

JUDGMENT : HER HONOUR JUDGE FRANCES KIRKHAM : TCC. 26th June 2001.

1. The claimant ("Bickerton") is a building contractor. The defendant ("Temple") is a contractor specialising in the design, manufacture and installation of windows, curtain walling and cladding.
2. Bickerton and Temple contracted in about March 2000 whereby Temple agreed to carry out work at premises belonging to United Glass Ltd in Harlow. The sub-contract sum was about £125,000 plus VAT. Temple carried out preliminary work from about late February 2000 and began work on site in early March 2000. During the course of the contract, Bickerton became concerned about progress and quality of materials and workmanship. By letter dated 22 June 2000, Bickerton gave notice of their intention to determine the sub-contract. By letter of 14 August 2000, Bickerton gave notice of determination. Temple left site. Bickerton engaged others to undertake work which Bickerton maintain was work necessary to complete unfinished work and to remedy defects in work undertaken by Temple.
3. The contract between Bickerton and Temple was a construction contract within the meaning of Part 2 of the Housing Grants Construction and Regeneration Act 1996.
4. The contract was based on the DOM/2 form of contract. It is suggested that Bickerton's conditions of contract also applied to the sub contract.
5. Bickerton contends that it validly terminated the contract in August 2000 and arranged for outstanding work to be completed and defects to be remedied.
6. On 29 January 2001 Notice of Adjudication was given on behalf of Bickerton. The Notice stated that disputes had arisen between Bickerton and Temple relating to the sub contract. It alleged that Temple had failed to design, manufacture or install work in accordance with the sub contract and had failed to complete the work.

The Notice went on to refer to Bickerton's having issued notices under Clauses 21.3.2 and 21.3.3 of DOM/2 and in accordance with sections 110 and 111, respectively, of the 1996 Act.

Bickerton stated in paragraph 6 of the Notice that the gross amount which Temple had applied for was £119,210.89 of which. Bickerton had paid £78,034 less £3,901.30 retention.

The following matters in the Notice are also relevant:

- 1) [Bickerton] has and/or will have incurred additional costs in completing the subcontract works and in carrying out remedial works in excess of the sums withheld.
- 2) [Bickerton] has incurred additional costs in obtaining expert opinion in respect of the design, manufacture and installation of the sub-contract works that would not have been necessary had [Temple] complied with its obligations under the subcontract.

[Bickerton] seeks:

- "[1] Recovery of costs incurred in completing and carrying out remedial work in excess of the amount withheld that would not have been incurred had (Temple) complied with its obligations under the sub contract.*
- [2] Recovery of costs incurred in obtaining an expert's report in respect of the sub-contract works that would not have been incurred had [Temple] complied with its obligations under the subcontract.*
- [3] Recovery of costs to be incurred in respect of further corrective works that would not have been incurred had [Temple] complied with its obligations under the sub contract.*
- [4] Recovery of other projected costs that would not have been incurred had [Temple] complied with its obligations under the sub contract.*
- [5] An order that [Temple] be responsible for the costs and expenses incurred by the adjudicator in this adjudication. Had [Temple] complied with its obligations under the sub-contract, then it would not have been necessary for the adjudication process to have been commenced: For this reason, [Bickerton] also seeks the costs incurred in securing the appointment of an adjudicator."*

7. An adjudicator was appointed on 31 January 2001.
8. Bickerton's submission to the adjudicator (called Referral Notice) dated 5 February 2001, outlined its claims. It made reference to the sub-contract sum of £127,821.05 plus VAT and to the various applications for payment which Temple had made. The last of these was dated 7 August 2000. Bickerton annexed to their submission a schedule showing each of the payments which Temple had

applied for, together with the relevant payment due dates and final payment dates and the dates of the withholding Notices. These showed that the total gross valuation of Temple's applications was £119,210.89.

Relevant paragraphs of the submission are:

"23 On 12 December 2000 [Bickerton] further advised [Temple] of an increase in the estimated set off against any further payments that might be due, bringing the total to £66,185.46. This estimated sum has since increased again and a revised summary... .. totalling £109, 018.52 is attached to this (document), The net amount claimed under this head is therefore £17,413.19.

"28 Regardless of the fact that [Bickerton] has determined the sub-contract, the total amount that it has been possible to set off is inadequate to reimburse [Bickerton's] total additional expenditure. The net difference between the total value of works carried out by [Temple] (£435,027.96 applied for) and the net sum unpaid (£78,034.00) is £41,176.89. The total additional costs that [Temple] (sic) has already incurred amounts to £24,392.73 and this will be supplemented by the further cost of remedial and completion work still to be carried out."

In the prayer of the submission, Bickerton list the amounts they claim, totalling £109,018.52 made up as follows:

- (1) £11,104.77 pursuant to paragraph 12
- (2) £6,510.00 pursuant to paragraph 14
- (3) £17,413.19 pursuant to paragraph 23
- (4) £73,990.56 pursuant to paragraph 29
- (5) Costs "

Paragraphs 12 and 14 referred to payments made to others to complete work and to the cost of engaging an expert to advise, respectively. I have quoted above the text of paragraph 23. Paragraph 29 refers to a quotation from a third party for the cost of further completion and remedial work.

9. On 11 February 2001 Temple produced a final account, showing a gross sum of £137,993.56. Temple's representative sent that to Bickerton's representative by letter dated 10 February 2001. It appears to have been sent also to the adjudicator.
10. On 13 February 2001 a response to Bickerton's claim submission was served on behalf of Temple. Temple did not accept that there was a dispute or difference, so contended that it was not appropriate for adjudication to take place at all. Temple contended that the purported determination was invalid. They made detailed comments on the allegations of defective workmanship and materials and of delay. Temple did not say, expressly, what was the total value of the work which they claimed to have completed. The only clue to Temple's position appears to be found in paragraph 27 of their document which reads:

"[Temple] advised that the reason as to why [Bickerton] terminated their employment in August 2000 was not due to poor quality installation works but solely to avoid making payment. The conditions of sub-contract provided that in the event of determination no further monies are due to the sub-contractor until a much later date in the future. At the time of determination a sum approaching £70k was due to (Temple) from [Bickerton]. Some nine months later this amount continues to remain outstanding."

Temple made it clear that it was taking part in the adjudication under protest.

11. On 21 February 2001, a response to Temple's submission was served on behalf of Bickerton. Relevant paragraphs are:

"20 For the purpose of record, [Temple's] Final Account, as submitted with the response, was requested at the meeting held on 18 September 2000 when it was promised by the end of September. The account as submitted includes a number of items that are not acceptable for various reasons, mainly that they should have been allowed for in the tender or should have been omitted as work not carried put. The acceptable total is £119,975.58, only little different from the current valuation."

"30 It is acknowledged that the Final Account total based on the submission attached to the response may amount to £119, 915.58 (see paragraph 20 above). All costs incurred by [Bickerton] to date together with those anticipated are Set out in tabular form..."

12. On 4 February 2001, Temple's then representatives wrote to the adjudicator. That letter contested the adjudicator's right to proceed, on the ground that no dispute existed between the parties. Alternatively, it was suggested in that letter that, if the adjudication proceedings were to continue, Temple's final account should be included within the adjudication. The adjudicator replied on 6 February 2001 inviting the parties to agree to broaden his jurisdiction to include Temple's final account. By letter dated 7 February 2001. Bickerton's then representatives wrote to say that they did not agree either to suspension of the adjudication or to the inclusion of Temple's final account within the adjudication.

13. The adjudicator issued his decision on 8 March 2001. The following extracts are relevant:

"25 The dispute as referred to me relates to alleged defects and deficiencies in the works designed and installed by Temple and the costs arising from such matters.....

28 Bickerton ...seek a decision as to

(1) Recovery of costs already incurred in identifying, carrying out and completing remedial work and

(2) Recovery of costs to be incurred in respect of further corrective works and costs that would not have been incurred had Temple complied with its obligations under the sub-contract...

29. Whilst the Referral Notice identifies particular sums against each item claimed, the Notice of Adjudication is unspecific as to the exact sum claimed and hence my decision addresses the sum (if any) to which I consider Bickerton are entitled.

30. By virtue of clause 38A.5.4 of the contract between the parties, I am not obliged to give reasons for my decision....

48. Bickerton contend that the total value of works carried out by Temple amounts to £119,210.89 gross and that £78,034 (prior to £3,901.13 retention) has been paid to Temple. I have not been requested to adjust the retention sum.

49. It follows from my decision that the account may be summarised thus:

<i>Total value</i>	<i>119,210.89</i>
<i>Less</i>	
<i>Gross Payment</i>	<i>78,034.00</i>
<i>Amount Due</i>	<i>41,176.89</i>
<i>Costs accepted by me</i>	<i>53,563.21</i>
<i>Net sum due to Bickerton</i>	<i>£12,386.32"</i>

The adjudicator went on to decide and direct as follows:

"(1) Bickerton are entitled to withhold from sums otherwise due to Temple £53,563.21 in respect of the costs identified above plus VAT... and

(2) Temple shall peremptorily pay to Bickerton £12,386.32 seven days after this decision is taken up by either party plus such VAT as is properly chargeable on the total sum of £53,563.21 noted in (1) above, and

Subject to the parties remaining jointly and severally liable for my costs, Bickerton shall pay £1,957.20 and Temple shall pay £3,873.75, both sums including VAT... "

14. Temple have refused to pay any of the sums ordered by the adjudicator. Accordingly, Bickerton seek Summary Judgment pursuant to CPR Part 24 in respect of the sums which the adjudicator determined Temple should pay.

Issues

15. The issues were most ably argued by Mr Willis and Mr Jones.

It is common ground that the adjudicator's decision stems from the Notice of Adjudication dated 29 January 2001 and that the parties had not agreed to give the adjudicator jurisdiction to deal with the final account between the parties.

16. Temple's case is that the adjudicator was wrong to have taken the £119,210.89 as a starting point from which to deduct sums claimed by Bickerton. Both parties had understood and proceeded on the basis that the adjudicator would not be dealing with the final account. In concluding as he did that the total value of work carried out by Temple was £119,210.89 gross (paragraph 48 of his decision) the adjudicator in effect determined the final account position and thus stepped outside his jurisdiction. As that sum was the starting point for the deduction of the sums which Bickerton claimed, it follows that the adjudicator went outside his jurisdiction in deciding that a sum of money was payable to Bickerton.
17. Bickerton's case is that the adjudicator had jurisdiction because the Notice of Adjudication made it clear that Bickerton was seeking recovery of money spent and to be incurred. "Recovery" means that payment is required. The Notice did allow the adjudicator to take an account; that is what he did in order to determine how much was payable to Bickerton. He was entitled to take the figure of £119,210.89 as the starting point and deduct from this the sums he concluded were due to Bickerton.

The sub contract does not expressly exclude the right to set off and recover damages.

Conclusion

18. The adjudicator had jurisdiction. to determine what sums could be validly withheld from sums otherwise due to Temple. The sum otherwise due to Temple was not agreed between the parties. Temple had put the gross figure in issue, albeit in an oblique way, by the assertion in their submission that at the time of determination of the sub-contract, a sum approaching £70,000 was due to Temple. By simple arithmetic, one can see that Temple did not accept that the correct starting point was £119,210.89. Accordingly, the adjudicator was not entitled to take that figure as the unchallenged starting point.

It appears that the adjudicator knew that Temple contended for a higher final account figure not only because of the reference in Temple's own submission but also because the final account had been sent to him.

The adjudicator did make a decision as to what was the gross sum due to Bickerton: he concluded that Bickerton's figure of £119,210.89 was the correct total gross value of work. In doing so, in effect, he decided the account figure. This is because the only possible account figure which could at that stage have been decided was the final account. However, determination of the final account had been expressly excluded from the scope of the adjudication.

To calculate any sum actually payable to Bickerton there had to be a starting figure from which to subtract the sums which the adjudicator decided Bickerton were entitled to withhold from Temple. There was no agreed starting figure. As the starting figure was challenged, the adjudicator was in a position where he had no alternative but to decide what the starting point should be. He determined that the gross amount of the last valuation was the correct starting point. Because that involved in effect a decision as to the final account figure, and because that had been excluded, the adjudicator did not have jurisdiction to determine that figure.

Use of the word "recovery" in the Notice of Adjudication was sufficient to entitle the adjudicator to award a sum of money to Bickerton. But what was lacking was the right to determine the gross valuation figure from which to deduct payments already made and sums which Bickerton were entitled to withhold. Accordingly the adjudicator did not have jurisdiction to calculate that a sum of money was actually payable to Bickerton or to order that such sum he paid.

19. In the circumstances I conclude that the learned adjudicator exceeded his jurisdiction and that he was not entitled to direct that a sum of money be paid by Temple to Bickerton. Bickerton is thus not entitled to summary judgment on its claim.

Mr Willis, Solicitor Advocate of Merricks for the Claimant
Mr Jones solicitor of Richard Jones & Co for the Defendant