JUDGMENT : Mr. Justice Field : TCC. 31st October 2005.

Introduction

1. This is an application under s. 72 of the Arbitration Act 1996 ("the Act") for declarations that the claimant, Hackwood Ltd ("Hackwood") are not party to any arbitration agreement with Areen Design Services Ltd ("ADS") and that therefore arbitration proceedings started by ADS against Hackwood are a nullity. There is also a cross-application by ADS for a declaration that Hackwood, having applied under s. 72 of the Act, are debarred from participating in these arbitration proceedings should the court find that Hackwood are party to an arbitration agreement with ADS.

2. Hackwood own Hackwood House, a Grade II listed property situated at Hackwood Park, Basingstoke, Hampshire. In the period 5th June 2001 to 1st July 2003 ADS carried out extensive refurbishment works on Hackwood House for Hackwood. Prior to the start of the works, it had been agreed by way of a letter of intent dated 25th July 2000 that pending execution of a formal contract based upon the JCT Standard Form Contract With Contractor's Design 1998 Edition ("the JCT Contract"), ADS would proceed with pre-contract programming, liaison with named domestic contractors, invitation of tenders and, subject to the agreement of Hackwood, would obtain possession of the building to set up a site establishment.

3. On 4th June 2001, Hackwood proposed that ADS should begin the refurbishment works on the terms of another letter of intent of that date. That letter ("the 4th June letter") made reference to the JCT Contract. The parties contemplated they would execute a formal JCT Contract once certain outstanding matters had been agreed. In the event no such contract was ever executed. The works were accordingly done under the terms of the 4th June letter.

4. A certificate of practical completion was issued on 9th September 2003. ADS applied for numerous extensions of time, not all of which were granted. In January 2004, ADS applied for an adjudication in respect of the extensions of time that had been refused. It was ADS's case that the terms of the JCT Contract had been incorporated into the contract under which the works had been done and that pursuant to those terms and on the facts of the case they were entitled to extensions of time. Hackwood participated in the adjudication. They positively averred that the terms of the JCT Contract had been incorporated into the contract but contended that no further extensions were justified. By a decision dated 5th March 2004, the adjudicator, Mr. Michael Biscoe, held that ADS were not entitled to any further extensions of time.

5. By letter dated 21st January 2005, ADS gave notice of an arbitration to Hackwood, and applied to the Chartered Institute of Arbitrators ("CIArb") for the appointment of an arbitrator. On 4 March 2005, Mr. Robert Knutson was appointed arbitrator. In their Points of Claim served in the arbitration, ADS plead that the contract incorporated the terms of the JCT Contract and claim entitlement to extensions of time and to additional sums for the works undertaken and for variations. The total sum claimed is just over £4 million. It is these arbitration proceedings that Hackwood say are a nullity. In contrast to the position they took in the adjudication Hackwood now say that the contract did not incorporate the JCT Contract .

6. The JCT Contract provides by Art 6A that where the entry in the Appendix stating that "clause 39B applies" has not been deleted, then subject to a right to adjudication under clause 39A, any dispute or difference as to any matter or thing of whatsoever nature under the contract or in connection therewith shall be referred to arbitration in accordance with clause 39B and the JCT 1998 edition of the Construction Industry Model Arbitration Rules (CIMAR).

7. So far as relevant, Clause 39B provides:

39B Arbitration

A reference in clause 39B to a Rule or Rules is a reference to the JCT 1998 edition of the Construction Industry Model Arbitration Rules (CIMAR) current at the Base Date.

39B.1.1 Where pursuant to article 6A either Party requires a dispute or difference to be referred to arbitration then that Party shall serve on the other Party a notice of arbitration to such effect in accordance with Rule 2.1 which states:

"Arbitral proceedings are begun in respect of a dispute when one party serves on the other a written notice of arbitration identifying the dispute and requiring him to agree to the appointment of an arbitrator";

and an arbitrator shall be an individual agreed by the Parties or appointed by the person named in the Appendix in accordance with Rule 2.3 which states:

"if the parties fail to agree on the name of an arbitrator within 14 days (or any agreed extension) after;
(i) the notice of arbitration is served, or
(ii) a previously appointed arbitrator ceases to hold office for any reason, either party may apply for the appointment of an arbitrator to the person so empowered."

39B.2 Subject to the provisions of article 6A and clause 30.8, the Arbitrator shall, without prejudice to the generality of his powers, have power to rectify this Contract so that it accurately reflects the true agreement made by the Parties, to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of or the Parties and to ascertain and award any sum which ought to have been the subject of or included in any payment and to open up, review and revise any account, opinion, decision requirement or notice issued, given or made and to determine all matters in dispute which shall be submitted to him in the same manner as if no such account, opinion, decision, requirement or notice had been issued, given or made.

8. In relation to Clause 39B, Appendix 1 provides for the option of choosing the President or a Vice-President of RIBA or of RICS or of CIArb to act as appointor of the arbitrator and if no such election is made, the appointor is to be the President or a Vice-President of CIArb.

9. As I have said, Hackwood contend that they were not party to any arbitration agreement with ADS because the terms of the JCT Contract were never incorporated into the contract. ADS submit that on the true construction of the 4th June letter, the JCT Contract terms were incorporated into the contract. In the alternative, ADS argue that in averring in the adjudication that the contract incorporated the JCT Contract, Hackwood made an irrevocable election from which they cannot now depart.

The facts

10. The first contractor approached to do the works on Hackwood House was a firm called FSI. FSI submitted proposals but these were rejected and in July 2000 Hackwood approached ADS. They provided ADS with FSI's proposals and asked them to come up with proposals of their own. By letter dated 18th July 2005, ADS submitted a tender for works described in an attachment thereto dated 13th July 2000: the tendered contract sum was £10,000,000. Whilst this tender was under consideration, ADS were authorised under the letter of intent dated 25 July 2000 to take the steps identified in paragraph 2 above.

11. In the course of the ensuing negotiations ADS drew up a set of Contractor's Proposals that specified the work to be done. There were regular meetings at which these proposals were discussed. On 16th March 2001, ADS made a revised offer to carry out the works set out in their Contractor's Proposal for £13.2 million and by letter dated 22nd March 2001 confirmed that the Contractor's Proposal incorporated a number of matters that had been discussed at various meetings. ADS's Contractor's Proposal was discussed in negotiation meetings held on 3rd April 2001 and 17th April 2001. Both parties contemplated that a formal contract on the terms of the JCT Contract would be concluded. Under the JCT Contract the scope of the work is set out in "Employer's Requirements" and "Contractor's Proposals" and if there is a discrepancy between the two, the Contractor's Proposals prevail (see condition 2.4). The minutes of the latter meeting record that ADS are awaiting sight of Employer's Requirements and Contract Conditions.

12. In May 2001 ADS produced a revised set of Contractor's Proposals called "Revision B" which stated that ADS's offer to complete the design, construction and fitting out of the works described in the Contractors Proposals was "submitted on the basis of a Standard JCT 1998 Contract with Contractors' design."

13. In early May 2001, ADS were sent a number of volumes of proposed Employer's Requirements and a copy of the JCT Contract and some proposed amendments thereto. ADS sent their detailed comments on the proposed amendments by letter dated 10th May 2001. One of the matters with which ADS disagreed was Hackwood's proposal that ADS furnish a performance bond. Another of the matters was the question of who should bear the cost of additional works made necessary by the terms of

planning or regulatory approvals. Hackwood maintained that the cost of such work should be borne by ADS; ADS disagreed.

14. As the negotiations dragged on Hackwood became more and more keen that the works should start. There had already been delay caused by the foot and mouth outbreak earlier that year. ADS's position was that they would only start the works if Hackwood issued an instruction in the form of a letter of intent. Hackwood accordingly issued the 4th June letter. It was in these terms:
Areen Design Services Limited
(Address)
Attention Mr. Peter Heath
Dear Sir
HACKWOOD HOUSE BASINGSTOKE
We refer to our various discussions and meetings and to your letter dated 16 March 2001 confirming your offer to complete the design, construction and fitting out of the works on the above project in the sum of £13,200,000.00 (Thirteen Million Two Hundred Thousand Pounds) excluding VAT.
We confirm our instruction for you to formally commence on site on 5 June 2001 with a construction programme on site of 65 weeks completing on 2 September 2002. We also confirm that the basis of the contract will be the Standard Form of Building Contract with Contractor's Design 1998 Edition incorporating Amendments 1:999, 2:2000, 3:2001.
Would you please take this letter as our formal instruction to proceed with the design, construction and fitting out of the works as set out in the Contractor's Proposal document, pending the issue of the formal contract documentation which is currently being prepared for completion by yourselves and our company.
In the event that a formal contract is concluded then all work instructed and carried out under this letter and any sums paid by us shall be taken into account.
If for whatever reason we at any time give notice to cease work (in which event you shall as soon as practicable cease all work) we shall reimburse all reasonable and proper costs incurred by you in accordance with the terms of this letter.
Please sign below and return this letter to us.
Yours faithfully
For and on behalf of
HACKWOOD LIMITED

15. ADS accepted these terms by starting the works the following day. However, negotiations on the wording of the Employer's Requirements continued, particularly on the question of the cost of works consequential on planning approvals. There was also disagreement on "Temporary Roofs". In addition ADS proposed a series of amendments to the wording of a number of clauses in the JCT Contract which were not accepted by Hackwood. The parties also failed to agree on which of the options set out in Appendix 1 to the JCT Contract should apply. In addition to the choice of the appointor of the arbitrator, these options relate to such matters as the applicability of the CDM Regulations; the applicability of the Joint Fire Code; and the rate of liquidated and ascertained damages. Appendix 1 also contemplates that the parties will specify therein the base date, the date of completion and the date of possession.

16. As I have said, the parties failed to reach agreement on the outstanding issues and the works were completed without a formal JCT Contract ever being executed. Nonetheless, in the course of the completion of the works, ADS submitted and Hackwood processed valuations for interim payments on the basis that the relevant terms of the JCT Contract applied and in dealing with variations and requests for extensions of time both parties referred to the applicable clauses in the JCT Contract.

Did the 4th June letter incorporate the terms of The JCT Contract?

17. It is common ground that a valid and enforceable contract came into existence upon ADS's acceptance of the terms of the 4th June letter by starting work on 5th June 2001. The question I have to decide is whether under this interim contract the provisions of the JCT Contract were to apply. In my judgement, this question must be answered by an objective assessment of the parties' intentions having regard to the terms of the letter and the matrix of facts in which it is set. Since the parties

intended the letter to record the terms of their interim contract and it is not contended that that contract was varied by subsequent contract or that there is an estoppel, no regard can be had to the parties' conduct subsequent to the 5th June 2001: see *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583; *Schuler (L) A.G. v Wickman Machine Tool Sales Ltd* [1974] AC 235.

18. By the terms of the 4th June letter ADS agree to carry out the works specified in the Contractor's Proposal for the sum of £13.2 million and in accordance with a programme on site of 65 weeks completing on 2nd September 2002. Although ADS are obliged to complete the works; Hackwood are free to terminate the contract at any time. ADS are only to have a contractual right to complete the works if a formal JCT Contract is signed following agreement on all outstanding issues.

19. In my judgement, construed as a whole and in its context, the effect of the 4th June letter was to incorporate terms of the JCT Contract into the interim contract save to the extent that those terms were inconsistent with the terms of the letter. ADS had made it clear that they were submitting their Contractor's Proposal (Revision B) on the basis of a Standard JCT 1998 Contract with Contractors' design, and although both parties intended that a formal JCT Contract should be executed if outstanding matters were agreed, there was a distinct possibility that final agreement would not be reached and ADS would be required to undertake the Revision B works to completion. Against this background the effect of the words of the third sentence: "We also confirm that the basis of the contract will be the Standard Form of Building Contract with Contractor's Design 1998 Edition incorporating Amendments 1: 1999, 1: 2000, 3: 2001," was to incorporate the JCT standard terms into the interim contract.

20. Mr. Bowsher submitted that the parties cannot have intended to incorporate the terms of the JCT Contract when they were still negotiating the terms of the final contract. I reject this submission. The object of the 4th June letter was to establish the terms of an interim contract that the parties appreciated could govern the whole of the project. For the purposes of the interim contract, the scope of the work, the price and the construction programme were all agreed. Against this background, the fact that the parties were negotiating a contract intended to replace the interim contract is not inconsistent with an intention that the JCT Contract's standard terms should be incorporated into the interim contract.

21. Mr. Bowsher also argued that the use of the future tense ("will be") in the third sentence strongly indicated that the JCT Contract's terms were only to apply if a formal contract were executed. I disagree. The whole of the letter is looking to the future since, when it was written and sent, no contract of any sort was in existence. The use of the future tense in the third sentence therefore does not signify that it was only if a formal contract were entered into that the parties' relations would be governed by the JCT Contract.

22. Mr. Bowsher further contended that the words: "If for whatever reason we at any time give notice to cease work …. we shall reimburse all reasonable and proper costs incurred by you in accordance with the terms of this letter," showed that the parties did not intend to incorporate the JCT Contract into the interim contract. Again, I disagree. The reimbursement is to be in accordance with "the terms of this letter" and those terms are not inconsistent with the JCT Contract being incorporated into the contract.

23. Mr. Bowsher also relied on the fact that the parties had not agreed which of the options set out in the Appendix were to apply. In my opinion this is not inconsistent with an intention to incorporate the JCT Contract into the interim agreement. Where the Appendix specifies a choice where none of the options is exercised, that choice will apply. It follows that the appointor of the arbitrator in this case is the President or a Vice-President of CIArb. It also follows that the whole of the CDM Regulations applied and not just regulations 7 and 13. Where the Appendix does not specify a default election, the failure of the parties to have agreed such an election does not on the facts of this case rob the JCT Contract of sufficient certainty for the interim contract to be enforceable or otherwise render it unworkable. Thus the failure of ADS and Hackwood to agree the rate of liquidated and ascertained damages means simply that clause 24 is not incorporated. And the failure to agree whether the Joint Fire Code shall apply means that that code will not apply.

24. Mr. Bowsher relied on the decision of HHJ Humphrey Lloyd QC in *Amec Capital Projects Limited v Whitefriars City Estate Limited* [2003] EWHC 2443 (TCC). That was a case where building work was done under a letter of intent put forward by the defendant employer whilst the parties were negotiating the terms of the JCT Contract. The contractor obtained a decision from an adjudicator and sought to enforce the decision by proceedings brought under CPR Part 8. The employer sought a stay of the enforcement proceedings under s. 9 of the Act on the ground that the real dispute between the parties was who should be appointed as adjudicator and this dispute was subject to an arbitration agreement.

25. The relevant parts of the letter of intent were:
"Pending execution of a formal contract based upon an amended standard form of Building Contract with Contractor's Design 1998 Edition …. and any further amendments as specified … and any other amendments as may be agreed between ourselves, we hereby issue this letter of intent of instruction in relation to your firm price tender … for the execution of the above works…."
Until the execution of a contract in the form referred to above ….. the terms of payment and all other terms and conditions, including the arbitration agreement in Article 5 (sic), shall be as contained in the form of contract referred to above."

26. Prior to the issue of the letter of intent the contractor had sent to the employer their comments on amendments proposed by the employer and set out in a schedule. One of the amendments proposed by the employer was that it should be stated in the Appendix that the adjudicator should be a named individual and in the event of his unavailability a person nominated by him; the Appendix proferred by the employer also stated for the purposes of clause 39B.1 that the appointor of an arbitrator would by the President or a Vice-President of the RICS. No formal JCT Contract was ever executed.

27. HHJ Lloyd QC concluded that on the true construction of the letter the "form of contract referred to above" was based on an amended form and the amendments contemplated were those made to the Appendix in the schedule sent to the contractor. In paragraph 11of his judgement the learned judge said:
The amendments are, as I have already indicated, those set out in the schedule. It would be theoretically possible to carry out work even of this substantial nature and magnitude on an unamended JCT form, but it would not be possible to do so on an unamended JCT form which did not have some, at least, of Appendix 1 to that contract completed, because that Appendix requires decisions as to matters essential to an effective contract for any work, and certainly this work. Unless the options are selected and the Appendix is completed the form is incomplete and unusable and lacks the certainty required for the contract and envisaged by it. I cannot believe that the defendant would have allowed work to have started on such an uncertain basis, or that the claimant would have accepted such uncertainty. Accordingly. I read the words "amended standard form" as including the defendant's proposals set out in the schedule as it relates to the Appendix.

28. If HHJ Lloyd QC was meaning to say that in all cases, whatever the factual context, the JCT form is unusable and lacks essential certainty if the options in the Appendix are not selected I do not with respect agree with him for the reasons I have given. Accordingly, I reject Mr.Bowsher's submission that ***Amec Capital Projects Limited v Whitefriars City Estate Limited*** is as an insurmountable obstacle to finding that the terms of the JCT Contract were incorporated into the interim contract.

29. The parties did not delete the entry in Appendix 1 stating that "clause 39B applies." Accordingly the JCT Contract terms that were incorporated into the interim agreement included the arbitration agreement contained in clause 39 B.

30. I conclude therefore that on the true construction of the 4th June letter Hackwood are parties to an arbitration agreement.

31. The conclusion expressed in paragraph 30 renders it unnecessary to decide whether Hackwood made a binding election by averring in the adjudication that the JCT Contract was incorporated into the contract. This being so, I decline to make any findings on the election issue.

Are the arbitral proceedings properly constituted?

32. Mr. Bowsher submitted that Mr. Knutson was not validly appointed and that the notice of arbitration did not properly identify the relevant dispute.

33. In my judgement, Mr. Knutson was properly appointed. None of the options spelt out in that part of the Appendix that relates to clause 39B was selected. As I have already held in paragraph 23 above, the appointor of the arbitrator was accordingly the President or a Vice-President of CIArb and it is not disputed that Mr. Knutson was appointed by the CIArb.

34. The notice of arbitration served by ADS stated: "Disputes and or differences including but not limited to claims of extensions of time due to ADS under the Contract and consequential loss and expense payments owed to ADS therefor, claims by ADS for prolongation and disruption costs, claims by ADS for reimbursement for works additional to the agreed scope of Works, and monies owed to ADS under its Final Account have arisen between the parties." In my opinion this was a perfectly adequate notice for the purposes of clause 39B.

35. Hackwood's Points of Claim also plead that insufficient notice of the arbitration had been given because the notice was sent to Hackwood's old registered office and not to their new registered office. In fact notice of the arbitration has manifestly come to the attention of Hackwood through communications between the parties' solicitors and Mr. Bowsher rightly did not seek to argue this last point.

36. In my judgement, therefore, the arbitration begun by ADS is properly constituted.

Are Hackwood debarred from participating in the arbitration?

37. Section 72 (1) of the Act provides:
A person alleged to be a party to arbitral proceedings but who takes no part in the proceedings may question –
(a) whether there is a valid arbitration agreement,
(b) whether the tribunal is properly constituted, or
(c) what matters have been submitted to arbitration in accordance with the arbitration agreement,
by proceedings in the court for a declaration or injunction or other appropriate relief.

38. To ensure that they fell within this provision, Hackwood took no part in the arbitration begun by ADS. On 13th July 2005, the arbitrator issued a procedural order whose effect was that if Hackwood failed to serve Points of Defence as directed by an earlier order or "boycotts the Full Procedure or fails to submit to the jurisdiction of the Arbitration in any other way," the previous timetable laid down by the arbitrator was not to apply and ADS were to serve their Statements of Witnesses of Fact by 19 September 2005. By letter dated 31st August 2005, however, the arbitrator stated that he would receive evidence from Hackwood if their s. 72 application failed. Faced with this decision by the arbitrator, ADS contend that Hackwood, having applied under s. 72, are legally debarred from participating in the arbitration if (as I have held) their application fails.

39. In support of this contention Mr. Goddard QC for ADS argued that the right to apply under s. 72 conferred a special privilege when that right was compared with the rights of challenge conferred by ss. 30 and s. 32 of the Act. Under s. 30 the challenge has to be made within the arbitration and the right to have a jurisdictional question decided by the court under s. 32 is conditional on the written agreement of all parties, the permission of the arbitral tribunal and the court being satisfied that there is a good reason why the matter should be decided by the court. Moreover, the rights of challenge conferred by ss. 30 and 32 are capable of being lost if the requirements of s. 73 are not met. It follows, submitted Mr Goddard, that it would be contrary to the policy of the Act if an unsuccessful s. 72 applicant were to be allowed to participate in the arbitration. The words "who takes no part in the proceedings" in s.72 (1) ought therefore to be construed as meaning takes no part at any stage whether before or after a s. 72 challenge.

40. Mr. Goddard also argued that if a party makes a s. 72 application he is to be taken to have made a binding election that debars him from any subsequent participation in the arbitration.

41. I cannot accept Mr. Goddard's submissions. In my judgement it is clear that s. 72 requires no more than that an applicant should not take part in the arbitral proceedings down to the determination of his application. If it had been the intention to debar an unsuccessful applicant from subsequent participation in the proceedings the Act would have spelled this out in clear terms since he would be being denied a contractual right. It is accordingly for the arbitral tribunal to decide whether it is appropriate for an unsuccessful s.72 applicant to be allowed to participate in the arbitration.

42. Turning to Mr. Goddard's submission that Hackwood are debarred from participating in the arbitration by reason of the doctrine of election, in my opinion this submission is misconceived. Plainly, having opted to proceed by way of an application under s. 72, Hackwood cannot seek to have the same issues determined under s. 30 or s. 32. But this is the extent of the consequences of their election to apply under s. 72. Whether having applied under s. 72 Hackwood are debarred from participating in the arbitration depends on the true construction of the Act and I have already dealt with that.

Conclusion

43. For the reasons I have given Hackwood's application is dismissed and so too is ADS's cross-application. Hackwood are party to the arbitration agreement contained in Article 6A and clause 39B and are not debarred from participating in the arbitration proceedings brought against them by ADS.

Mr. Michael Bowsher (instructed by Simmons & Simmons) for the Claimant

Mr. Andrew Goddard QC (instructed by Lane & Partners) for the Defendant