JUDGMENT : HHJ Peter Coulson QC: TCC. 15th November 2007

Introduction

1. This is a claim for £102,274.85 arising out of an adjudication decision of Mr. Tony Bingham, dated 2nd August, 2007. The claim is made up of the outstanding principal sum of £99,366.14, due by reference to that decision, and the sum of £2,908.71, due by way of interest.

2. The Defendant is not here and is not represented. However, the Defendant has taken a variety of points in the correspondence and, very properly, Mr. Pimlott, for the Claimant, has dealt with those points in his helpful skeleton argument. It seems to me therefore appropriate that I deal with those points by way of a short Judgment, both because they are raised by way of defence to the application for summary judgment, and because they are of some wider significance.

Contract In Writing

3. The first point taken by the Defendant is the suggestion that the adjudicator did not have the necessary jurisdiction to decide the dispute because there was no contract in writing. This was a point raised fair and square in the original adjudication. It was a point on which the Defendant made detailed submissions. The adjudicator considered those submissions and decided that there was a contract in writing. The jurisdictional challenge therefore failed.

4. A party who has a jurisdictional challenge in adjudication has a clear choice. He can agree that the adjudicator should decide the question of jurisdiction, and to be bound by that result. Alternatively, he can reserve his right to argue that, whatever the adjudicator decides, the adjudicator did not have jurisdiction to reach that conclusion.

5. ***Project Consultancy Group v Trustees of the Gray Trust*** [1999] BLR 377, a decision of Dyson J (as he then was), is an example of a case where the party with the jurisdictional challenge made it clear before, and all the way through the adjudication process, that it challenged the jurisdiction of the adjudicator. Therefore, when the matter came before the court on an enforcement application, the Judge had no hesitation in finding that the jurisdictional challenge remained and had not somehow been waived merely because the adjudicator had dealt with the issue in the adjudication. An example of the alternative approach that a party seeking to challenge the jurisdiction of the adjudicator might take can be found in ***Nordot Engineering Services Ltd. v Siemens plc***, a decision of His Honour Judge Gilliland, Q.C., sitting in the TCC in Salford in April 2000. In that case, the Judge found that the parties had agreed that the adjudicator's decision on the question of jurisdiction would be binding and thus could not subsequently be opened up.

6. I refer to these cases because, in his skeleton argument, Mr. Pimlott, referred to one of the older cases on this issue, namely, ***Whiteways Contractors (Sussex) Ltd. v Impresa Castelli Construction (UK) Ltd.*** (2000) 16 Const.L.J., 453. That was a case in which His Honour Judge Bowsher, Q.C. concluded that, because the adjudicator's decision on jurisdiction was part of his overall decision, and that overall decision was binding on the parties, then the decision as to jurisdiction must also be binding.

7. It seems to me that the decision in ***Whiteways,*** along with a number of the earlier decisions dealing with challenges to the adjudicator's jurisdiction in which similar views were expressed, needs to be treated with some caution. I consider that the better view is that, in circumstances such as these, the court must examine whether or not, when the jurisdiction point was raised in front of the adjudicator, the parties agreed to be bound by his conclusions. If so, the adjudicator's decision on jurisdiction is binding. If the challenger's position was reserved, and he made it clear that, although he was content for the adjudicator to express a view on the point, he did not agree to be bound by that view, it is not binding.

8. In the present case there is no suggestion in any of the documents before the court that the Defendant, Ridgewood, ever reserved its position. Indeed, on the face of the documents, and in particular on the face of the adjudicator's decision, it seems clear that Ridgewood argued that the adjudicator did not have jurisdiction and put their submissions in writing, without reserving their position at all. They appeared, therefore, to be content to be bound by his decision on jurisdiction. I have seen nothing to suggest that they reserved the right to argue at any later stage that the adjudicator did not have the jurisdiction to reach that decision. Accordingly, it seems to me that the decision that the adjudicator reached as to the existence of a contract in writing cannot now be challenged by Ridgeway.

9. Even if I was wrong about that, and in some way Ridgewood could still challenge the adjudicator's jurisdiction, I consider that, on the facts, the Defendant cannot make out that the adjudicator was arguably wrong in the conclusion that he reached. Indeed, I would say that the adjudicator was almost certainly right, and that there was a contract in writing.

10. It is true that the contractual letter in question was in the form of a letter of intent. There have been a number of cases recently, including the decision of His Honour Judge Wilcox in ***Bennett Electrical Services Ltd. v Inviron Ltd.*** [2007] EWHC 46(TCC), and the decision of His Honour Judge Thornton Q.C. in ***Mott McDonald Ltd. v London & Regional Properties Ltd.*** [2007] EWHC 1055 (TCC), in which the particular letters of intent in question were ruled not to be contracts where all the terms were in writing.

11. However, all these cases turn on their own facts. In the present case, the letter of intent made plain that there was complete agreement as to the parties to the contract; as to the contract workscope (because it was contained in what was described as "Tender Documents dated 2nd November, 2005"); as to an agreed lump sum of £200,787.75; as to an agreed set of contract terms (namely the JCT 2005 Standard Form, Private with

Quantities), with 5 percent retention and £5,000 per week liquidated damages; and as to a contract period of sixteen working weeks.

12. For those reasons the adjudicator concluded that there was a binding contract between the parties in the form of the letter. He rightly observed that "*there appears to be nothing left for the parties to agree*". He went on to note that all that was missing was a set of documents which made that agreement more formal, but in my judgment he rightly concluded that that did not mean that there was not a contract between the parties with all the terms in writing.

13. Accordingly, it seems to me clear on the face of the documents that, even if the Defendant had reserved its right to be able to argue that the adjudicator did not have jurisdiction because there was no contract in writing, the adjudicator's decision that he did have the necessary jurisdiction was the right one. In those circumstances the challenge as to the absence of a contract in writing must fall away. There is no jurisdictional bar to the Claimant's application for summary judgment.

Service

14. The second point is concerned with the service of the claim form by which the Claimant sought to enforce the adjudicator's decision. The Defendant is a company based in Jersey. On the face of correspondence emanating from the Defendant they maintain that the service of the claim form on them was invalid. The invalidity, they say, stems from the fact that, although they received the claim form, the Claimant had not obtained the permission of the court to serve the claim form outside the jurisdiction.

15. It seems to me that this is a bad point for the reasons explained in Mr. Pimlott's skeleton. CPR 6.19(1)(b) provides that permission of the court for service outside the jurisdiction is not required where the claim is one: *"... which the court has power to determine under the Judgments Regulations and ... (b)(iii) the Defendant is a party to an agreement conferring jurisdiction to which Article 23 of the Judgments Regulation refers*".

16. The Judgments Regulation is Council Regulation (EC) 44/2001 which has direct effect in the United Kingdom and therefore needs no implementing legislation. Article 23 provides:

"If the parties, one or more of whom is domiciled in a Member State, are agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing ..."

17. The Claimant is domiciled in the U.K. The first part of the test in Article 23 for service without permission is therefore met. The remaining point is whether the parties have agreed, in writing or evidenced in writing, that this court has jurisdiction to settle any disputes which have arisen or which may arise between them. I have already set out, for other reasons, my conclusions as to how and why there was a contract in writing between the parties. I have referred to the existence of the JCT 2005 Form and its incorporation into this contract. Article 9 of the Form makes plain that this court shall have jurisdiction over any dispute or difference between the parties which arises out of, or in connection with, that contract.

18. Accordingly, it seems to me plain that the claimant did not require the court's permission to serve the claim form outside the jurisdiction. Thus the second objection falls away.

19. The third potential objection is also concerned with service. The claim form did not include a statement of the ground on which the Claimant was entitled to serve it out of the jurisdiction, and that is properly conceded by Mr. Pimlott. The question then is what the effect of such an omission might be. The point was considered by Rimer J, as he then was, in ***Trustor AB v Barclays Bank plc & Anr.,*** (Times Law Reports, November 22nd, 2000). In that case the claim form also excluded a statement of the ground on which the entitlement arose. Rimer J concluded that, although non-compliance was not trifling, it did not justify the court in saying that there had been no service at all. It was at most an irregularity and, since there had been no prejudice, the claim form had been validly served.

20. I reach precisely the same conclusion here. In particular I note that there is no question of any prejudice being suffered by the Defendant as a result of this alleged failure. There are before the court two letters from the Defendant, dated 13th and 14th November, taking specific points on the claim that is made against them. Thus the Defendant has had every opportunity to consider the claim and make such points as it wishes by way of defence. Accordingly, there has been, and can have been, no prejudice arising out of the irregularity. The service was valid.

21. Accordingly, the third and final potential objection to the claim falls away.

Conclusion

22. For the reasons that I have indicated, the various potential defences raised by the Defendant to the application for summary judgment must all fail. Thus, the adjudicator's decision should be summarily enforced. For those reasons the Claimant is entitled to summary judgment in the sum of £102,274.85. That sum must be paid within fourteen days: namely, by 4.00 p.m. on 29th November, 2007.

23. The Claimant seeks an order for indemnity costs. Regrettably, it is not uncommon for a Defendant to fail to pay on the adjudicator's decision, thereby obliging the Claimant to issue enforcement proceedings. Thereafter, it is also not uncommon for the Defendant to refuse to co-operate such that the Claimant has to go to the expense of

pursuing the enforcement proceedings through to this sort of summary judgment hearing. In ***Gray & Sons (Builders) (Bedford) Ltd. v The Essential Box Co. Ltd.*** [2006] EWHC 2520 (TCC) the Defendant adopted the same approach as the Defendant has adopted in the present case, albeit there, the day before the hearing, the defendant indicated that it did not oppose the application for summary judgment. I concluded in ***Gray*** that an order for indemnity costs was appropriate. I said that the Defendant knew, or ought to have known, that it had no defence to the claim to enforce the decision and that it was unreasonable for the Defendant to continue to give the impression that the application was resisted, thereby causing the Claimant to incur costs.

24. It seems to me that the same conclusion must be appropriate here. Although I have been carefully through the points raised by the Defendant in the correspondence in order to satisfy myself that the adjudicator's decision was properly enforceable, it is plain from the earlier paragraphs of this Judgment that the Defendant had no substantive basis for challenging the decision. This sum ought to have been paid months ago. This court will not encourage parties, who have no defence to a claim based on an adjudicator's decision, to use up valuable court time and the resources of the successful party in running unmeritorious points that are doomed to fail.

25. For those reasons, therefore, it seems to me that it is appropriate to award indemnity costs in this case. I therefore order that the Defendant should pay the Claimant the sum of £7,758, being the costs claimed.

26. For completeness, I should also say that, in a letter of today's date to the court, the Defendant makes the point that since they are not being represented today, it is unnecessary for the Claimant to attend by both solicitor and counsel. The suggestion is that they should not have to pay the costs thereof. There are two answers to that.

27. The first is that, even in that last letter, the Defendant does not admit liability. It was therefore necessary for Mr. Pimlott to go through the various points raised by the Defendant. It was also necessary for the court to consider those arguments and to reach a concluded view on them, for which exercise Mr Pimlott's assistance was invaluable.

28. The second is that the Claimant has complied with the earlier directions of the court, which required the Claimant to produce a skeleton argument earlier this week. The skeleton argument was extremely helpful and has allowed this hearing to be conducted in an efficient fashion. In those circumstances, it is quite wrong now to seek to deprive the Claimant of some of its costs, merely because the Claimant (unlike the Defendant) has complied with the orders of the court, in particular by the production of a full and helpful skeleton argument. Accordingly, the point raised in today's letter by the Defendant cannot operate to reduce the costs in any way.

MR. C. PIMLOTT (instructed by Silver Shemmings LLP) for the Claimant.
THE DEFENDANT was not present and was not represented.