

JUDGMENT : MR. JUSTICE AKENHEAD : TCC. 9th May 2008.

Introduction

1. Cubitt Building and Interiors Limited ("Cubitt") engaged Richardson Roofing (Industrial) Limited ("Richardson") as roofing sub-contractors at a building site at Hampton Wick Riverside, Old Bridge Street, Hampton Wick, London. The case raises the not unfamiliar "battle of the forms" as well as an issue of more general interest relating to whether the Court or tribunal of final jurisdiction should stay the proceedings to enable adjudication to take place.
2. Cubitt seeks in these proceedings declaratory relief that its terms and conditions were incorporated into the sub-contract between the parties and injunctions that Richardson should be restrained from continuing with an arbitration started by it in November 2007 and that adjudication should proceed before any further proceedings.
3. Richardson seeks a declaration that the DOM/1 Sub-Contract Conditions were incorporated into the sub-contract and that Cubitt's application that the arbitration should be stayed pending adjudication should itself be stayed under Section 9 of the Arbitration Act 1996.
4. I will first address the history and exchange of correspondence between the parties and the "battle of the forms" issue before turning to the adjudication issue.
5. I found all the witnesses honest but, although none was deliberately unhelpful, some were more helpful than others. On balance, I found the Richardson witnesses to be more helpful in their recollections than the Cubitt witnesses and where their evidence materially clashed I prefer the evidence of the former.

History

6. Cubitt was the main contractor employed to carry out superstructure works to 40 residential and 15 affordable units, one porter's lodge, a shell only restaurant and wine bar and two shell only and one fitted office unit at Hampton Wick. Richardson was and is a specialist roofing contractor who had, however, never worked for Cubitt before.
7. By letter dated 13th January 2003, Cubitt invited Richardson to quote for the roofing works. That letter informed Richardson that the main contract was to be the Standard Form of Building Contract (1998 Edition) Private with Quantities and subject to further specific amendments. Bills of quantities (relating to the roofing) were enclosed with the letter. Various further relevant pieces of information were provided:
"2. The contract period will be 50 weeks commencing March 2003.
3. Firm contract.
4. Liquidated & ascertained damages will apply at the rate of £30000.00 per week or part thereof.
5. Payment terms will be 4 weeks from the end of the month.
6. Your tender will be deemed to include 2.5% Main Contractors Discount.
7. The defects liability period will be 12 months from the date of practical completion of the main contract.
8. Insurances: clause 21.1.1. £5,000,000.00
10. Retention 5%
13. The Supporting Documents for the purpose of your tender include extracts from the Preliminaries, relevant Preamble pages, Specification pages, and relevant pages from the Pricing Schedule upon which you should base your tender."

There was no hint or suggestion in this invitation that any specific standard terms or Cubitt's own terms would apply.

8. Although, Richardson did not respond to this invitation, following a further invitation on 3 March 2003, Richardson quoted as they had been requested. There is no dispute that that quotation was not accepted.
9. By letter dated 15 April 2003, Cubitt again invited Richardson to quote for the roofing subcontract works for the particular project at Hampton Wick. The tender was invited to be returned by no later than 25 April 2003 and was to be based on much the same information as had been provided earlier with only minor exceptions such as reference to the contract period (being 52 weeks commencing June 2003) and liquidated damages applying at £20,000 per week otherwise the invitation was similar to the earlier one with no standard terms or Cubitt's terms and conditions being referred to.
10. By letter dated 2 May 2003, Richardson submitted their quotation. Materially, it stated as follows:
*"In response to your enquiry we have pleasure in submitting our present prices as follows, subject to our standard terms and conditions overleaf and the particular conditions set out below.
Supply and Fix Rigidal standing seam roof system all as specification H31. ...
We return herewith one copy of your Bill of Quantities duly priced.
The total amount of our priced items is £445,528.22 net plus VAT.
All contract and subcontract orders or agreements placed with us on or after the 1st May 1998 shall incorporate the provisions of the Housing Grants, Construction and Regeneration Act 1996.
Our tender will be held open for 3 months from the date of submission thereafter it will be subject to review and adjustment with respect to fluctuations in the price of labour, materials and plant. ...*

Day work rates Labour RICS + 250%
Materials and Plant Costs + 25% ..."

Mr. Hanwell was the estimator for Richardson who signed that quotation and was personally involved in the pricing.

11. Over the next few days it is clear, and I find, that Richardson were asked to price various individual pages of the Bill of Quantities again with the result that the net price came down somewhat.
 12. I will return later to the Richardson "Standard Terms and Conditions". The quotation letter however made it clear that a number of facilities, such as scaffolding hoisting and crange, were to be provided at no cost to Richardson in effect by Cubitt. These type of items are usually referred to (and indeed were later referred to) as "attendances".
 13. On 12 May 2003, Cubitt called Richardson in to a meeting at Cubitt's offices. That meeting was attended by Messrs. Payne, Stevenson and Mr. Malcher for Cubitt and Mr. Inman and Mr. Hanwell for Richardson. I only heard oral evidence from Mr. Payne and Mr. Hanwell. I did not find Mr. Payne's evidence, at least that given orally, of any real help at all. Unsurprisingly he had very little recollection of the meeting independent of the largely pro-forma meeting minutes which he prepared. Much of his evidence was that he could not recollect what was said or done. On the other hand, I found Mr. Hanwell's recollection and evidence of much more assistance.
 14. At this meeting, as was Cubitt's normal practice in relation to subcontractors, a pro-forma form entitled "Pre-Subcontract Meeting Minutes" containing contract details which were to be confirmed or otherwise was handed over for discussion and agreement. The form runs to some eight pages.
 15. The witnesses agreed that the meeting was not a very long meeting and certainly did not extend beyond one hour. However it is clear, and I find, that substantial agreement on every aspect of the subcontract was reached. So far as is most material to the issues in this case, the following was identified as agreed:
 - "1.2 The Subcontractor agrees to waive his standard terms and conditions in favour of the DOM/1. **Agreed.**
 - 1.3 Valuations will be monthly with payment being due for payment within 28 days of Architects Certificate. **Agreed.**
 - 1.4 The sub-contract order will be placed in the sum of £404,628.22 and is fully fixed until September 2004 and including 2.5% MCD. **Agreed.**
 - 1.5 Retention of 5% to be held until practical completion of the project, when 2.5% will be released and the remaining 2.5% within 28 days of receipt of the making good defects certificate. **Agreed. ...**
- 3.0 PROGRAMME AND METHOD STATEMENT.
- 3.1 Period required for production of working/design drawings A/B 4wks
 - 3.2 Period to be allowed for approval of working/design drawings. ½ wks.
 - 3.3 Period required for manufacture from approval of drawings. 3/4wks.
 - 3.4 Total period required for design 8-10 wks from placement of order.
 - 3.5 Total period required for works on site.
 - 3.6 RR agreed to work to programme as detailed below.

Area of Works	Earliest Start Date	Latest Start Date	Duration
Block A (Roof)	07.07.03	28.07.03	9-10 wks
Block B (Roof)	21.07.03		9-10 wks
Block D (Roof)			3 wks
Block C (Roof)			6 wks
Cladding			6 wks

3.8 Total number of visits required **Roof - six visits Cladding 3 visits ...**

9.0 ADMINISTRATION

9.1 Subcontractor's Insurance Cover:

Employers Liability

Public Liability

9.4 Day works [all rates described as "Given in Tender"]

9.5 Liquidated and Ascertained Damages - the L & A damages and the Sub-Contract are £20,000.00 per week or part thereof. **Agreed. ...**

10.0 SITE DISCIPLINES.

10.1 Access to Site.

Old Bridge Street off of the High Street.

Deliveries to be booked into CBI booking system using forms, two hour time slot available ..."

There was attached to the completed subcontract meeting minutes a Schedule of Attendances which the parties representatives put crosses against all those attendances which were by agreement to be provided by Cubitt and by Richardson.

16. Over the next few days, at the invitation of Cubitt, Richardson was asked to amend its pricing to reflect relatively minor changes to the Bills of Quantities. Richardson sent in a number of re-priced pages of the Bills of Quantities.
17. By letter dated 29/5/2003, Mr. Corbett of Cubitt (who gave evidence) sent to Richardson what he called "our Letter of Intent". It stated, materially, as follows:

"Please accept this letter as notification of our instructions to proceed with the manufacture, supply and installation Roofing, Lead and Aluminium Flashings, Rainscreen, Cladding, Rainwater Pipework and Gutters, and Drawings at the above project, in accordance with the contract documentation listed on attached documents, for the sum of £401,666.58 less 2.5% Discount.

It is the intention that a formal sub-Contract will be entered into between us in accordance with the contract documentation listed on attached document. On a formal sub-Contract being entered into, the provisions of this letter shall cease to have effect and the works carried out and payments made pursuant to this letter shall be treated as having been carried out and made under the formal sub-Contract.

If at any time subsequent to the issue of this letter we give you written notice by fax or post, either that the project will not proceed for whatever reason or otherwise requiring you to cease work or part thereof, you shall immediately cease all services hereunder, in which case your entitlement would payment [sic] in accordance the provisions of DOM/1, save for loss of profit.

Pending the conclusion of a binding formal sub-Contract, payment for all work properly carried out will be fully in accordance with the terms and conditions of the sub-Contract.

Please acknowledge your acceptance of the above and your undertaking to commence now and proceed diligently with the execution of this instruction by signing and returning a copy of the letter only."
18. On the second page there appeared the following which from the terms of the letter was intended to be signed by Richardson:

"We confirm acceptance of the contents of your letter dated 29 May 2003 and confirm that we are now proceeding with all necessary resources to meet your programme requirements."

Room was left for the signing and dating of this acceptance. There were no documents or list of documents attached.
19. That letter having been faxed to and received by Richardson, Richardson internally prepared what it called its Standard Quality Plan which identified details of the subcontracts. It refers to the "Order No" as "Letter of Intent" dated 29/05/03. It provided other details of the project.
20. I accept that immediately upon receipt of that fax, Richardson proceeded to prepare requisite drawings and order the requisite materials. Richardson however did not return the letter of intent duly signed as accepted.
21. A few days later on 6 June 2003, Cubitt sent its order reference 0102/C to Richardson. Materially it said as follows:

"WE HEARBY [sic]place the subcontract, as defined by our standard terms and conditions ref Cubitt/SC1 (copy attached) and as set out below.

To carry out all works as detailed in our Letter of Intent to you dated 29/May 2003 ref DC/HWR/104 and as detailed in the attached schedule of numbered documents."

The "Gross Value of Order" was identified as £401,666.58 with a "discount" of 2.5% and a "retention" of 5%. The words quoted above "WE HEARBY ...AS SET OUT BELOW" are standard wording on the form whilst the other words quoted were written in ink. Further down on the face of the order the following appeared:

"As part of Cubitt ... Quality System Procedures it is required that you sign and return the yellow copy of this order as acknowledgment of acceptance, prior to payment being made to you".
22. The "Attached Schedule of Numbered Documents" was entitled Document No. 1 and identified eight documents: the Enquiry, the Revised Drawing Schedule, the Tender, the 12 May 2003 meeting minutes, the revised offer of 21 May 2003, revised BOQ Price of 23 May 2003, the revised price for zinc of 29 May 2003 and the "Letter of Intent" of 29 May 2003.
23. I heard evidence as to whether Cubitt's standard terms and conditions were sent with this order. The onus of proof is on Cubitt which seeks to assert that their standard terms and conditions were sent with the order. I heard evidence from Mr. Hanwell and Mr. Richardson who were confident that the standard terms and conditions were not included. Their administrative office was a small one with all the relevant people at Richardson being in the same room as the lady who opened the post in the morning.
24. Mr. McCloskey of Cubitt, although he could not remember this particular subcontract order, gave evidence that it was his invariable practice to send the standard terms and conditions with orders. Other than his practice, there was however no other corroborative evidence from Cubitt that their terms were sent. I also heard the evidence of Mr. Giles who was the managing director of Stone & Ceramic Limited, another subcontractor employed by Cubitt on the Hampton Wick project. His evidence was to the effect he did not receive Cubitt's standard terms with his order either. This, if anything, corroborates and underlines the view which I have formed on the evidence. I prefer

the evidence of Mr. Richardson and Mr. Hanwell and in any event Cubitt has not established on the balance of probabilities that their terms were sent.

25. A relatively immaterial issue arose between the parties as to whether or not the order was in fact faxed. Although Mr. McCloskey wrote on the face of the order "Hard Copy in Post", I am not satisfied that it was sent by fax.
26. Richardson, having prepared the requisite drawings and procured the relevant materials, commenced work on or about 7th July 2003.
27. I will not dwell in any great detail on what happened thereafter. After their first application for payment, Richardson put in several invoices referring to the order reference 0102/C dated 6th June 2003 and showing a retention of only 2.5%. All payments made and all subsequent applications however identified a retention of 5%.
28. Richardson's works were completed in 2004. It was, perhaps surprisingly, only in November 2005, well over a year after the date when Cubitt suggest that Richardson had completed (13th October 2004), that Cubitt indicated that it intended to deduct liquidated damages for an alleged eight weeks' period of "culpable delay". That prompted from Richardson on 29th November 2005 a complaint that Cubitt was "being disingenuous" and a claim for an extension of time.
29. Mr. Richardson told me, and I accept, that much of the following correspondence was prepared by a claims consultant, who was not well briefed.
30. Richardson gave notice of adjudication on 2 December 2005 referring to the subcontract as having been entered into "on or about 6th June 2003" and to the fact that there was not a signed DOM/1 subcontract agreement in place. That adjudication was or proved abortive and was not pursued.
31. During correspondence which followed, Richardson stated in a letter to Cubitt on 1 February 2006 that no Standard Terms and Conditions were attached to the subcontract order.
32. A second adjudication was commenced by Richardson in June 2007 in which it was again asserted that the subcontract was entered into on or about 6th June 2003. The adjudicator decided, having heard submissions from both sides, that the subcontract did incorporate Cubitt's standard terms.
33. On 28 November 2007, Richardson's Solicitors served a Notice of Arbitration on Cubitt's Solicitors. In this Notice, Richardson asserted that the DOM/1 conditions were incorporated in the contract. No arbitrator has yet been appointed.

Discussion on the Sub-Contract

34. I have formed a very clear view on the facts that essentially agreement was reached between the parties at the subcontract meeting on 12th May 2003. There was agreement on price and all essential areas which required agreement. There was agreement for instance between the representatives of the parties that the roofing works would be completed within 18 weeks and the cladding works within six weeks, a total of 24 weeks. That was confirmed not only on the face of the meeting minutes in effect but also from Mr. Hanwell's evidence and his own note of the meeting. There was agreement in terms of attendances as to who was to provide what at the site and for the project.
35. There was an issue between the parties as to whether there was agreement as to the use or incorporation of the DOM/1 conditions of subcontract. I am wholly satisfied on the evidence that it was agreed between the parties at that meeting that DOM/1 would apply to the subcontract between the parties. Mr. Payne's evidence, mostly consisting of assertions that he could not recall, was unsatisfactory in this regard whilst Mr. Hanwell's evidence was clear. Mr. Hanwell's evidence was wholly supported by the terms of the meeting minutes. The parties "agreed" that Richardson's standard terms and conditions would be waived "in favour of the DOM/1". That meant to those attending the meeting that the DOM/1 conditions would apply to the sub-contract that was to be entered into. In return for that, Richardson, as their own standard terms and conditions indicated, were prepared, to abandon their standard terms and conditions.
36. It is said that insufficient was agreed either at this meeting or later to enable the DOM/1 Conditions to work. I disagree for the following reasons:
 - (a) The DOM/1 contract envisages in Section C that 16 "parts" need to be filled in.
 - (b) It is clear in any event that a number of them contain default provisions, such as Parts 8 and 14 relating to the relevant body to nominate an adjudicator or arbitrator. Default provisions are provided that if no nominator is selected the RICS should be the appointer.
 - (c) All the other parts are capable of determination from that which was agreed at 12 May 2003. For instance, it is clearly possible to define the Sub-Contract Works (Part 2). It is possible to ascertain what day work rates were agreed from the tender (Part 5). The retention percentage was identifiable (Part 7). Attendances were wholly agreed (Part 9).
 - (d) Ultimately, Miss Franklin for Cubitt identified only three matters in DOM/1 which she relied upon as needing to have been agreed which were not. First, she said that Article 2 of the DOM/1 Articles of Agreement requires the parties to identify whether the price for the subcontract works was in effect a lump sum price or a sum to be determined upon re-measurement of the works. There is an issue between the parties as to whether or not the subcontract was on one basis or the other. It is however not necessary for me to determine that

- because it must be one or the other. It remains a matter of argument and, possibly, evidence as to the price basis which the parties agreed. The parties appear to have been "agreed" as to a price of £404,628.22 subject to discount and fixed until September 2004. It was not as if the minutes for the parties at the meeting were not agreed. The issue is as to the interpretation to be put on those words in the context of what was said at or before that meeting. That is readily capable of ascertainment. However, because I did not hear evidence or, indeed, much argument as to whether it was lump sum or re-measurable basis for payment, it would be inappropriate for me to make a final decision on that point.
- (e) Next Miss Franklin said that, because the parties had not agreed an overall completion date the subcontract if it incorporated DOM/1 could not effectively operate because a completion date was necessary to enable the extension of time and liquidated damages provisions to operate. I have formed the view, however, that the parties were agreed as to the time and progress obligations. They agreed a commencement date, albeit that there were alternative dates. They agreed periods for the production of drawings. It is clear, from Mr. Hanwell's evidence which I found convincing, that an overall completion period was agreed. Thus it is possible to ascertain what the completion date or dates would be, depending on which of the optional dates for commencement was taken.
- (f) Finally, Miss Franklin says that because the parties had not agreed the basis upon which VAT would be charged, the DOM/1 Conditions cannot work. There was however fundamental agreement, if one refers back to the tender, that VAT was to be charged. There appear to be no issues between the parties as to that. The options in DOM/1 effectively involve the mechanics of how and when VAT is payable. If the parties have not agreed the mechanics of how and when (as opposed to if) VAT is payable, then as a matter of statute there will be a default provision which is, in essence, that a VAT registered service provider (such as Richardson) may charge for VAT in effect by way of invoice. Since the mechanics were in any event never agreed as such, I cannot believe that the absence of agreement is of any ultimate significance in contractual terms.
37. But for the fact that neither party sought to plead or argue that a binding agreement was reached at this subcontract meeting on 12th May 2003, I would have been inclined to say that all essential elements of a contract between the parties had been agreed at this meeting and there was thus a binding subcontract at that time. When I put that possibility to counsel, they both made it clear that this was not being argued, with Miss Chambers for Richardson saying that the price remained to be finalised. Certain it is that the context of what followed was what had been agreed at the meeting of 12 May 2003.
38. However, assuming as I must there was not a concluded subcontract at that meeting, and the parties are expecting some further "coming and going" on the price (as there turned out to be), all that the further exchanges between the parties before the Letter of Intent related to were changes in the price. It seems to me therefore inevitable that immediately before the Letter of Intent was sent there was an offer capable of acceptance, namely the finally revised price together with all the other terms which had all materially been agreed on or by 12 May 2003 at this meeting.
39. In my judgment and based on the pleadings, Cubitt's letter of 29 May 2003 was in contractual terms an acceptance of the most recent offer. The wording in the first paragraph strongly suggests that:
"Please accept this letter as notification of our instructions to proceed with the manufacture, supply and installation ... for the sum of £401,666.58, less the 2.5% Discount."
40. The fact that this letter was described in its covering letter as a "Letter of Intent" does not particularly add anything to its legal status. As has been accepted in numerous cases such as *British Steel Corporation v. Cleveland Bridge & Engineering Co.* [1981] 24 BLR 94, letters of intent can evidence or create a contract where none exist or simply be an indication that a party intends in the future to enter into a contract with the other party. One must simply analyse in terms of offer and acceptance what if anything was agreed by or what agreement is evidenced by the letter of intent in question.
41. The fact that, in the letter of intent of 29 May 2003, Cubitt indicated that it was the intention to enter into a "formal" subcontract in the future does not undermine the legal effect and purpose of the first paragraph in the letter which effectively is an acceptance of the most recently revised quotation. The fact that the letter indicates that when a formal subcontract is entered into the letter of intent provisions in effect lapse is likely to be a statement of the obvious. The second paragraph itself indicates that until a formal contract is entered into the letter itself shall have "effect" which must be legal effect.
42. The third paragraph of the letter of intent adds little other than setting up a term that if for any reason the project does not go ahead Richardson would be paid everything they would be entitled to under the DOM/1 conditions save for loss of profit.
43. The fourth paragraph makes it clear from its own wording that, until there is a binding formal subcontract, payment is to be made "in accordance with the terms and conditions of the sub-Contract". This presupposes that the letter of intent is in effect creating or is intended to create a subcontract in itself.
44. The letter of intent on its face is wholly consistent with the incorporation of the DOM/1 conditions of subcontract because it specifically refers to an entitlement to payment under the DOM/1 conditions, albeit in relation to the project not proceeding all the way through.
45. The only caveat to my conclusion on the letter of intent is that the third paragraph could be said to be a counter-offer given that it was a term that was not raised by either party before the letter was sent. This was not a point

which was argued by either party. However, in the light of my conclusions about the order (see below) this makes no difference.

46. If the letter of 29 May 2003 is to be treated as a counter-offer, it was one of the "Numbered Documents" attached to Cubitt's Order of 6th June 2003.
47. There is no dispute that, if the Order was a new offer or further counter offer, it was accepted by conduct in the sense that following its receipt in early July 2003 Richardson started work: that is clearly conduct which is sufficient by necessary implication to accept such an offer or counter offer. Accordingly, it becomes necessary to construe this order to determine whether or not the Cubitt standard terms and conditions were incorporated. One must bear in mind that there are essentially two different aspects to this order: that which is on the proforma form of order and the handwritten parts and the specific reference to the Numbered Documents.
48. It is clear from the Numbered Documents precisely the basis upon which the works were being ordered. The fact that the meeting minutes of 12 May 2003 were to be incorporated, the fact that such minutes record agreement that the DOM/1 conditions apply and the use on the face of the order of the expression "Numbered Documents" which is a defined term in the DOM/1 conditions points inexorably towards an agreement that the DOM/1 conditions were agreed to be incorporated into the subcontract between the parties. The expression "Numbered Documents" is not a defined term and does not feature in Cubitt's standard terms. Thus, the specific documentation and terms which were incorporated by this order or intended to be incorporated into the relationship between the parties are inconsistent with an objective intention to incorporate Cubitt's standard terms referred to on the proforma part of the order.
49. It was not seriously argued that the DOM/1 conditions and Cubitt's standard terms and conditions were compatible. They are obviously not. For instance, Clause 12 of Cubitt's standard terms and conditions imports conditions precedent to any entitlement to an extension of time whilst such conditions precedent are not present in Clause 11 of the DOM/1 sub-Contract conditions.
50. Accordingly one has to construe the Order and the specific Numbered Documents to see whether, judged objectively, the parties intended that Cubitt's standard terms should apply and/or have priority over the DOM/1 subcontract conditions.
51. From the specific wording (in handwriting) on the face of the order, it was clearly and objectively intended that the contractual documentation was to be the "Numbered Documents" set out in the attached schedule. Simply therefore construing what it was that was objectively intended, the order on its face did not intend that the Cubitt Standard Terms and Conditions should apply.
52. Even if Cubitt's standard terms were incorporated, Clause 1.7 thereof makes it clear that in the event of conflict between various documents provision was made for resolving it:
"The Sub-Contract Order and the Terms and Conditions should be read and construed as a single document. In the event of any conflict between:
1.7.1 The Sub-Contract Order and the [standard Cubitt] Terms and Conditions, the Sub-Contract Order shall prevail"
Thus, as there clearly is a clash between the DOM/1 Conditions incorporated expressly by the order and Cubitt's standard terms, it is clear that the DOM/1 conditions prevail as they are specifically incorporated by the order.
53. It is well established in English law that where a contract obtained in or evidenced by a printed form which has clauses specifically inserted which are inconsistent with the printed wording:
"The written words are entitled to have a greater effect attributed to them than the printed words, in as much as the written words were the immediate language and terms selected by the parties themselves for the expression of their meaning" (see **Robertson v French** (1803) 4 East, 130 per Lord Ellenborough).
54. If one couples all the above with my finding of fact that the standard terms and conditions referred to on Cubitt's order were not attached, as the Order suggests that they were, it must follow that the Cubitt standard terms were not incorporated. It is clear on authority that the standard terms and conditions were not incorporated. In Chitty on Contracts (7th Edition) it is stated at paragraphs 12.0142 to 1 2.015:
"Reasonable sufficiency of notice. *It is the third of these rules which has most often been to be considered by the Court. The question whether the party tendering the document has done all that was reasonably sufficient to give the other notice of the conditions is a question of fact in each case, in answering which the tribunal must look at all the circumstances and the situation of the parties. Cases where the notice has been held to be insufficient have been those where ... on documents sent by fax, reference is made to conditions stated on the back but those conditions were not in fact stated on the back or otherwise communicated ... It is not necessary that the conditions themselves shall be set out in the document tendered. They may be incorporated by reference, provided that reasonable notice of them has been given.*
Onerous or unusual terms. *Although the party receiving the document knows it contains terms and conditions, if a particular conditions relied upon is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other's attention ..."*
There was at least one onerous term, in Cubitt's terms, which is not in the standard contracts, namely the conditions precedent in Clause 12 (see above).

55. In *Poseidon Freight Forwarding Ltd. v. Davies Turner Southern Ltd.* [1996] 2 Lloyd's Rep 388, there was a reference on the faxed order to conditions set out on the back of the document but which were not in fact faxed. That was insufficient to allow for incorporation. Leggatt LJ stated:
"This is not a case where a party declares that the terms are available for inspection. It is a case where, on documents sent by fax, reference is made to terms stated on the back, which are, however, not stated or otherwise communicated. Since what was described as being on the back was not sent, it was a more cogent inference that the terms were not intended to apply."
56. The fact that the proforma part of the order stated that the Cubitt standard terms were "attached" and they were not attached, point conclusively, simply as a matter of construction, to the proposition that the parties objectively did not intend that those standard terms should be incorporated.
57. For all those reasons, I am satisfied that Cubitt's standard terms and conditions were not incorporated and that the subcontract was contained in and/or evidenced by the letter of intent, the order and the Numbered Documents referred to in the order.
58. That essentially disposes of the main issue between the parties as to what the subcontract was.
59. Although there was reference in the pleadings to a possible estoppel argument on the part of Cubitt, that was not pressed by Miss Franklin, wholly properly. I do not consider that there is anything of value, in determining what the sub-contract was or in construing any of its terms, in that which passed between the parties in the months and indeed the years after the subcontract was entered into and performed. That could only be relevant if there was a material issue of fact between the parties as to what in fact had been agreed. During the course of the subcontract, neither party appears to have acted specifically in accordance with the DOM/1 Conditions or Cubitt's standard terms. Thus, the issue as to which conditions are applicable is not materially assisted, by an examination of what happened after July 2003.
60. Miss Chambers for Richardson sought to advance arguments based on mistake or rectification. I cannot see on the facts that they have any relevance, particularly given the primary arguments put forward by the parties and the findings which I have made.
61. It follows from the above that the court will declare that the subcontract between the parties incorporated the DOM/1 conditions including the provisions for an arbitration set out in the DOM/1 form of sub-contract. It also follows that Cubitt's claims for declaratory relief that the sub-contract incorporated Cubitt's standard terms and that the pre condition in those standard terms that any court litigation must be preceded by adjudication will be dismissed as will be their application for an injunction against Richardson proceeding with the arbitration.

The Adjudication Issue

62. There remains an issue between the parties, raised by Cubitt in Paragraph 10 of the Particulars of Claim:
"Alternatively if, which is denied, the Subcontract contained an arbitration clause, Cubitt is nevertheless first entitled to an adjudication of the dispute pursuant to Section 108 of the Housing Grants, Construction and Regeneration Act 1996 and the Court has an inherent discretion to stay arbitral proceedings whilst such an adjudication takes place."
63. The adjudication clauses in DOM/1 are as follows:
"Article 3.1. If any dispute or difference arises under the sub-contract either party may refer it to adjudication in accordance with Clause 38A."
Clause 38A sets out in effect what is to happen when there is a reference to adjudication. There is no wording which suggests that the parties or the party seeking adjudication is compelled to proceed to adjudication. Clause 38A.4.1 states:
"When pursuant to Article 3 a party requires a dispute or difference to be referred to adjudication then that party shall give notice to the other party of its intention to refer the dispute or difference, briefly identified in the notice, to adjudication ..."
64. Accordingly, simply as a matter of construction of the DOM/1 Conditions incorporated into the subcontract between the parties in this case, one cannot construe the adjudication provisions in a way that makes adjudication a pre- condition to the institution of the final dispute resolution process agreed by the parties which is arbitration pursuant to Article 4.1 and Clause 38B. Indeed it is clear that, in comparison, the wording in the arbitration clause is much less "discretionary" than that in Article 3. Article 4 says:
"Subject to Article 3, if any dispute or difference ... shall arise between the Contractor and the Sub-Contractor ... then it shall be and is hereby referred to arbitration ..." (emphasis added)
65. Thus, I interpret these provisions in the standard form to permit either party if it so wishes to refer a matter to adjudication at any material time. The parties have used the words *"either party may refer [a dispute] to adjudication"*. Although Article 4 is prefaced with the words *"subject to Article 3"*, there would have to be very much clearer wording to make adjudication a pre-condition to arbitration.
66. Miss Franklin for Cubitt also relies upon the terms of Section 108 of the Housing Grants, Construction Regeneration Act 1996. Section 108(1) states:
"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."

Simply as matter of construction, that does not impose an obligation on the part of a party to a construction contract to refer disputes to adjudication: a right is not an obligation.

67. Accordingly, I am satisfied that as a matter of construction both of the DOM/1 contract conditions and the 1996 Act there is no pre-condition or indeed obligation requiring either party to refer any disputes to adjudication. There is simply a right on a party to proceed to adjudication at any time if it so wishes.
68. Reliance is placed by both counsel on the case of *DGT Steel & Cladding Ltd v. Cubitt Building & Interiors Ltd* [2007] EWHC 1584 (TCC). In that case HHJ Peter Coulson QC (as he then was) found that Cubitt's standard terms and conditions did lay down a binding agreement on the parties to adjudicate. At Paragraph 12 he summarized the law in the following terms:
"I derive from the authorities noted above the following three principles which seem to me to be relevant and applicable to contracts containing a binding adjudication agreement:
(a) *the court will not grant an injunction to prevent one party from commencing and pursuing adjudication proceedings, even if there is already court or arbitration proceedings in respect of the same disputes ...*
(b) *the court has an inherent jurisdiction to stay court proceedings issued in breach of an agreement to adjudicate ... just as it has with any other enforceable agreement for ADR ...*
(c) *the court's discretion as to whether or not to grant a stay should be exercised in accordance with the principles noted above. If a binding adjudication agreement has been identified then the persuasive burden is on the parties seeking to resist the stay to justify that stance ..."*
69. It seems to me that this case was primarily concerned with what the court was to do or might do faced with a binding agreement to adjudicate. As indicated above, I am wholly satisfied that there was no binding agreement as such to adjudicate. There was an agreement between the parties whereby either party could, at its own option, refer a matter to adjudication but there was no obligation on the party in question to refer the matter to adjudication.
70. However, the learned judge said this, obiter, at paragraph 21:
*"Accordingly, even if I was wrong in my construction of clause 19, and it was not a mandatory adjudication provision **Cubitt** would still be entitled to assert their right to have any dispute referred, in the first instance, to adjudication. Because there was a binding adjudication agreement, they would still be entitled at least to ask the court for a temporary stay of the court proceedings. It would then be a matter of discretion as to whether or not the stay was granted. Therefore, after all this, it seems to me that perhaps the only substantive difference between the two potential situations (a mandatory agreement to adjudicate or one that is merely optional) is that if, as I have found, the adjudication provisions were mandatory, the court is likely to be even more willing to exercise its discretion in favour of the stay than will be the case if there was a simple right to adjudication."*
I have added the emphasis to **Cubitt** above to underline the fact that the learned judge was addressing what might happen if **Cubitt** wanted to exercise a right to adjudicate
71. The learned judge has recently written a book "Construction Adjudication" (OUP 2008). At Paragraph 14.35 the learned author says:
*"In **DGT Steel**, there was considerable debate about whether the adjudication agreement in that case was compulsory, with the parties obliged to submit any dispute to adjudication, or simply optional, with the parties having the right (but not the obligation) to submit disputes to adjudication. The judge concluded that, ultimately, it made little difference since, even if the agreement was not compulsory, the type of adjudication agreement envisaged by the 1996 Act which gave each party the right to adjudicate a dispute (no matter which side of the dispute they might be on), constituted a binding agreement which gave each party the right, in appropriate circumstances, to seek to enforce their entitlement by way of an application for a stay"*.
72. Of course, it is open to any party to apply for relief to the requisite tribunal to enable it to exercise its right to adjudicate. I do not accept however that there must be a stay of any legitimately constituted proceedings, whether in arbitration or in court proceedings, where there is merely a discretionary right to adjudicate as opposed to a binding pre-conditional adjudication requirement. I suspect that what the learned judge and author really intended was that the proceedings in question, in terms of timetable and the like, should not be so conducted as to prevent a party from pursuing its contractual or statutory right to adjudicate. Thus, it may be appropriate in certain circumstances to build into the timetable in court or arbitration proceedings a 28-day period to enable one party to adjudicate if, for any good reason, it cannot sensibly pursue adjudication at the same time as its court or arbitration proceedings. Thus, having regard to the Overriding Objective, if the Court believes, following representations, that there is a measurably good prospect that adjudication will finally resolve the disputes or some of them the court may well build into its timetable for trial some time to enable a party to adjudicate. That however is different from a stay. A party who has started court or arbitration proceedings is entitled to have those proceedings resolved as reasonably expeditiously as the Court can achieve and justice demands; it should not be forced to have those proceedings delayed or stayed by it itself being forced to adjudicate when it does not want to exercise its right to do so.
73. If this were a matter which was to be left within the court for final resolution, I would be most disinclined either to stay these or the arbitration proceedings to enable Cubitt to adjudicate if it so wished or even to build into the timetable for trial a period to enable it to do so. That is primarily because there have already been two adjudications instituted and one adjudication decision adjudicating upon Richardson's claim for outstanding

certified sums. Cubitt has had three to four years to pursue any of its claims by way of adjudication. It has chosen not to do so. It would be an odd and unfortunate state of affairs if it were able to delay the prosecution of the substantive proceedings to enable it to pursue a course which it has failed to take over that period of time.

74. However, the question of whether or not there should be a stay is not a matter which this Court can consider. Richardson effectively seeks to argue that any dispute between the parties as to whether or not there should be a stay is entirely a matter for the arbitrator. I agree; this aspect of the matter is part of the dispute and timetabling referred to arbitration. If this matter proceeds in arbitration, the arbitrator is entitled to lay down a timetable as he or she thinks fit. The arbitrator may have regard to the contents of this judgment as to what is appropriate in terms of any timetabling to enable Cubitt to adjudicate if it really wishes to do so but he or she is not bound by the views which I have expressed.

Decision

75. Accordingly, Cubitt's claims in their entirety fail and are dismissed whilst Richardson's claim for declaratory relief is upheld.

Kim Franklin (instructed by Fenwick Elliott) appeared for the Claimant
Gaynor Chambers (instructed by CJ Hough & Co Ltd) appeared for the Defendant