

JUDGMENT : His Honour Judge Richard Havery : 30th July 2001.TCC.

1. I have before me an application on the part of the claimant for a declaration that the claimant is entitled to pursue two disputed monetary claims against the defendant, amounting to some £4.2 million by way of adjudication procedures provided for by the Housing Grants Construction and Regeneration Act 1996.
2. The question depends on whether a contract between the parties dated 14th August 1998 is a construction contract within the meaning of section 104 of that Act which was entered into after the commencement of Part 2 of the Act on 1st May 1998.
3. The background is this: road widening works to Junctions 18 to 19 of the M5 motorway were undertaken by the defendant (which I shall call Costain) as main contractor to the Secretary of State for Transport pursuant to a main contract, concluded in about June 1995, the terms of which incorporated the ICE conditions of contract, fifth edition. Costain sub-contracted part of the works to Cleveland Structural Engineering Limited (which I shall call Cleveland).
4. The sub-contract was dated 7th August 1995 and incorporated the FCEC form of sub-contract 1984, the blue form, with amendments. In November 1996 Cleveland changed its name to Redpath Dorman Long Limited (which I shall call Redpath). By a novation agreement dated 14th August 1998, the sub-contract was novated in favour of the claimant (which I shall call Yarm Road). That novation agreement is the agreement in question. In contemplation of the novation agreement, Costain and Redpath concluded a supplemental agreement on 10th August 1998, the effect of which was to vary the provisions for valuation and for reimbursement of the sub-contractor.
5. The novation agreement is dated 14th August 1998 and is expressed to be between:
 - (1) Redpath.
 - (2) The claimant, Yarm Road, under its then name of Kvaerner Cleveland Bridge Limited and
 - (3) The defendant under its then name Costain Civil Engineering Limited.
6. It is expressed to be supplemental to the sub-contract of 7th August 1995 and recites that Redpath desires to be released and discharged from the sub-contract, and that Costain has agreed to release and discharge Redpath upon the terms of the claimant undertaking to perform the sub-contract and to be bound by the terms thereof. That is given effect to by the operative part of the agreement which reads as follows:
 - (1) *"The substitute sub-contractor" (that is Yarm Road) "undertakes to perform the sub-contract and to be bound by the terms thereof in every way, as if the substitute sub-contractor were a party to the sub-contract in lieu of the original sub-contractor."*
 - (2) *"The main contractor releases and discharges the original sub-contractor from all claims and demands whatsoever in respect of the sub-contract, and accepts the liability of the substitute sub-contractor upon the sub-contract in lieu of the liability of the original sub-contractor and agrees to be bound by the terms of the sub-contract in every way as if the substitute sub-contractor were named in the sub-contract as a party there to in place of the original sub-contractor."*
 - (3) *"For the avoidance of doubt it is expressly agreed between the parties that":*
 - 3.1: *"Any and all rights of the main contractor against the original sub-contractor accrued under the sub-contract prior to the date hereof shall hereafter be exercisable and enforceable by the main contractor against the substitute sub-contractor." And:*
 - 3.2: *"Any and all rights of the original sub-contractor against the main contractor accrued prior to the date hereof shall hereafter be exercisable and enforceable only by the substitute sub-contractor and not by the original sub-contractor against, the main contractor."*
7. The relevant parts of section 104 of the Act are these:
 - (1) *"In this part a construction contract means an agreement with a person for any of the following: (a) the carrying out of construction operations."*
 - (5) *"Where an agreement relates to construction operations and other matters, this part applies to it only so far as it relates to construction operations. An agreement relates to construction operations so far as it makes provision of any kind within subsection 1 or 2."*
 - (6) *" This part applies only to construction contracts which (a) are entered into after the commencement of this part."*

8. It is common ground that the operations provided for by the sub-contract were construction operations within the meaning of s105 of the Act. It is common ground on substantial authority that the novation agreement discharged the original sub-contract of 7th August 1995 and created a fresh sub-contract. Indeed even if that were not the case, the novation agreement would clearly be an agreement with Yarm Road for the carrying out of construction operations.
9. Mr John Marrin QC for the defendant Costain, submitted that the first part of section 104(1) meant "*in this part a construction contract means an agreement with a person making new provision for any of the following.*" Mr Marrin relied in part on the use of the word "provision" in subsection 5. But in my judgment, that does not help him. Mr Marrin's principal argument was that if the novation agreement constituted a construction contract within the meaning of the Act, the Act would have retrospective effect. He submitted relying on *Bennion on Statutory Interpretation* (third edition page 235), that unless the contrary intention appears an enactment is presumed not to be intended to have a retrospective operation. I accept that proposition. Mr Marrin submitted that the novation agreement did not make new provision for the carrying out of construction operations in that the same operations were already provided for by the sub-contract. Mr Marrin contrasted that situation with three other cases, first he contrasted it with further sub-letting on the ground that further sub-letting would create a sub sub-contract for the first time. Second he contrasted it with a further sub-contract, entered into after determination of the sub-contract by the main contractor under Clause 17(1) of the blue form. That was new provision because the subject works of the new sub-contract would be only the works that remained to be done whereas under the novation agreement Yarm Road had undertaken liability for all the operations under the sub-contract. Third Mr Marrin contrasted the situation upon novation with the case where a formal contract was entered into after the works had been started under, a letter of intent. In that case new provision was made because until the formal contract came into being there was either a relationship of quasi contractor only an "if-contract" .
10. Mr Marrin pointed to certain consequences that he submitted would follow if the novation agreement fell within the Act. Yarm Road would enjoy the right under section 108(2) to refer a dispute to adjudication at any time, which could relate to work done as far back as 1995. It would enjoy the right to payment without deduction in the absence of a withholding notice served in accordance with section 111. The right to stage payments under section 109. The right to suspend work for non-payment under section 112 and the prohibition of "pay when paid" clauses under section 113. Likewise, it would be open to Yarm Road to maintain against Costain claims for interest by way of damages for breaches of contract occurring in 1995, 1996 and 1997, on the footing that monies were withheld in the absence of a proper withholding notice. And upon the making of a novation agreement any withholding of monies in the absence of a withholding notice, hitherto lawful, would become irremediately unlawful. Mr Marrin did not suggest that those were practical concerns in the instant case, but he submitted that to treat Part 2 of the 1996 Act as applying retrospectively in that way would plainly give rise to absurdity. It would be nonsensical if Costain were potentially liable in damages for failure to serve a withholding notice in 1995, 1996 or 1997, when the withholding notice regime itself had yet to be conceived. He accepted that there were cases where such anomalies could occur. He accepted, for example, the correctness of the decision of His Honour Judge Anthony Thornton QC in **The Atlas Ceiling and Partition Company Limited v Crowngate Estates (Cheltenham) Limited** (18th February 2000, 2000 CILL 1639), where the effect of a formal contract made after 1st May 1998 was that work carried out before that date pursuant to a letter of intent was retrospectively subjected to the regime of Part 2 of the 1996 Act.
11. Mr Marrin submitted that the court should construe the Act so as to minimise the room for such anomalies. He cited a number of cases illustrating the way the court had decided cases where enactments whose effect turned on events occurring over a period came into force during that period. In particular, he relied on **Alexander v Mercouris** (1979 1 WLR 1270) which related to section 1(1) of the Defective Premises Act 1972. In my judgment, each of those cases turns on the application of the particular statute to the particular facts. Mr Richard Gray QC for the claimants, has not suggested that the act on its true construction does not give rise to those potential anomalies. For present purposes I

shall assume that they exist, but I am not to be taken as deciding that the enactments in sections 109-113 of the Act are retrospective.

12. I accept that the anomalies, if they exist, are potentially serious; but in my judgment it is not open to me to construe the Act in the way in which Mr Marrin contends. The wording is clear and the effect is inescapable, that the novation agreement falls within section 104 (1) (a) and within section 104 (6) (a). Accordingly, I make the declaration that the claimant seeks.

MR RICHARD GRAY QC and MR GWILLIM appeared on behalf of the Claimant.

MR JOHN MARRIN QC appeared on behalf of the Defendants.