J L Builders & Son v. Naylor & Naylor
Case No: B2/2008/0778(A)
B2/2008/0778
[2009] EWCA Civ 1621

Court of Appeal (Civil Division)
CA (Civ Div)
Before: Lord Neuberger Lord Justice Longmore and Lord Justice Lawrence Collins
Date: Thursday, 18th December 2008
On Appeal from Telford County Court (His Honour Judge Mitchell)

Representation

Mr J Ramsden & Mr C Bittler (instructed by Hextalls LLP) appeared on behalf of the Appellant.

Mr A Clark (instructed by Grindeys) appeared on behalf of the Respondent.

Judgment

Lord Neuberger:

1 This is an appeal and an application to adduce further evidence arising out of a decision of HHJ Mitchell, sitting in the Telford County Court. He decided that the defendants, Mr and Mrs Naylor, the employers under a building contract, had repudiated that contract and that their repudiation has been accepted by the claimant contractor, a Mr Leake, trading as JL Builders and Sons.

2 The relevant facts for the present purposes of the appeal and the application are as follows. The terms of the contract were agreed in 2003 and were somewhat brief and imprecise. In his clear and careful judgment, the judge resolved certain disputes relating to the terms of the contract and those findings are unchallenged.

3 In April 2004, after the work had started, the claimant asked for £20,000 on account of alleged additional works which he had identified in a handwritten schedule. The defendants paid £10,000 and asked for further information from the claimant in order to justify the balance. The judge held that the defendants were entitled to seek such information before being prepared to pay any further money.

4 The claimant provided a more detailed statement on 21 June 2004, showing the costs of extra works for which he claimed an additional sum of £25,500 odd, saying that this was "the remaining balance to date". This led to an increasingly acrimonious dispute which culminated with the claimant walking off the site with all his tools on 28 June 2004. Although this might have been a repudiatory breach, the judge found that it was not accepted the defendants, and that again is not challenged.

5 I can take what happened next from the judgment:

"23. On 3 July the claimant sent the defendants a typed copy of the list of claimed extras which he had previously provided in handwritten form in April. At this juncture the defendants consulted a building consultant and quantity surveyor, Mr Alan Mountford. The claimant also instructed a quantity surveyor, Mr Lithgoe. The two sides met with the quantity surveyors on site on 2 August. The claimant expressed his confidence that the accuracy of his figures would be confirmed by the quantity surveyors. The first defendant said that he would abide by whatever figure was found by them to be justified.

24. The claimant said that he would finish the job and the first defendant expressed his satisfaction with that. Matters were left on the basis that the claimant would provide Lithgoe with necessary materials to support his figures and Lithgoe, in turn, would transmit the information to Mountford by 4 August.

25. That information did not arrive with Mr Mountford. Mountford chased Lithgoe, who made a further promise to provide it by 11 August. Mr Mountford then faxed Lithgoe to the effect that delays in the provision of information ran the risk that the defendants might terminate the claimant's contract. Again the information did not material-

ise. The claimant in evidence said that he had provided Lithgoe with the necessary details, but sadly Lithgoe was in the throes of some nervous breakdown. The claimant had not been informed of the contents of Mountford's fax to Lithgoe.

26. On 12 August the first defendant instructed Mountford that he wished to engage another contractor. On 18 August Mountford wrote to the claimant:

'We have still not received any communication from you or your quantity surveyor in connection with the provision of financial information or resumption of works at the above, despite having been promised information by Wednesday, 4 August 2004 and then subsequently by Wednesday, 11 August 2004.

We cannot wait any longer. We are instructed by our clients, Mr and Mrs Naylor, to inform you that your employment is now determined. You are not to return to site.

We will now appoint a contractor or contractors to complete the works. Upon completion of the works we will forward to you a statement of account as outlined in our letter to Mr and Mrs Naylor, copied to you, reference AFM/msw/JN3253cn02, dated 12 July 2004."'

6 The 12 August fax was responded to by the claimant, effectively accepting that the contract was determined. Having decided that the precise terms of the contract between the parties, the judge said this at paragraph 33 of his judgment:

"That brings me to the central question as to whether either, and if so which, of these parties was finally in repudiatory breach of contract. The foundation of the ultimate breakdown in the parties' relationship was the claimant's demand for further interim payment, and the defendants' unwillingness to satisfy the demand."

7 Having found that the defendants' refusal to pay was not a repudiatory breach, and that the claimant walking off the site, while it may have been a repudiatory breach, was not accepted by the defendants, the judge reached his conclusion in paragraph 37-39 of his judgment:

"37. As at 28 June, both the claimant and the defendants were expressly stating their desire to continue with their contract as soon as the immediate difficulties could be resolved, and they were sensibly seeking to find a mutually acceptable machinery to that end. Neither was suggesting or accepting any repudiatory breach by the other. Indeed, to the contrary. That in due course led to the discussions on 2 August when it was agreed that the figures could be resolved by the respective quantity surveyors, whereupon the defendants would pay immediately what was found to be due and the claimant would resume work.

38. It was at that point that the most unfortunate failure occurred on the part of the claimant's quantity surveyor, Lithgoe [I interpose for the purposes of the judgment that it subsequently transpired that Mr Lithgoe was mentally unwell and indeed had suffered a nervous breakdown although it is not entirely clear whether that nervous breakdown had occurred at that time]. The time for the provision of information by Mr Lithgoe to Mr Mountford had not been made of the essence. Mr Mountford's fax to Lithgoe was not sufficient to make it so. Notice should have been given to the claimant himself clearly stating what was required of him, the date by which it was reasonably required and that, in default, it might be considered to be evidence of an intention on his part no longer to perform the contract and then, in those circumstances, the contract might be terminated by the defendants.

39. That would have alerted the claimant to Lithgoe's default and have given him the opportunity to instruct another quantity surveyor, as he was subsequently to do. The claimant never repudiated the arrangements which were mutually agreed on 2 August. Ultimately it was defendants who, having determined to employ another contractor, repudiated their contract with the claimant by the notice which was served on their behalf by Mountford on 18 August 2004. The contract had, as I find, continued to subsist up to that point, and that notice was then impliedly accepted by the claimant. The notice itself expressly stated: "Your employment is now determined."

8 So far as the application is concerned, the defendants' complaint relates to a fax sent by Mr Mountford, the defendants' surveyor, to Mr Lithgoe, the claimant's surveyor, on 9 August. Strangely, while it is referred to in the first sen-

tence of paragraph 25, and discussed in paragraph 38, of the judgment, the page was not before the judge. It is from Mr Mountford to Mr Lithgoe and was copied to Mr Naylor, the first defendant, Mr Mountford's client; it reads as follows:

"Dear Mr Lithgoe, re 207 Newcastle Road, Stone, Staffordshire.

We confirm the contents of our telephone conversation this morning, during which you assured us that the information promised for Wednesday 4 August 2004 should now be delivered to us by no later than Wednesday 11 August 2004.

Whilst we appreciate that there may have been extraneous circumstances hindering delivery of information by the original date, we do express our concern that another week has passed with no further progress towards completion of the works.

In the circumstances, and being mindful of Mr and Mrs Naylor's continuing distress and disappointment, we put you and your client on notice that any further delays in the provision of information will leave us no alternative but to revert to our previous position of considering the contract determined. We would then proceed to unilaterally value the works and concurrently seek tenders for its completion.

Yours sincerely, Alan F Mountford and Associates"

9 Whether or not the defendant needed permission to put in this fax as new evidence on this appeal, given that it was not before the judge but was referred to in his judgment, is not a matter we need decide. For my part, it seems clear that as the judge's reasoning, in particular in paragraph 38 of his judgment, was partly based on its assumed contents it would be plainly unjust to the defendants if this fax was not before us. Furthermore, as the two issues which Mr Ramsden, who appears on behalf of the defendants, wishes to raise turn on this fax were not canvassed before the judge, it seems to me that we should look at this fax in any event.

10 The two issues are conveniently identified by reference to what the judge said in paragraph 38 of his judgment. The first issue is whether the fax of 9 August was precluded from being a notice making time of the essence (to put it loosely) because it was not sent to the claimant or received by the claimant; it was simply sent to Mr Lithgoe, his quantity surveyor. The second issue is whether the fax precluded from being sufficiently good notice because it does not spell out sufficiently clearly what is required of the claimant or Mr Lithgoe and within what timescale.

11 So far as the second point is concerned, although it is right to record that we have not heard from Mr Clark who appears on behalf of the claimant on the issue, it seems to me that the contents of the 9 August fax did satisfy the requirements of the law so far as making time of the essence are concerned. Indeed, I rather suspect that if the fax had been before the judge he would have so held. It is only fair to the judge to record that he based his assumptions as to what the fax contained by reference to the unchallenged evidence of Mr Mountford, who described it in his evidence as being rather less clear and less specific than it actually was.

12 As I see it, this appeal therefore turns on whether or not the fact the fax of 9 August was sent to Mr Lithgoe rather than to the claimant, prevent it from operating as a notice making time of the essence given the judge's finding in clear terms that it was never passed on by Mr Lithgoe to the claimant and that the claimant did not know about it until some time after the claimant received Mr Mountford's fax of 18 August.

13 The question therefore is whether Mr Lithgoe had authority to receive on behalf of his client, or to be served with on behalf of his client, contracted any notice and in particular the notice of 9 August 2004. In that connection his role was, as described in paragraphs 23 and 24 of the judgment, namely that he would be provided by the defendant with all "necessary materials" to support the July 3 schedule. Upon that happening, Mr Lithgoe would, in his capacity as quantity surveyor, review and advise on the figures (and possibly the works in the schedule) and would communicate his views to Mr Mountford together with any necessary materials provided to him by the claimant, and that thereafter he and Mr Mountford would seek to agree a figure.

14 On the face of it that is potentially quite a wide instruction, quite a wide authority, as Mr Ramsden says, because it gave Mr Lithgoe on behalf of the claimant, and indeed Mr Mountford on behalf of the defendants, power to agree a figure which could amount to nothing or a very substantial sum which the respective parties would then be bound by. The defendants would have to pay any sum which was so agreed and the claimant would have to come back on site once a sum was agreed, even if that sum was nil.

15 However, whether one characterises that authority as wide or not, it does not seem to me that it extends to receiving notices under the contract or notices which have contractual effect. The parties had agreed what the authority of their respective quantity surveyors was, namely to try and agree -- and if possible *to* agree -- certain figures: a classic role, one might have thought, for a quantity surveyor. But that is quite a different thing from being entitled to receive notices. Mr Ramsden accepted, quite rightly in my view, that the necessary consequence of his submission that the notice of 9 August was validly served on the claimant was that the notice of 18 August, actually determining the contract served by Mr Mountford on specific instructions from his clients the defendants, could have been served on Mr Lithgoe alone.

16 The role of quantity surveyors was discussed by HHJ Frances Kirkham in GPN Limited (In Receivership) v O2 (UK) Ltd [2004] EWHC 2494 TCC . I quote from paragraph 24-26 partly because she usefully sets out relevant observations in the two leading textbooks on building contracts. The paragraphs read as follows:

"24. The learned authors of both **Hudson's** *Building & Engineering Contracts* (11th edition at paragraphs 2.057, 2.061 and 2.064) and **Keating on** *Building Contracts* (7th edition at paragraphs 13-16, 13-17 and 13-22) both have helpful sections on the authority of construction industry professionals and the extent to which they can bind their employers in relation to third parties. It is said in **Hudson** that an architect or engineer in private practice has no implied authority to make a contract with a contractor or to vary or depart from the concluded contract. Paragraph 2-064 states: 'An owner who by some conduct or statement has misled a contractor into thinking that the architect has full authority may well be held either actually to have authorised the architect to contract on his behalf or, if not, to have clothed him with ostensible authority to contract. This, of course, would depend on the particular facts, but does not detract from the general principle that an architect, even instructed to obtain tenders, has no ostensible authority to conclude a contract, and strong facts would be needed to rebut the presumption.'

25. Similarly, it said in **Keating** that 'in the absence of some express power acceptance [of a tender] should be by the employer. It seems reasonably clear that an architect engaged [for the purpose of inviting tenders] has no implied power to bind an employer by acceptance of a tender...

If an architect exceeds the authority of his employment, the employer is not liable to for his acts unless there is apparent or ostensible authority..."

And the HHJ Kirkham then said at paragraph 26:

"26. It is not suggested that the same principles would not apply to a quantity surveyor as are described in **Hudson** and **Keating** in relation to an architect."

Now, of course, those observations were directed to a slightly different point, but it seems to me nonetheless that the contractual functions of an agent are not to be extended beyond what he or she is expressly told to do or understood he or she should do, or what is reasonably incidental thereto.

17 The most attractive way in which the argument was put by Mr Ramsden was that, because Mr Lithgoe could have come to an agreement which would have resulted in the building contract being determined, he must have had authority to receive notices which determined the building contract. Even if the premise is right, I do not accept the conclusion. If he had authority to try and agree with Mr Mountford, but failed to do, that would have had the result of putting an end to the building contract, but that is because the

parties had agreed that themselves at the meeting of 2 August. However, it had certainly not been agreed that Mr Lithgoe, or indeed Mr Mountford, had authority on behalf of their respective clients to receive notices putting an end to the contract on grounds of repudiatory breach, or indeed notice which would have the result of a repudiatory breach being committed.

18 I am not sure I even accept the premise, because it seems to me that what probably agreed was that, if the quantity surveyors could not reach agreement, then the parties would be thrown back on the position that they were in before the meeting of 2 August, namely the claimant contending that he was entitled to have walked offsite and refusing to return, and the defendants contending that he was not entitled to have done this. It also seems to me that it is significant that the final notice putting an end to the contract on the defendant's case was served not on Mr Lithgoe but on the defendants, or the defendant, Mr Leake himself.

19 In my view, therefore, the appeal fails. It is a conclusion I reach with real sympathy for the defendants. First, this is a case where both parties have acted understandably and not improperly; no doubt there were rights and wrongs on both sides and it would be inappropriate to say more, but it does not appear that either party behaved at all badly. If either party took a bad point in law, it was taken in good faith. Further, it may be regarded to some extent as a matter of happenstance as to which of the parties was ultimately in repudiatory breach in light of the rather tangled history of this matter, as is apparent from the judge's judgment. Nonetheless, although it is fair to say that the defendants have some cause for complaint in the sense that the precise way in which the judge found against them was not canvassed in terms before him, they have had the opportunity now to attack his reasoning. Further, one of the possible grounds -- it is not entirely clear that it was one of the grounds, but one of the possible grounds -- namely the lack of clarity in the fax would not have been a good ground for impugning the fax of 9 August as a valid notice making time of the essence. In my view, however, the judge was right in his view that service of the notice on Mr Lithgoe, and the fact that it did not come to the attention of the claimant, is fatal to it.

20 I ought to mention one further point. Mr Ramsden laid stress on the fact that the fax did not merely put Mr Lithgoe but also "your client" on notice. With respect, I do not think that gets matters any further. While it makes Mr Lithgoe more open to criticism for not having passed the fax onto his client, or its contents onto his client, it would involve pulling oneself up by one's bootstraps to say that that somehow assisted the defendants' case. Either Mr Lithgoe had authority to receive the notice or he did not. Clearly, the notice ultimately must have been addressed to the client because Mr Lithgoe was not a contractual party, but the fact that it refers to the client does not, I am afraid, assist the defendants' case.

In those circumstances, for my part I would dismiss this appeal.

Lord Justice Lawrence Collins:

21 I agree. I only add this. The claimant's original claim was for £23,000. The counterclaim was for £47,000. Judging by the appellant's schedule of costs for this hearing, I would be surprised if the aggregate costs are much less than £100,000. Consequently, by not settling this dispute, each side has exposed itself to the risk of a costs deal far in excess of its claim. I do not know and cannot know whether it is a reflection on the parties or on one of them, or on their advisors, or on one set of them that has lead them to this position, but it is extremely regrettable that what seems to have been the reasonable behaviour of the parties before the contract was terminated did not subsist in the litigation period.

Lord Justice Longmore:

22 I agree with both judgments which have been delivered.

Order: Appeal dismissed

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