Allen Wilson Joinery Ltd v Privetgrange Construction Ltd [2008] Adj.L.R. 11/17

JUDGMENT : Mr Justice Akenhead: TCC. 17th November 2008

Introduction

1. The Claimant, Allen Wilson Joinery Ltd, seeks by way of an application for summary judgment to enforce an adjudicator's decision dated 8 August 2008 whereby the Defendant, Privetgrange Construction Ltd, was ordered to pay £12,449.70, plus VAT as due, together with interest of £564.23 up to 8 August 2008 and at the rate of £4.51 per day thereafter and £3,525 for the Adjudicator's fee.

2. Issues are raised as to whether the contract between the parties was in or evidenced in writing for the purposes of Section 107 of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA"), as to whether any matters said to have been orally agreed were trivial or immaterial, as to whether if the evidence about any orally agreed matters is weak, conditions should be imposed on any leave to defend granted and as to whether the adjudicator had jurisdiction to award interest.

The background

3. The Claimant was a sub-contractor employed by the Defendant to manufacture, deliver and install three full flights of stairs from a basement to the second floor of a development project known as Silverwood, Wentworth, Surrey. The Defendant was the main contractor. The Claimant was a company which manufactured and installed various different types of joinery work. It seems to be accepted that the two companies had worked together on a number of projects before the Silverwood one.

4. In May 2007, contact was made between the two companies with a view to the possibility of the Claimant providing a quote for various sets of stairs at the Silverwood development. On 24 May 2007, the Defendant sent to the Claimant plans and a section detail illustrating, broadly, where the stairs were to go in the development. These details did not identify the precise dimensions or indeed any great detail about what the stairs were to comprise.

5. By an e-mail dated 21 June 2007, the Claimant (its Mr Terry) provided what was called "*a budget quotation for the staircases required*" for Silverwood. This quotation describes in some detail what was covered by the quotation: *"All of the stairs are to be manufactured from yellow pine strings, 22mm MDF treads and 9mm ply risers with all of the necessary newels, storey newels, banisters, string capping and hand rails to be from the 'Burbridge' range, or equivalent, and are to be out of Hemlock. Stairwell linings are to be from primed MDF, thickness T.B.C. All components are to be spray primed in our workshop for the final painting by others all landing joists and chipboard sheet flooring are to be fitted by A.W.J. with plasterboard and making good/decoration to be by others."*

   There then followed a description of how many steps there were to be in each set of stairs between floors followed by these words: *"All of the above for the sum of £19,673.00 plus VAT."*

   At the end of the quotation the following appears: "*The final costs will be finalised when full details have been agreed and site surveys have been carried out."*

   There seems to be little or no dispute between the parties that the contract between them was based on and incorporated this "*budget quotation*". There is an issue between the parties as to when that contract came into being.

6. At some stage over the next few months, the Claimant appears to have done a site survey. On 21 December 2007, Mr Terry of the Claimant sent to the Defendant (its Mr Seagroatt) what was said to be *"dimensioned drawings"* for the stairs. These are in the form of a dimensioned plan for each set of stairs with dimensions given for the rises and goings together with the pitch. Isometric drawings were also provided which would give a 3D impression of what the stairs would look like. On 4 January 2008, Mr Terry sent several more drawings relating to the stairs with some more detail of what was to be provided.

7. Thereafter in January 2008, the Claimant commenced work for installing the stairs. However, by February 2008, the Architect was reported as stating that the staircase being installed was unacceptable in his view. It appears that the stairs were rejected. When the Claimant presented its invoice for the work done, it was not paid.

The Adjudication

8. A dispute had arisen between the parties as to whether the Claimant was entitled to any payment from the Defendant. The Defendant sought to argue that no sum was due, the stairs had been designed or manufactured inappropriately and that there had been substantial delays in any event in proceeding with the stair work.

9. On 11 July 2008, the Claimant served a Notice of Adjudication on the Defendant, applying on the same day to the RICS to nominate an adjudicator to decide the dispute. The RICS nominated Mr Harvey Mason as the Adjudicator on 15 July 2008.

10. The Defendant's solicitors challenged Mr Mason's jurisdiction on the grounds that, where there was a contract between the parties, it was not in writing for the purposes of section 107 of the HGCRA. They also made clear that they challenged his jurisdiction to award interest.

11. The Referral Notice is dated 18 July 2008. In it the Claimant claimed the amount due under the contract as at that stage £17,416.11 and the payment of interest.

12. By its Response dated 30 June 2008, the Defendant maintained its jurisdictional objection but responded to the merits of the claims made against it. Amongst other things, the Defendant submitted in this Response the following:

    "(a) That the Claimant was engaged to design as well as to manufacture, deliver and install the staircase.

    (b) That the Claimant would complete the work within 8-12 weeks.

(c) That this time obligation was varied in or around August 2007 to the effect that the work would be completed by Christmas 2007.

(d) That there were various implied terms that the Claimant would carry out its work with reasonable care and skill and that the Claimant would perform its obligations within a reasonable time."

The Defendant raised an objection to the award of interest.

13. The Claimant produced its Reply to that Response on 2 August 2008. It denied that there was any express term for the design of the staircase or that terms were agreed about the completion times.

14. Witness statements from Mr Seagroatt and Mr Terry were also exchanged in the adjudication. I will return to these later.

15. On 8 August 2008, as indicated above, the Adjudicator issued his Decision allowing to the Claimant somewhat less than they had been claiming but allowing to the Claimant some interest.

These proceedings

16. The Defendant did not accept or honour the Adjudicator's Decision. In consequence on 16 September 2008, the Claimant issued proceedings seeking to enforce the Decision. The application for summary judgment was supported by a statement from the Claimant's solicitors. The Defendant's case in these proceedings was supported by two witness statements, one from Mr Seagroatt and the other from its solicitor Mr O'Callaghan. There was exhibited to the latter's statement most of the relevant contemporaneous documents together with Mr Seagroatt's and Mr Terry's statements in the Adjudication.

The evidence and the arguments on the Contract

17. The Defendant seeks to argue that there was not a written contract for the purposes of Section 107 of the HGCRA because various matters were agreed, only, orally. These matters are as follows:

(a) An oral agreement, probably in May 2007, between Mr Seagroatt and Mr Terry that the Claimant would design the staircase as well as manufacture, deliver and install it.

(b) They agreed completion within eight to 12 weeks, this agreement being varied in about August 2007 to the effect that the works would in any event be completed by Christmas 2007.

(c) That there was an implied term, to be implied by reason of the previous course of dealing between the parties that sub-contracting was not permissible.

(d) Because the accepted quotation expressly stated that costs were to be finalised, it is said that there was no agreement in writing.

18. As to the alleged design agreement, Mr Seagroatt's evidence was and is as follows:

(a) In his witness statement in the Adjudication, he says, materially,

"7. … it was understood between us that Allen Wilson would carry out the actual design of the staircase …

8. I understand that Allen Wilson deny that they would design the staircase. I do not understand why they say this. Privetgrange did not carry out any design for the staircase at all. We told Allen Wilson where the staircase needed to go and how much space was available for it, but other than that I agreed with Chris Terry that he would design, manufacture and install the staircase. We never wrote down the agreement about design, but it was understood between us."

Reliance is also placed on the fact that design drawings were produced, so it is said, in December 2007 and January 2008 by the Claimant.

(b) In his statement for the court proceedings, Mr Seagroatt says this:

"7. As I explained in my first statement, I agreed with Chris Terry that Allen Wilson would carry out the design of the staircase. That is still my recollection."

19. As against that, Mr Terry in his Adjudication statement said materially the following:

"7. There was no specific agreement that AWJ would carry out the design of the staircase which is evident from Quote Ref: 2007/CT/123 in my e-mail dated 21 June 2007. That was for the manufacture, delivery and installation of the stairs.

8. I did not agree with RS or anyone else that AWJ would design the staircase. The agreement was not written down because it did not exist and I certainly did not understand that there was any such agreement. As far as I was aware the whole of the design was to be carried out by DF [the architect].

9. … I repeat, there was no agreement that it was AWJ's responsibility to design the staircase. …

46. The reason that the drawings did not show the design for the stairs is that AWJ were not liable for the design. The drawings that AWJ prepared were simply working drawings. …

49. All of the drawings submitted were for construction purposes only and they were adequate for this purpose."

20. As to the issue of time for completion, Mr Seagroatt says as follows:

(a) In his Adjudication statement he says as follows:

"15. Time was also an issue on this project. I do not remember precisely what was discussed on the issue of timing, but I know that my normal practice is to obtain and agree lead times with suppliers and I am pretty sure that

this is what I would have done on this project. The lead time for the stairs would have been no more than 8-12 weeks, including design.

16. In any event, by August it was clear that there were specific time constraints to be complied with. This was because the beneficial owner of Silverwood was planning a visit to the property at Christmas, and the staircase had to be ready for use by then, so that the staff could carry out their work unobtrusively during this visit.

17. I discussed this with CT [Mr Terry] as soon as I knew of the visit and he agreed that he would meet the Christmas deadline. I have been shown a letter from Allen Wilson's Advisers, Peter J Riley, dated 24 July 2008 …, which denies that this was agreed. I am quite sure that it was. We needed the staircase so that the staff did not have to stay in hotels. Allen Wilson were very aware of this and agreed to comply with our requirements."

(b) In his statement for these proceedings, he says:

"22. As explained in paragraph 12 of my original witness statement, my understanding is that we appointed Allen Wilson in July 2007. I have been told that Chris Terry says in his witness statement that there was no contract between Allen Wilson and Privetgrange in August 2007. That does not reflect my understanding. However, I have been asked if anything new was agreed between July and August 2007.

23. As explained in my first statement, it was in August 2007 that Chris Terry agreed to complete the staircase by Christmas and so the agreements [were] reached before, according to Chris Terry, we had entered into an agreement at all."

21. Mr Terry in his Adjudication Statement says as follows:

"14. There was little or no communication from RS between July and October 2007 until his e-mail to me on 22 October 2007 asking me to let him know where we were on the staircase situation … We had received no instructions from PC [Privetgrange] at this stage.

15. Suppliers would normally only give a firm lead-time for delivery once an official order has been placed. It is AWJ's normal practice not to commence work prior to receiving some form of instruction. I note that RS is only 'pretty sure' that he would obtain and agree lead times whereas I am absolutely sure that there was no agreement to lead time.

16. PC had still placed no official order with AWJ as at August.

17. Had PC placed an order with AWJ in August 2007 I am confident that we could have completed the staff stairs by Christmas. However they did not and I would not have agreed to this without some form of instruction. As far as I was concerned there was no contract between PC and AWJ at that time.

18. When did PC give AWJ the job? …

29. … It still took until 4th December for RS to send an order number. It was not an official PC purchase order like the ones previously sent on previous contracts but came from a private e-mail account of RS and obviously sent quite begrudgingly …

41. AWJ made no express undertaking, or any undertaking at all, to meet the programme because we were not given the programme. The main cause for any delay was PC's failure to place the order in a reasonable time."

22. So far as the implied term and the previous dealings relating to sub-contractors, Mr Seagroatt in his Adjudication Statement said as follows:

"Allen Wilson is a company which has done work for Privetgrange on the Wentworth Project for quite a while and, until the difficulties over the service staircase, their work was satisfactory. Before carrying out work on the service staircase, Allen Wilson had previously manufactured and installed various joinery items at Linden House … We always employed Allen Wilson to carry out work directly for us. It never occurred to me that they would sub-contract the work out, as they had never done so before. It was important to us that they do the work themselves, because we relied on the skill and expertise such as they had displayed in previous work.

40. Secondly, this e-mail [dated 12 December 2007] was the first indication I had received that Allen Wilson were sub-contracting the work. As it claimed above, this was contrary to my understanding of how they would operate the contract."

23. Mr Terry's evidence on the topic was as follows:

"4. While AWJ may not have previously sub-contracted work for PC there was no agreement that prohibited sub-contracting …

12. It was certainly not our understanding that we would not sub-contract the work. It was sub-contracted to a company that had more expertise in this type of work that AWJ."

The law relating to the need for written contracts

24. Section 107 of the HGCRA, materially, is as follows:

"(1) The provisions of this Part apply only where the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.

The expressions 'agreement', 'agree' and 'agreed' shall be construed accordingly.

(2) There is an agreement in writing—

(a) if the agreement is made in writing (whether or not it is signed by the parties),

(b) if the agreement is made by exchange of communications in writing, or

(c) if the agreement is evidenced in writing.

(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.

(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.

(5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.

(6) References in this Part to anything being written or in writing include its being recorded by any means."

25. The leading authority on this topic is the case of ***RJT Consulting Engineers Ltd v DN Engineering (Northern Ireland) Ltd*** [2002] BLR 217. Ward LJ (with whom Robert Walker LJ agreed) said as follows:

*"13. Section 107(2) gives three categories where the agreement is to be treated in writing. The first is where the agreement, whether or not it is signed by the parties, is made in writing. That must mean where the agreement is contained in a written document which stands as a record of the agreement and all that was contained in the agreement. The second category, an exchange of communications in writing, likewise is capable of containing all that needs to be known about the agreement. One is therefore led to believe by what used to be known as the **eiusdem generis** rule that the third category will be to the same effect namely that the evidence in writing is evidence of the whole agreement.*

14. Sub-section (3) is consistent with that view. Where the parties agree by reference to terms which are in writing, the legislature is envisaging that all of the material terms are in writing and that the oral agreement refers to that written record.

15. Sub-section (4) allows an agreement to be evidenced in writing if it (the agreement) is recorded by one of the parties or by a third party with the authority of the parties to the agreement. What is there contemplated is, thus, a record (which by sub-section (6) can be in writing or a record by any means) of everything which has been said. Again it is a record of the whole agreement. …

*19. On the point of construction of section 107, what has to be evidenced in writing is, literally, the agreement, which means all of it, not part of it. A record of the agreement also suggests a complete agreement, not a partial one. … It must be remembered that by virtue of section 107(1) the need for an agreement in writing is the precondition for the application of the other provisions of Part II of the Act, not just the jurisdictional threshold for a reference to adjudication. I say **'unfortunately'** because, like Auld L.J. whose judgment I have now read in draft, I would regard it as a pity if too much **'jurisdictional wrangling'** were to limit the opportunities for expeditious adjudication having an interim effect only. No doubt adjudicators will be robust in excluding the trivial from the ambit of the agreement and the matter must be entrusted to their common sense. …"*

26. That case was followed by Jackson J (as he then was) in ***Trustees of the Stratfield Saye Estate v AHL Construction Ltd*** [2004] EWHC 3286 (TCC). He said in paragraph 47: *"The principle of law which I derive from the majority judgments in **RJT** is this: an agreement is only evidenced in writing for the purposes of section 107, subsections (2), (3) and (4), if all the express terms of that agreement are recorded in writing. It is not sufficient to show that all terms material to the issues under adjudication have been recorded in writing."*

27. I accept and endorse the principles enunciated in the ***RJT*** case by the majority and by Jackson J in the later case. So far as this case is concerned, the following can properly be stated:

(a) For there to be a construction contract in writing for the purposes of Section 107 and Part II of the HGCRA, all the terms of the contract must be in writing and recorded in one of the ways set out in Section 107.

(b) Whilst adjudicators (and indeed judges) should be robust in determining whether trivial matters said to have been agreed only orally between the parties can prevent what would otherwise be a written contract for the purpose of Section 107 being a written contract, the exercise of determining what is trivial must be an objective one in relation to the particular contract and parties concerned. What may be *"trivial"* in one contract may not be in another. Thus, for example, an oral agreement on a million pound project as to which of two mildly differing shades of light blue paint might be used may be trivial on one development but not on another.

(c) It is always necessary to determine whether a so-called agreement made orally was in reality expected or intended to be binding as between the parties. Thus, the parties having discussed and agreed something orally might later have reduced their agreement into writing in such a way as to supersede the earlier oral agreement. A later oral agreement may not be binding; for instance, it may lack consideration or otherwise may not be intended to be binding.

28. As to whether the existence of implied terms converts an otherwise written construction contract into one that is no longer a written contract for the purposes of Section 107, HHJ Havery QC in ***Connex South Eastern Ltd v MJ Building Services Group PLC*** [2004] BLR 333 said the following on this topic:

*"24. … The first question I must consider is whether [the contract] was in writing, so as to fall within section 107 of the Act. Otherwise, the adjudicator would have no jurisdiction. Mr Ashton drew my attention to the case of **RJT** … He submitted that the complete agreement … must be in writing in order to fulfil the requirements of section 107. Mr Speaight submitted, and Mr Ashton agreed, that whichever approach is adopted, it was manifestly not the intention of Parliament to exclude from the jurisdiction of an adjudicator an agreement solely because it contains implied terms. I accept that very reasonable proposition."*

29. Some six months before this decision, HHJ Seymour QC reached no concluded view on this topic in ***Galliford Try Construction Ltd v Michael Heal Associates Ltd*** [2003] EWHC 2886 (TCC). He said at paragraph 29:

*"… it may be necessary to consider carefully the effect of s. 107 of the 1996 Act as interpreted by the Court of Appeal in **RJT** … in a case in which it is found that an alleged agreement which has been performed can be completed so as to result in a binding contract by some such implication of terms as was postulated by Steyn LJ in **G Percy Trentham Ltd v Archital Luxfer Ltd** … The Court of Appeal did not expressly consider what the position would be if a contract included terms which were to be implied. … It may be that the mischief which Parliament was anxious to avoid does not arise in a case in which terms fall to be implied into a contract as a matter of law, regardless of the actual intention of the parties. However, it could arise in an acute form if it were suggested that a contract, not otherwise complete, could be completed after it had been executed by the implication of terms which were said [to] represent the actual, but unexpressed, intention of the parties."*

These remarks of HHJ Seymour QC were expressed to be obiter in any event and they are certainly not conclusive on the topic.

30. I prefer (if there is any difference) the view endorsed by HHJ Havery QC in the ***Connex*** case. Terms are implied into contracts by operation of law. A number of different tests are propounded for the implication of terms. Thus, some terms are in effect implied into contracts by statute. Others are implied into contracts to give them *"business efficacy"* or in effect to make the contracts work. There are other requirements said to exist such as reasonableness of implied terms. Terms are implied into contracts as a matter of law, albeit that some terms may be implied in the context of a factual relationship or even a factual history which exists between the parties. I see no reason to distinguish between different implied terms in the context of Section 107 of the HGCRA. Thus, the implication of any terms does not render what would otherwise be a written contract under that section into something not covered by Part II of the HGCRA.

Is there a triable issue on whether there was a written contract?

31. I have formed the view, not without some hesitation, that there is a triable issue, at least on some aspects of the issues relating to terms said to have been orally agreed:

(a) So far as design is concerned, there is a straight issue of fact as to whether there was an oral agreement whereby the Claimant undertook to "design" the staircases. I cannot resolve that issue. The issue however is not as simple as who said what to whom and when about design. There are questions to be considered as to whether any informal discussion or agreement (if that is what it was) was superseded by the quotation of 21 June 2007 which, it appears to be common ground, was accepted at some stage by the Defendant. The second matter relates to whether or not the quoted obligation of manufacturing and installing the staircases necessarily involved the provision of working drawings. If the obligation to design, as discussed and agreed (if at all) beforehand, involved no more than the production of working drawings, the quotation which was accepted would evidence the design obligation such as it was in writing for the purposes of the HGCRA. I am not however in a position on the evidence to decide factually whether anything more than working drawings were required in practice, although previous experience on the facts of other cases might suggest that there may be little difference.

(b) So far as the time obligation is concerned, there is some factual difference between the parties as to whether there was any oral agreement as to time for completion. The Defendant's evidence relating to alleged agreements about 8-12 weeks completion is vestigial. Ms Jones for the Defendant conceded that the evidence was weak on this topic. However there is more evidence about whether there was some oral agreement relating to completion by Christmas 2007. For instance in an e-mail of 3 December 2007, Mr. Seagroatt said to Mr Terry that the Defendant was looking for "*installation of the services staircase by Xmas as agreed*". There may well be arguments, which I cannot resolve, as to whether or not there was or was intended to be any binding agreement in relation to completion by Christmas 2007. It is necessary for the Defendant to establish that even if there was some oral discussion and "*agreement*" about a completion date it was mutually intended by the parties to be binding.

(c) So far as the implied term, said to exist, that the Claimant would not sub-contract, that is something which, even if it exists by operation of law, does not impact upon the question as to whether or not the contract between the parties was a written one for the purposes of Section 107.

(d) The final point relating to the "*Budget Quotation*" of 21 June 2007 is in my view a bad one taken by the Defendant. It appears to be common ground that the Budget Quotation contained in the e-mail of Mr Terry of 21 June 2007 was accepted by the Defendant. It is a matter of interpretation as to whether or not the price of £19,673.00 plus VAT was an accepted price or whether it was more a *"ballpark"* figure which was to be *"finalised when full details had been agreed and site surveys had carried out"*. If it was the former, on any count the relevant term on price is set out in writing in this e-mail. Even if however the final price remained to be agreed, the parties had recorded in writing their agreement that the price was to be finalised at a later stage and the parties, in a binding way, agreed to proceed on that basis. If a price was agreed, albeit later, as a matter of fact, then that is the price that would be due; if the price was not agreed at the later stage, the necessary implication would be that the Claimant would be entitled to a reasonable price for the work and materials to be provided.

32. I have formed the view therefore that leave to defend should be given and that therefore, in simple terms, the application for summary judgment fails. However, I have formed the view that this is a case in which a conditional order should be made. Whilst there are issues on the facts which I cannot resolve, there are some aspects of the factual case advanced by the Defendant which might appear somewhat improbable. A good example of that is the agreement alleged in relation to the 8-12 week completion or lead-in delivery time. I am by no means convinced

that the somewhat unparticularised factual assertions relating to an agreement about *"design"* said probably to have been made in May 2007, add anything to the parties' mutual understanding as to what was encompassed so far as design was concerned, by the quoted obligation to manufacture, deliver and install the stairs. I have accordingly decided that, as a condition of leave to defend, the Defendant should pay into court £10,000 within 14 days.

Interest - the law

33. One of the issues in the Court of Appeal decision in ***Carillion Construction Ltd v Devonport Royal Dockyard Ltd*** [2006] BLR 15 was whether it was within the jurisdiction of an adjudicator to award interest on the sum found to be due under the underlying construction contract. The issue was dealt with between paragraphs 88 and 95 of the judgment in that case. It was a case in which, as here, the Scheme for Construction Contracts as adumbrated in SI 1998 No 649 was applicable. Paragraph 20(c) of the Scheme states:

"The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute. In particular, he may -…

(c) having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid."

34. At paragraph 91 of the Court of Appeal's judgment, the following was stated:

*"The real question, as it seems to us, is what effect is to be given to the words **'in particular'**, which precede the three subparagraphs (a) to (c). It is necessary to have regard to the structure of paragraph 20 as a whole. There are three sentences: (1) the adjudicator **shall** decide the matters in dispute; (2) [In deciding those matters] he **may** take into account other matters (which are specified); (3) In particular [in deciding those matters] he **may** (a) open up, revise and review decisions already taken or certificates already given (unless the contract otherwise provides), (b) decide that any of the parties is liable to make payment and if so when and in what currency and (c) decide the circumstances in which (and the rates at which and the periods for which) interest is to b paid. Within that structure effect has to be given to the words **'In particular'** at the beginning of the third sentence. We can see no reason why those words should not bear their usual and natural meaning. What comes after them is intended to be a particularisation of what has gone before. What comes after elaborates and explains what has gone before; it does not add to what has gone before. So the adjudicator may decide questions as to interest if, but only if, (i) those questions are **'matters in dispute'** which have been properly referred to him or (ii) those are questions which the parties to the dispute have agreed should be within the scope of the adjudication or (iii) those are questions which the adjudicator considers to be **'necessarily connected with the dispute'**. Questions which do not fall within one or other of those categories are not within the scope of paragraph 20(c) of the Scheme. There is no freestanding power to award interest."*

35. On the facts of that case the Court of Appeal decided that the parties had conferred on the adjudicator a jurisdiction to award interest which he would not otherwise have had.

Interest - the decision

36. I am satisfied here that the Adjudicator did not have jurisdiction to award interest, assuming that he had general jurisdiction as an adjudicator under the HGCRA. This was not a case, as in the ***Carillion*** case, where the parties agreed or accepted that he should have jurisdiction. It is clear from the Response if nothing else that the Defendant made it clear that they were arguing that the Adjudicator did not have jurisdiction to award interest. There is no suggestion that there was a term of the contract which permitted or required the imposition of interest for late payment. It does not arise as a matter of law. Even though the Claimant purported to refer a claim for interest to the Adjudicator it was not "*properly*" referred to him within the meaning of that expression adumbrated in the ***Carillion*** decision in paragraph 91 of the judgment. It has not been argued, and properly so, that the question of interest is one which the Adjudicator could properly consider to be *"necessarily connected with the dispute"*. Accordingly, the Adjudicator had no jurisdiction to award what would otherwise be considered as discretionary interest. He had no jurisdiction to apply a discretion so far as the imposition of interest is concerned.

37. In that context, even if there was a construction contract in writing (which remains to be decided by way of a trial), the Adjudicator did not have jurisdiction to order interest to be paid. As has been accepted in argument, if the remainder of his decision is otherwise enforceable, it would only be this part of his decision (that is, relating to interest) which would not be enforceable.

Costs

38. Having heard argument from the parties, I have decided that the appropriate order to make is that the costs of the summary judgment application should be reserved. If it emerges that the oral agreements said to have been made between the parties either were not made or, if made, were never intended to be included in or covered by such contract as there was between the parties, that may well be a factor which the trial judge would wish to take into account in determining whether the costs of and occasioned by the summary judgment application should be borne by the Defendant.

Decision overall

39. The Claimant's application for summary judgment is dismissed. The Defendant is given leave to defend on terms that it pays into court within 14 days the sum of £10,000. The Claimant's claim for enforcement of that part of the Adjudicator's decision by which he ordered the Defendant to pay interest is dismissed. The costs of and occasioned by the summary judgment application and hearing are reserved.

Crispin Winser (instructed by Gullands) for the Claimant. Jennifer Jones (instructed by O'Callaghan & Co) for the Defendant