that the company's bankers had, as recently as 30 December 2011, renewed its overdraft facilities, which he said indicated that the bank had a reasonable degree of confidence in Berry's future. He said also that the profit and loss forecast for the 12 month period to December 2012 indicated an anticipated profit of about £50,000.
20. As Miss Bodnar pointed out, the management accounts do contain some anomalies. For example, whilst the turnover for the 6 month period to December 2011 was approximately half that for the 12 month period ending in June 2011 - as one might expect, the overheads were of a similar order in each set of accounts. This might suggest that the overheads had dramatically increased in the last 6 months. There was no explanation for this, but even if that is the position it does not alter the fact that the accounts, if substantially correct, show the company to have been trading profitably, if only just.
21. Mr Berry also referred to a potential claim by Berry against a firm of geotechnical consultants which is said to have a value of £750,000 (based on a 70% prospect of success). However, there is no material upon which I can begin to put a realistic value on this claim (or to discount the possibility that it might fail with an adverse order for costs). In these circumstances, I consider that the existence of this claim should be ignored.
22. It is also asserted on behalf of Berry that it has the support of other companies in the group. Although it is not suggested that any of the sister companies has a contractual obligation to advance funds to Berry, it is said that they would do so if it was

necessary. One of those companies, Mainbelt Ltd (“Mainbelt”), owns a number of specialist piling rigs which are said to have a value of £250,000 unencumbered by any charges. Mr Berry says that Mainbelt could borrow against these assets if it needed to raise funds with which to support Berry. Again, whilst I am prepared to accept that all this may be true in principle, it is common experience that companies are sometimes not quite so willing to support sister companies in the same group if the effect of that support would be simply to satisfy a creditor in circumstances where the continuing viability of the sister company is in doubt. Once again, therefore, I do not feel able to attach very much weight to these assurances of support from Mainbelt.

23. However, taking the evidence as a whole, I am satisfied that Berry is currently trading profitably and will probably continue to do so for the next year or two with or without the injection of a further £20,000 at this stage. I therefore see no reason why it should find itself unable to repay the judgment sum in 12 to 18 months time if it were to receive it now.
24. Sheer has indicated that it is willing to pay the amount of the judgment into court: indeed it attempted to do so, but I understand that it failed to follow the correct procedure with the result that its cheque was returned by the court. Mr John Denis-Smith, who appeared for Berry, observed pertinently that the existence of an accumulated profit and loss account deficit of some £560,000 in Sheer’s latest accounts (to 31 March 2011) had not prevented it from finding the £20,000 odd to make this payment into court. In these circumstances, he asked rhetorically, why should the court conclude that Berry would be any less able to find £20,000 if it needed it when its most recent balance sheet deficit was less than a quarter of that of Sheer?
25. I consider that there is some force in that observation, which is why I prefer to consider Berry's current trading position and its future trading prospects, rather than simply looking at the bottom line of its balance sheet (particularly when that balance sheet is some 18 months out of date). I have no reason to doubt the evidence that Berry currently has a full order book or that it will continue to trade at a modest profit for the foreseeable future. I have already noted that Mr Berry has indicated that he is expecting Berry to make a profit of about £50,000 during the next 12 months, an estimate that I accept may be optimistic. However, even if it is, in the light of the figures in the management accounts I see no reason to conclude that it will trade at a loss. Provided that it remains in profit, there is no reason why it should not be able to repay the judgment sum in 12 to 18 months time should it have to do so.
26. For these reasons I am not satisfied that Sheer has made out a sufficiently persuasive case to justify a stay. I therefore refuse its application for a stay of execution of the judgment sum.

### **Interest and costs**

27. The adjudicator concluded that Sheer was not liable to pay Berry any interest and so no interest was awarded. However, the parties have very sensibly come to an agreement about interest, which is that £260 is to be paid in respect of the period up to and including 2 February 2012 and that thereafter interest is to be at the rate of 6.75% until date of payment (being a daily rate of £4.54). Accordingly I direct that interest is to be added to the sum awarded on that basis.

28. By agreement, Sheer is to pay Berry's costs and those costs have been agreed at £13,000. That sum is to be paid within 7 days of the handing down of this judgment.

**Conclusion**

29. I direct that Sheer is to pay the judgment sum, together with interest calculated in accordance with paragraph 27 above to the date of payment, to Berry's solicitors within 7 days from 15 February 2012 .