

JUDGMENT : HIS HONOUR JUDGE THORNTON QC. TCC. 14th February 2003

Introduction

1. The claimant seeks to enforce the award of an adjudicator which the defendant declines to pay on the grounds that it was decided without jurisdiction. The underlying background to that decision was refurbishment works being carried out by the claimant shopfitters at a new Tally Weijl retail clothing store in Oxford Street, London, W1N 9HB. The refurbishment works were carried out between June and September 2000 and, following practical completion, disputes as to the value of that work arose which the claimant referred to adjudication having elected to adopt the statutory Scheme Rules concerned with the appointment of, and the procedure to be adopted by, the adjudicator. The claimant sought the nomination of an adjudicator from The Association of Independent Construction Adjudicators. Mr C D Morris was nominated and he published his decision on 16 August 2002 in which he decided that the claimant should be paid £95,483.78, interest of £11,717.97 and the adjudicator's fees. No reasons were asked for prior to the publication of that decision so that the decision is unreasoned.
2. The defendant has declined to pay the sums directed to be paid. Two jurisdictional grounds are taken by the defendant. Firstly, it is contended that there was no construction contract in existence between the parties and, hence, no construction contract underlay or gave rise to the claimant's statutory entitlement to an adjudication as to the disputes concerning the true value of its work. Secondly, it is alleged that if there was a construction contract in existence, that contract was different in content to the construction contract found to exist by the adjudicator. In consequence, that contract incorporated different adjudication rules into any adjudication arising out of that contract to those adopted by the adjudicator and, thus, the adjudicator was appointed, and the adjudication was conducted by reference to, the wrong rules and in contravention of the parties' agreement as to the procedural rules that would apply. On this additional ground, therefore, the defendant contended that the adjudication was conducted without jurisdiction.
3. If the defendant makes good either ground of alleged lack of jurisdiction, the decision is a nullity and is unenforceable. However, the claimant contends that the adjudicator had referred to him the question of what was the true value of its work and as to what were the applicable terms incorporated into the construction contract both parties accepted was in existence. Thus, the adjudicator correctly proceeded on the basis that there was a construction contract underlying both the disputes referred to him and his appointment, that its terms did not clearly and unequivocally incorporate any adjudication procedural rules and that, in consequence, the Scheme Rules applied (The Scheme for Construction Contracts (England and Wales) Regulations 1998) . In any case, the application of the wrong rules, if the adjudicator applied the wrong rules, did not amount to an error which undermined his jurisdiction and the resulting decision was still valid. In summary, any error as to the terms of the contract or as to the applicable procedural adjudication rules was an error of law within the adjudicator's jurisdiction and did not render the decision unenforceable.
4. Since the defendant failed to pay the decision as directed, these proceedings were instituted on 23 January 2003 in the form of a Part 8 Claim Form. The claimant seeks summary judgment for the sums directed to be paid.

The Construction Contract

5. The dispute as to the adjudicator's jurisdiction involves a consideration of whether the parties entered into a construction contract at all and, if so, what conditions of contract were incorporated into that construction contract. Since detailed evidence was adduced that was directed to these questions, I will summarise it although I leave over for further consideration whether I should make my own findings on these questions which, if the adjudicator had jurisdiction, were ones that were essentially for him to decide.
6. The work on site started on 9 June 2000. Prior to that, no contract documents had been prepared and no tendering process had been undertaken. The claimant had been introduced to the defendant by the project architect a short time before work started and invited to undertake the shopfitting work which was to be undertaken at great speed and with an immediate start on site. The contract documentation would be produced and agreed and a contract entered into as work proceeded. At the first project

meeting held on 15 June 2000, it was agreed, in a non-contractual sense, that the work would be subject to a form of prime cost contract and that the claimant and the consultants would produce an agreed schedule of work. It was also agreed that a letter of intent would be provided by the defendant pending final agreement as to the terms of the contract.

7. During June and July 2000 the claimant undertook the strip out work without any clearcut letter of intent having been provided. The nearest that the defendant got to providing such a letter was by a letter dated 7 July 2000 in which the defendant wrote to the claimant instructing it to carry out the works subject to a term that the form of the contract would be the JCT Standard Form of Prime Cost Contract 1998 ("JCT PC 98"). However, this was immediately responded to by the claimant in a letter dated 10 July 2002 addressed to the architect declining to enter into a contract which incorporated these conditions and instead offering its own conditions which had already been sent to the defendant.
8. The claimant became increasingly concerned at the lack of any contractual basis for the work it was carrying out, particularly once the stripping out work was completed and the refurbishment work, involving the employment of subcontractors, had started. On 21 July 2000, the claimant faxed the defendant and asked for formal instructions and an agreement by which it could continue the work. The fax sought a particular assurance regarding payment. The claimant reiterated these concerns at a subsequent site meeting held on 27 July 2000. On the following day, the claimant sent to the defendant four marked up plans showing the partitions that it had been asked to install with a budget price included. This document was signed by an authorised representative of the defendant. This jointly signed document is relied on by the claimant as giving rise to the construction contract. It also relies on its standard conditions sent previously to the defendant which contained a term that the defendant's acceptance of any quotation would confirm its agreement to all conditions contained in that standard conditions document.
9. The defendant, soon afterwards on 2 August 2000, sent the claimant a finalised letter of appointment which was in similar terms to that sent on 7 July 2000, thereby seeking to incorporate the JCT PC 98 terms and, if already applicable, seeking to exclude the claimant's standard terms. The letter contained a requirement that the claimant should confirm its agreement to the terms of the letter by returning the enclosed copy signed where indicated but this copy was neither signed nor returned by the claimant. No further communication of note occurred concerning the terms of the contract under which the work was being carried out.
10. On the basis of these exchanges, the claimant contended that the contract was formed by its offer contained in its quotation of 28 July 2000 read with the earlier communication enclosing its standard conditions and the defendant's acceptance of both constituted by its signature on that quotation.
11. The defendant contended that, at best, the joint signatures on the document of 28 July 2000 could only have related to, and given rise to, a construction contract concerning the partitions. Since the quotation made no reference to earlier communications or to the claimant's conditions, these conditions could not be regarded as applying to any of the claimant's work. In consequence, the other work could only have been subject to the letter dated 2 August 2000 and that the claimant's failure to sign and return a copy did not preclude a contract coming into being.
12. The claimant disputed the defendant's contentions, particularly on the ground that, since a contract was already in being, its failure to sign and return the offer contained in the letter dated 2 August 2000 was the clearest possible indication that it was not agreeing to be bound by that proposed contract and remained bound by the earlier contract.
13. It can be seen from this summary that it was not clearcut or obvious which set of conditions, namely the claimant's conditions or JCT PC 98, had been incorporated into the construction contract but that there was in existence a construction contract of some kind. Thus, one of the disputes requiring resolution was as to which set of conditions had been incorporated since that the answer to that question would determine whether the basis of valuation and payment was in accordance with the claimant's rates and quotations or by reference to a prime cost. Unless a pure question of jurisdiction as to whether or not a contract existed at all arises, a court ought ordinarily not decide a disputed question in enforcement

proceedings since that question has been left, by the terms of the statutory jurisdiction of the adjudicator, for decision by the adjudicator.

The Dispute Referred to the Adjudicator

14. The claimant had submitted a final account to the defendant in March 2002 claiming a sum of £144,706.64 plus VAT as being outstanding. Having failed to obtain what it regarded as a proper response to this document, it served a notice of adjudication on the defendant dated 3 July 2002 to the effect that the dispute between the parties was to be settled by the process of adjudication in accordance with the provisions of the Housing Grants Construction and Regeneration Act 1996. The notice enclosed a copy of the claimant's application to the Association of Independent Construction Adjudicators as a Nominating Body, for the appointment of an adjudicator. The nature of the dispute was stated to be "Valuation and payment of Final Account".

The Jurisdiction of the Adjudicator

15. The jurisdictional questions raised by the defendant in relation to the decision of the adjudicator arise out of the statutory basis for the adjudication. This is set out in section 108 of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") which provides:

"108 (1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section. For this purpose "dispute" includes any difference.

(2) The contract shall-

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice; ...

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provision of the Scheme for Construction Contracts apply. ...

114(1) The Minister shall by regulations make a scheme ("the Scheme for Construction Contracts") containing provision about the matters referred to in the preceding provisions of this Part."

The relevant scheme is set out in The Scheme for Construction Contracts (England and Wales) Regulations 1998 (SI 1998 No 649) ("the Scheme").

16. It has been seen that the parties were contending for one or other of two sets of conditions as having been incorporated into the contract which both parties accepted was a construction contract. The claimant contended that its conditions were incorporated and the defendant that the JCT Prime Cost Standard Form of Contract 1998 ("JCT PC 98") were incorporated. Both parties accepted that if the claimant's conditions were incorporated, that the requirements for adjudication provided for by section 108 were not met so that the adjudication would be governed by the Scheme whereas, given the detailed provisions for adjudication contained in JCT PC 98, if those conditions prevailed, the adjudication would be governed by the contractual provisions and not by the Scheme provisions. Since these provisions, whether the Scheme or the contractual, governed all questions of appointment, timescales and procedure, it is vital to know which applied. Surprisingly, the defendant did not put in evidence the details of either set of rules and merely confined its submissions to the general proposition that the "right" set of adjudication provisions had to be used for all questions of appointment and procedure for the adjudication to be correctly constituted and for the decision to be within jurisdiction and enforceable.

No Construction Contract

17. Turning to the history of the adjudication, the starting point is the reaction of the defendant on being informed that Mr Morris had been appointed as adjudicator. On receiving that information, the defendant's solicitors wrote to him with a copy to the claimant's solicitors on 16 July 2002 in the following terms:

"If there is a construction contract between [the defendant] and the [claimant] then it is in the JCT Standard Form of Prime Cost Contract 1998. The appointment of the applicant was confirmed, at the latest, by a letter dated 2 August 2000 specifying the form of contract.

As we understand it, you have been nominated by the [claimant] pursuant to the Scheme for Construction Contracts (England and Wales) Regulations 1998. However, if there is to be an adjudication then the nomination process and the rules of adjudication should follow the JCT procedure.

It follows that we can neither accept your jurisdiction, nor sign the Deed of Appointment. You will note that we are copying this letter to the [claimant's] solicitors and it may be that they will now be willing to withdraw your nomination and proceed correctly in accordance with the contract. If [the claimant] will not withdraw your nomination and if you are minded to proceed then [the defendant] will wish to participate without prejudice to their objection to your jurisdiction and under protest."

17. To this letter, the claimant's solicitors replied to the adjudicator as follows:
"... [The claimant] refute the statements contained in this letter to the effect that they are bound by the JCT Standard Form of Prime Cost Contract. This form of contract was rejected in express terms by [the claimant] as you will see in the statement of dispute.
The only agreement in writing or otherwise that exists between the parties is dated the 28th July 2000 which is [the claimant's] letter of that date incorporating their conditions duly signed and returned by [the defendant].
There can be no question regarding your jurisdiction in this matter the Scheme clearly applies."
18. The adjudicator, although his decision did not contain reasons, set out the procedural history of the adjudication in his decision. This included the following passage:
"The [defendant] wrote on 26 July 2002 'if despite our objections you decide to proceed with the adjudication then we reserve the right to make submissions on the matters put before you without prejudice to our challenge to your jurisdiction.' This sentiment was expressed in further communications and submissions made by the [defendant].
At paragraph 2.3 of the Statement of Response the [defendant] states that 'the [defendant] does not consent to or grant the adjudicator the authority to determine the issue of jurisdiction.'"
19. The defendant's written submissions for this summary judgment hearing clearly set out the nature of the jurisdictional challenge mounted by the defendant to the adjudicator's appointment and decision. These stated:
"3.1 The defendant's primary contention is that the adjudicator did not have the jurisdiction to adjudicate or determine the dispute purportedly referred to him by the claimant. The referral to adjudication and the nomination of the adjudicator were purportedly made pursuant to the term of the Scheme for Construction Contracts Regulations (England and Wales) 1998 ("the Scheme"). The claimant contends that the provisions of the Scheme applied by reason of their implication into its standard Conditions of Sale which it contend applied to the Works.
3.2 The defendant denies that the claimant's Conditions of Sale applied to the Works. The defendant avers that the Works were carried out pursuant to the terms of the JCT Prime Cost 1998 Standard Form of contract ("JCT PC 98"). JCT PC 98 complies with the provisions of sections 108(1) to (4) of the Housing Grants, Construction and Regeneration Act 1996 ("the Act") therefore it follows that there is no scope for the implication therein of the provisions of the Scheme.
3.3 The defendant avers that:
(i) JCT PC 98 applied to the work carried out by the claimant. Therefore, in purporting to act pursuant to the terms of the Scheme, the adjudicator was acting without jurisdiction because he failed to determine the dispute referred to him under the actual conditions between the parties."
20. It is clear from these extracts that:
 1. Each party was contending that there was a written construction contract in being. However, whereas the claimant was contending for one based on its own Conditions of Sale, the defendant was contending for one based on JCT PC 98.
 2. The defendant was contending that the applicable rules for the appointment of the adjudicator and for the procedure to be followed in the adjudication on appointment were those set out in JCT PC 98. The claimant was contending that since there were no standard conditions incorporated into the construction contract and that the only conditions incorporated were ones containing no rules of appointment or procedure, the statutory implication arose. This, being section 108 of the HGCRA, provides that if the construction contract does not contain specific minimum terms relating to the conduct of the adjudication, "the adjudication provisions of the Scheme for Construction Contracts apply".

21. The adjudicator clearly understood that these were the rival contentions of the parties since his decision contains this clearly stated passage:
"2.01 The [claimant] and [defendant] agree that there is a contract in place for the construction works carried out by the [claimant] between 8 June 2000 and 30 September 2000 at 368-370 Oxford Street, London, W1N 9HB.
2.02 There is dispute between the parties as to the precise Form of Contract. ...
2.05 Clause 108(1) of the Housing Grants, Construction and Regeneration Act 1996 specifically limits the scope of an adjudication to 'a dispute arising under the contract.' 2.06 *By extension, a dispute arising about the formation of a contract is beyond the valid scope of an arbitration (sic), and no decision has been made in that regard."*
22. The defendant now contends that there was no contract at all, that the parties' relationship was purely a non-contractual one that, in consequence, the claimant's only entitlement to payment was for a quantum meruit and that the adjudicator lacked jurisdiction since there was no construction contract in writing in place under and by virtue of which the claimant could refer resulting disputes to adjudication.
23. The jurisdictional challenge that the defendant mounted before the adjudicator was mounted on the premise that there was in existence a construction contract between the parties since that challenge was to this effect: "under our contract with the claimant, we are entitled to an adjudicator appointment procedure and to an adjudication in conformity with our contractual agreement. We are not required to submit to an adjudication conducted under a different procedure since that procedure would only be applicable if the terms of the construction contract contended for by the claimant, which are different from the terms that we contend for, are applicable." It would be diametrically opposite to that approach for the defendant now to contend that there was no contract at all between the parties.
24. It is not open to the defendant to advance this contention in these enforcement proceedings. As recorded by the adjudicator in his decision, the defendant accepted that there was a contract in being between the parties for the refurbishment work carried out by the claimant and based its submissions to him on that basis. This application and the adjudication should be considered on the basis that both parties accepted that a construction contract was in place since the decision is premised on that commonly accepted understanding and it would be inequitable if the defendant was now entitled to reprobate from its position before the adjudicator. Moreover, for the purposes of these enforcement proceedings, the defendant is estopped from resiling from that position having adopted it before the adjudicator.

Adjudication Rules

25. At first sight, the defendant's contentions pose an intractable logical puzzle. The puzzle is as to how an adjudication can start at all in the circumstances of this case. The puzzle arises in this way: both parties accept that there is a construction contract and that each party is, in consequence entitled to call for an adjudication of disputes arising under that contract. However, each party contends for different terms and different appointment procedures arising out of those terms. Thus, one of the disputes requiring resolution by the adjudicator is which terms were incorporated into the construction contract. Since an adjudicator's appointment must be made in conformity with the relevant contractual terms and since the adjudicator cannot determine his own jurisdiction, particularly where, as here, the defendant expressly states that he is not being given jurisdiction to determine his own jurisdiction, it would seem that the adjudicator is hamstrung since he cannot determine whether or not he should proceed to hear and decide the dispute in question. However, each party is nonetheless entitled to an immediate adjudication to resolve which terms were incorporated into the construction contract that they both accepted governed their relationship. It is clearly within the scope of an adjudicator's jurisdiction to determine whether particular documents were incorporated into the construction contract under which he was appointed and out of which the dispute arises (see **C & B Scene Concept Design v Isobars** [2002] BLR 93, CA particularly paragraphs 21-30 per Sir Murray Stuart-Smith).
26. On a careful analysis, however, the situation is not as puzzling as it seems on first sight. It is important to take into account the precise basis of the statutory jurisdiction of the adjudicator. As already set out, this is derived from section 108(1) of the HGCRA. That provides that "a party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with

this section." It follows that, since both parties agree that their relationship was governed by a construction contract, each of them has the right to refer dispute arising under that contract to adjudication. It would be surprising if that right could be thwarted because the parties could not agree as to which set of conditions had been incorporated into the contract or which set of adjudication provisions should apply. If the defendant's contentions are accepted, in a situation where it was not obvious which adjudication provisions should apply, even though it was accepted by both parties that their relationship was governed by a construction contract, it would not be possible to embark on an adjudication without first seeking a determination from the court to that question despite the statutory entitlement to an immediate and speedy adjudication.

27. Section 108, as has been seen, provides that the construction contract shall enable a party to give notice at any time of his intention to refer a dispute to adjudication and shall provide a timetable with the object of securing the appointment of an adjudicator and referral of the dispute to him within 7 days of such notice. The section continues: "If the contract does not comply with the requirements of subsections (1) to (4) [which include the provisions I have just summarised], the adjudication provisions of the Scheme for Construction Contracts apply."
28. If the parties enter into their construction contract in such a way that its terms are not clearly and unquestionably capable of being identified, because, as here, the negotiations consisted of a series of offers and counter-offers and no complete and composite set of contract documents was ever identified and signed, the parties have not produced a construction contract whose terms enable a party to give notice at any time of his intention to refer a dispute to adjudication nor have they provided a contractual timetable with the object of securing the appointment of an adjudicator within 7 days of such a notice. Indeed, without an adjudication, the manner of giving notice to refer a dispute to adjudication and the means of appointing, and the timetable for the appointment of, the adjudicator that are provided for in the contract cannot be ascertained.
29. In those circumstances, section 108 of the HGCRA provides that the Scheme shall apply since the contract does not comply with the statutory requirement that it should enable a party to give notice at any time of his intention to refer a dispute to adjudication nor does it provide an appropriate timetable for an appointment within 7 days of such a notice. A construction contract whose terms cannot be readily ascertained by both parties does not enable these essential formalities to be undertaken in the requisite timescale. A contract only enables these things to be done if it not only provides for them but also provides for them in a form that precludes any reasonable argument as to its terms concerning the adjudication which both parties have the right to demand and have instituted in a limited timescale.
30. This conclusion arises from the use of the words "*the contract shall enable*" and "*the contract shall provide*" in sections 108 (2) (a) and (b) of the HGCRA. These words, in the context of the mandatory requirement that a party has the right to refer a dispute arising under a construction contract, which includes a dispute as to which terms are included in the contract, to adjudication, mean that the contract shall both contain the required provisions and shall contain them in a manner and form that enables their applicability to be readily ascertained without dispute. If there is a dispute as to their applicability, the contract does not enable a party to give the requisite notice of an intention to refer a dispute to adjudication with the result that the contract does not comply with section 108(1) and that the adjudication provisions of the Scheme apply in default. This is so even if it subsequently emerges from the decision of the adjudicator that the terms of the construction contract did, in fact, comply with the requirements of section 108 (1) . Unless this extended construction of section 108 is applied by a court, effect cannot be given to the underlying mandatory requirement that a party has the right to refer all disputes arising under the construction contract to adjudication.

Conclusion

31. It follows that the adjudicator was appointed to determine disputes arising under a construction contract and, correctly, was both appointed under the Scheme and then applied the Scheme to that adjudication. Thus, the jurisdictional challenges to his appointment and decision fail and his decision is enforceable. There is to be judgment for the claimant.