Euro Construction Scaffolding Ltd v SLLB Construction Ltd [2008] Adj.L.R. 12/19

JUDGMENT : Mr Justice Akenhead: TCC. 19th December 2008.

Introduction

1. Euro Construction Scaffolding Limited ("Euro") as its name suggests is a scaffolding company. It was employed initially in May 2006 ("the May 2006 Contract") by SLLB Construction Limited ("SLLB") to provide scaffolding at a property known as "*The Bunker*", Seafield House, Partingdale Lane, London NW7, which SLLB was developing. It was also engaged by SLLB later in December 2007 to provide further scaffolding in relation to a swimming pool ("*the Pool Scaffolding Contract*"). This engagement gave rise to disputes which were referred to adjudication. The adjudicator's decision dated 3 October 2008 awarded to Euro £22,496.60 plus interest of £2,209.60 (and continuing) plus the adjudicator's fees of £3,983.66. That decision has not been honoured with the result that Euro brought enforcement proceedings in this Court.

2. The issues are simply whether the adjudicator was given jurisdiction to decide that he had jurisdiction and if not whether he did have jurisdiction. The jurisdictional issues arise out of whether the December 2007 contract was in writing for the purposes of Section 107 of the Housing Grants Construction and Regeneration Act 1996 ("HGCRA"). There is no issue that there is a separate Pool Scaffolding Contract between the parties.

The Facts

3. The scaffolding works to the main house were completed in about July 2007 and Euro was apparently paid for this work in about September 2007. A basement was excavated for the addition of a swimming pool which it is said necessitated cutting a shaft and tunnel through the deep concrete raft foundation of the bunker structure, following which it was decided to enlarge the excavation as an open cut dig with battered sides in order to cast a raft foundation for the pool bottom and then erect the swimming pool walls.

4. Mr Smith of SLLB says in written evidence that he was concerned about the stability of the slopes of the excavation and contacted a Mr McWhirter who told him that "*bird cage*" scaffolding was required. He says that on 12 December 2007 he contacted Mr James of Euro accordingly who said that he would visit site to determine whether he could solve the problem. Mr James apparently visited the site and met SLLB's site agent, Mr Gibson, on 13 or 14 December 2007.

5. On 14 December 2007 Mr James produced and sent to Mr Gibson a quotation offering to provide:
   "Independent scaffolding tied to main structure and erected in 2m lifts, fully boarded to top 2no lifts only.
   Independent to excavation hole.
   12m x 8m
   18m x 8m
   12m x 8m
   11m x 8m + 5m (bridged with welded beams at higher level)
   Plus run scaffold boards up bank of excavation to assist in supporting side walls and at high level tie scaffold across to support independent scaffold.
   COMPLETE FOR THE SUM OF £14,000 + VAT…"

6. What then happened is in dispute. Mr Smith says that after being called by Mr Gibson he called Mr James the same day on the telephone "*to confirm that he could provide a sufficiently robust solution to hold back the earth and allow us to build the basement safely.*" He then goes on to say in his Court statement at Paragraph 13:
   "Mr James made it clear that he could. I then gave him the go ahead and he thanked me for the order."

   He says he trusted Euro to design and install a structure fit for SLLB's purposes. In any event, the quotation was accepted orally.

7. It is then alleged that the scaffolding was not fit for those purposes, it buckled and had to be repaired and then removed, as, it is asserted, it was a safety hazard.

8. Its bills having not been paid, Euro decided to refer its disputed claim to adjudication. Its Referral Notice dated 27 August 2008 wrongly described the contract as the May 2006 Contract. It did not mention the 14 December 2007 quotation at all but in effect claimed that the work done after that time was a variation to the May 2006 Contract.

9. The Response said various things:
   "1. Without prejudice to SLLB's denial that the Referring Party's ("ECS") claim has any validity, SLLB makes the following submission in regard to the adjudicator's jurisdiction to decide this dispute.
   6. [It was here argued that the May 2006 Contract was not and could not be varied to add the work for which Euro was claiming]
   7. [SLLB argued that the works being claimed for were separate works from those arising under the May 2006 Contract]
   14. SLLB therefore respectfully submits that the adjudicator does not have jurisdiction to proceed any further in this matter.
   15. In the event that the adjudicator is minded to proceed with this adjudication, SLLB's participation will be without prejudice to its position on jurisdiction. SLLB also reserves its right to raise any relevant jurisdictional issues at any enforcement proceedings.

21. For the avoidance of doubt, SLLB denies the existence of a "construction contract" as defined by the [HGCRA], and accordingly SLLB's participation in this adjudication is without prejudice to its fundamental jurisdictional objections.

22. Even if, which is denied, the pool scaffold works formed part of the contract for the main house scaffold, and/or were carried out under a "construction contract" capable of being adjudicated under the specific terms of the Notice [of Referral], ECS has constantly misrepresented the basis of any such agreement.

27. An agreement was therefore concluded between SLLB and ECS for ECS to erect a bird cage or similar structure to retain the pool excavation walls.

28 … a term was implied that [the scaffold] would be fit for purpose.

85. [this was a summary] ECS was in breach of its implied warranty that it would provide a scaffolding structure fit for its intended purpose, or, in the alternative, ECS failed to use reasonable skill care and care in that …"

10. The Reply served on 24 September 2008 by Euro challenged much of what was said in the Response. By this stage, there had been acceptance by both parties that the claim based on and the jurisdictional point taken in connection with the May 2006 Contract were no longer maintained.

11. SLLB served a Rejoinder which was prefaced as follows:

"*1. Without prejudice to SLLB's denial that ECS claim has any validity, SLLB stands by its jurisdictional challenge on the basis of the lack of a compliant "contract in writing" as set down in SLLB's correspondence to the adjudicator.*

2. As the adjudicator has declined to follow SLLB's submissions on jurisdiction, SLLB has participated in this adjudication on a "without prejudice" basis, and reserves its right to raise any relevant jurisdictional issues at any future enforcement proceedings."

The remainder of the Rejoinder addressed the substantive issues but it reiterated at Paragraph 22 its reliance upon the implied term of fitness for purpose.

12. I now turn to the correspondence which was being generated. On 22 August 2008, the RICS nominated Mr Douglas Judkins as adjudicator; the Referral having been received by him on 29 August 2008, he gave directions on that day.

13. On 2 September 2008, MCMS Ltd (who were acting for SLLB) wrote to the adjudicator asking for an extension of time for service of the Response to 12 September 2008 but stated: *"We also ask you to note that SLLB's participation in this adjudication is without prejudice to any jurisdictional challenges it may wish to make in due course."*

On the same day, the adjudicator granted the extension sought.

14. On 12 September 2008, MCMS wrote to the adjudicator asking for a further extension of time until 7 pm that evening, and saying again: *"We also ask you to note that SLLB's participation in this adjudication is without prejudice to any jurisdictional challenges it may wish to make in due course."*

When serving the Response later that evening, MCMS said: *"Please note SLLB's participation in this adjudication is without prejudice to its position on jurisdiction"*

15. On 13 September 2008, the adjudicator wrote to the parties:

"The respondent has raised a challenge to my threshold jurisdiction that appears to have some merit. It says that the scaffolds described in Item 1 of the claimant's quotation Q/7376RJ, dated 16 May 2006, relate to the main house and not to the pool. The dispute referred relates to a scaffold erected to the pool. Moreover, it submits there is no contract in writing for the pool scaffolds.

The claimant is directed to submit a response to the challenge by noon on Tuesday 16 September 2008. I shall decide whether I have jurisdiction to proceed on the reference after the claimant has submitted its submission on the point. The claimant should consider whether a jurisdictional challenge raised three weeks after the date of the Notice of Adjudication is valid."

16. Following some correspondence apparently marked "*without prejudice*" which was not shown to me, SLLB by MCMS, in a letter dated 16 September 2008 indicated that SLLB would not object to the introduction of the contractual documentation relating to the pool scaffolding contract; a reservation as to jurisdiction was made at the end of that letter (set out later on in this judgment). The adjudicator wrote to the parties on 18 September 2008:

"I acknowledge receipt of Dispute-it.com's two letters of 17 September and of MCMS's letter of 16 September from which I understand that the claimant, with the agreement of the respondent, wishes to amend the Notice of Adjudication and the Referral so as to submit evidence to show that there is a contract between the parties concerning the pool scaffolds. I note that the respondent reserves its right to raise such jurisdictional objections as it sees appropriate in regard to the existence of a compliant "contract in writing".

I direct that the claimant adduces the evidence upon which it seeks to rely by 4.00pm today, Thursday 18 September 2008. The respondent should raise any cogent jurisdictional challenge, in relation to my threshold jurisdiction, by 4.00pm on Friday 19 September 2008.

If I consider that, on the evidence, I have jurisdiction, I shall advise the parties and issue further directions. The claimant should hold the Reply until I determine the jurisdictional point."

17. On 19 September 2008, MCMS wrote without as such making any jurisdictional qualification as it had before:

"Having now been provided with a copy of ECS's quotation reference Q/8740RJ [14 December 2007] we submit that the document does not record all of the terms agreed by the parties and is therefore not a contract in writing as defined in the Housing Grants, Construction and Regeneration Act 1996. SLLB refers to Daniel Smith's witness statement at paragraph 12, in which he states at line 5:

> *"…..Following his visit Mr James assured me that he could provide the scaffolding for the purposes we wanted….."*

Mr Smith continues at paragraph 13:

> *"…..I called Mr James the same evening to confirm that he could provide a sufficiently robust solution to hold back the earth and allow us to build the basement safely. Mr James said that he could and thanked me for the order."*

Mr Smith's witness statement clearly demonstrates that there was an express oral term that ECS would provide a scaffold solution fit for the purpose of retaining the pool excavation walls. This is not expressly written into the quotation and is therefore not recorded or evidenced in writing. SLLB submits that since ***RJT Consulting Engineers v DM Engineering (Northern Ireland),*** *[2002] BLR 217. It is trite law that all the terms of a contract must be recorded in writing. SLLB also refers to* ***Lloyd Projects Limited v John Malnick*** *as applying the ruling in* ***RJT Consulting*** *to a contract where the documents did not (as in the case with the quotation produced by ECS) record in writing orally agreed terms, and therefore did not evidence the agreement within the meaning of section 107(2) of the Housing Grants, Construction and Regeneration Act 1996.*

In the alternative, if the Adjudicator forms the view that the quotation is a compliant construction contract for the purposes of this dispute, and that he therefore has jurisdiction to proceed, SLLB submits that the agreement between ECS and SLLB is to be construed as set down in the Response and witness statements. SLLB refers the adjudicator to paragraph 85 as setting out the proper construction of ECS's obligations."

18. The adjudicator responded to this letter on 22 September 2007:

"I understand that the parties have agreed that the claimant may amend the Notice of Adjudication and the Referral such that the contract under which the dispute is referred is that formed by the respondent's oral acceptance of the claimant's offer of 14 December 2007. I understand that the oral acceptance was made by Mr F Gibson after obtaining the approval of Mr D Smith, both of the respondents (Mr Smith's witness statement at paragraph 15 and Mr Gibson's witness statement at paragraph 12).

The respondent contends that it was an oral term of the contract that the claimant would provide,

> ***"the scaffolding for the purposes (it, the respondent) wanted"***

which would be,

> ***"a sufficiently robust solution to hold back the earth and allow (the respondent) to build the basement safely."***

In his witness statement, Mr Smith says that the statements were made to him by Mr James of the claimant.

I reject the respondent's submission that the two statements are oral terms; in my opinion they are mere representations. A representation does not become a term of the contract.

Consequently, I conclude that the contract is wholly in writing. The express terms are set out in the claimant's Order, and therefore in writing, the contract contains implied terms, imported into the contact, by provision of statute."

He then gave directions for the service of the Reply

19. MCMS on behalf of SLLB replied to this on 22 September 2008:

"We have noted the contents of your letter and would wish to make the following brief comment.

You have stated that the quoted statements are "mere representations" and "A representation does not become a term of the contract".

We take issue with your analysis. Firstly, whilst a "mere representation" is unlikely to become a term of the contract, we submit that a "representation" may be a contractual statement which becomes a term of the contract subject to legal analysis of the statement.

We submit that there are two tests which confirm that the statements at issue should be construed as contractual statements and not "mere representations". We quote the following extracts from the "The Law of Contract by G.H. Treitel, 9th Edition…

We note that you have decided that the contract is wholly in writing and directed the claimant to submit its Reply by the 24th of September 2008. SLLB stands by its previous objections to your jurisdiction to proceed with the adjudication and reserves all of its rights in this regard."

20. The Reply and the rejoinder then followed. The Decision of the adjudicator dated 3 October 2008 runs to 29 pages and is reasoned. He addresses the procedural history as set out above and at Paragraph 1.12 he confirms that he stated that as at 19 September 2008 SLLB was objecting to his "*threshold jurisdiction on the ground that the contract was partly in writing and partly oral*". Paragraphs 2.1 to 2.10 of his Decision is headed "*Threshold Jurisdiction*"; in Paragraph 2.10 he goes on to say:

"Whether I was wrong in my analysis on the point became of no relevance as, on receipt of the Reply, I had the benefit of Mr James witness statement from which I decided that the statements were not made or agreed by Mr James for [reasons which he sets out later in the Decision]"

21. He found great difficulty in Paragraphs 2.29 to 2.47 of his Decision in accepting that the version of events put forward by Mr Smith was correct. With some justification, arguably, he could not see that the 14 December 2007 quotation was offering to provide a "*bird cage scaffold*" at all and he was of the view that Euro was in fact only asked to provide an access scaffold for construction of the pool walls and to provide scaffold boards (in effect for what they were worth) up the sides of the excavation only to assist SLLB's earth retaining measures.

22. SLLB having not paid the sums said by the adjudicator to be payable to Euro, Euro commenced proceedings in this Court in early November 2008 to enforce the Decision.

The Issues in these Proceedings and the Law

23. There are effectively two issues:
    (i) Did the parties, and in particular SLLB, give to the adjudicator jurisdiction to decide whether he had jurisdiction?
    (ii) If not, did he have jurisdiction in any event?

24. These issues arise out of the decision of the Court of Appeal in ***RJT Consulting Engineers Ltd v DM Engineers (Northern Ireland) Ltd*** [2002] BLR 217 in which Lord Justice Ward gave the majority judgment:

> *11. Let me deal first with Judge Thornton's views which command respect. As I read his judgment it was common ground (see page 11 of his judgment) that the parties accepted that there was in existence a construction contract contained in a letter which accepted the tender set out in the schedule of documents which accompanied the tender. Consequently the issue was not directed to the construction of section 107 of the Act but to the construction of section 108(1) of the Act dealing with the right to refer a dispute arising under the contract for adjudication. Once jurisdiction to refer the matter to arbitration was established the judge held, and in my judgment rightly held, that it was proper within that adjudication to decide whether or not a particular term had been incorporated into the contract. The scheme would be emasculated if a party were able to deprive the adjudicator his power to decide simply by putting up an argument that some term was or was not incorporated into an agreement otherwise accepted to be in writing. Giving a wide construction to section 108 begs the question whether a wide construction should be given to the jurisdictional threshold established in section 107. Section 107 may in fact serve another purpose.*
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> *12.I turn to the construction of section 107. Section 107(1) limits the application of the Act to construction contracts which are in writing or to other agreements which are effective for the purposes of that part of the Act only if in writing. This must be seen against the background which led to the introduction of this change. In its origin it was an attempt to force the industry to submit to a standard form of contract. That did not succeed but writing is still important and writing is important because it provides certainty. Certainty is all the more important when adjudication is envisaged to have to take place under a demanding timetable. The adjudicator has to start with some certainty as to what the terms of the contract are.*
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> *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.*
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> *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.*
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> *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.*
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> *16. Sub-section (5) is a specific provision. Where there has been an exchange of written submissions in the adjudication proceedings in which the existence of an agreement otherwise than in writing is alleged by one party and not denied by the other, then that exchange constitutes "an agreement in writing to the effect alleged". The last few words are important. The exchange constitutes an agreement in writing which does more than evidence the existence of the agreement. It also evidences the effect of the agreement alleged, and that must mean such terms which it may be material to allege for the purpose of that particular adjudication. It is not necessary for me to form a view about* ***Grovedeck Ltd. v Capital Demolition Ltd****. [2000] BLR 181 . Dealing with section 107(5) His Hon. Judge Bowsher Q.C. said:-*
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> > *"Disputes as to the terms, express and implied, of oral construction agreements are surprisingly common and are not readily susceptible of resolution by a summary procedure such as adjudication. It is not surprising that Parliament should have intended that such disputes should not be determined by adjudicators under the Act, ..." (Emphasis added by me).*
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> *I agree. That is why a record in writing is so essential. The written record of the agreement is the foundation from which a dispute may spring but the least the adjudicator has to be certain about is the terms of the agreement which is giving rise to the dispute…*

*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. The only exception to the generality of that construction is the instance falling within sub-section 5 where the material or relevant parts alleged and not denied in the written submissions in the adjudication proceedings are sufficient. Unfortunately, I do not think sub-section 5 can so dominate the interpretation of the section as a whole so as to limit what needs to be evidenced in writing simply to the material terms raised in the arbitration. 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. Here we have a comparatively simple oral agreement about the terms of which there may be very little, if any, dispute. For the consulting engineers to take a point objecting to adjudication in those circumstances may be open to the criticism that they were taking a technical point but as it was one open to them and it is good, they cannot be faulted."*

Lord Justice Walker agreed, albeit that Lord Justice Auld adopted a more liberal reading of the statute

25. This case was considered in ***Trustees of the Stratfield Saye Estate v AHL Construction Ltd*** [2004] EWHC 3286 (TCC), Mr Justice Jackson (as he then was) summarised the principle at Paragraph 47 of his judgment:

*"The principle of law which I derive from the majority judgments in **RJT i**s 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."*

26. The principles on which summary judgment may be given are clear and have been recently summarised by Mr Justice Coulson in ***Jacobs UK v Skidmore*** [2008] EWHC 2847 (TCC):

*"37. As for the test under CPR 24.2, a defendant in these circumstances needs to demonstrate that the defence has a real prospect of success; in other words that it is better than merely arguable (**International Finance Corp v Utexafrica Sprl** [2001] CLC 1361. On the one hand, it is not appropriate to conduct a mini trial on a Part 24 application (see **Swain v Hillman** [2001] 1 All ER 91); on the other hand, it is necessary for the court to undertake at least some investigation into the evidence so that a proper conclusion can be reached as to whether or not the defendant has a real prospect of successfully defending the claim.*

*38. In my judgment, any potential tension between these two imperatives is resolved by the comments of Lord Hobhouse of Woodborough in his speech in **Three Rivers DC v Bank of England (3)** [2001] 2 All ER 513, at 568. He said that at the trial, the test was which party's case was more probable (having regard to the burden of proof), but that this was not the position under CPR Part 24. For the purposes of summary judgment, he said, "the criterion… is not one of probability; it is absence of reality".*

27. So far as jurisdiction challenges to an adjudicator is concerned, it is necessary for the party objecting to the adjudicator' jurisdiction to make a clear and full reservation (see **Construction Adjudication** by Mr Justice Coulson (OUP) Paragraphs 7.05 to 7.08).

Did the parties give to the adjudicator jurisdiction to decide whether he had jurisdiction?

28. Another way of considering this issue is to consider if SLLB made an adequate reservation on jurisdiction in relation to their contention that a key term of the Pool Scaffolding Contract was agreed orally. That term was said to have been agreed on 14 December 2007 by Messrs Smith and James.

29. I have formed the view that adequate reservation was made by SLLB and the parties, and in particular SLLB, did not give to the adjudicator jurisdiction to decide whether he had jurisdiction. The answer to this lies in the chronology:

(a) The initial reservations as to jurisdiction, that is before the mutual acceptance that the reliance by Euro upon the May 2006 Contract was flawed and there had to be reliance upon the Pool Scaffolding Contract, were clearly primarily related to the fact that the May 2006 Contract could not govern the later relationship. Unsurprisingly, there was no reservation about a claim which had not yet been put properly.

(b) The adjudicator read SLLB's Response as giving rise to a threshold objection to his jurisdiction at least in part relating to the pool scaffolding work:

"The respondent has raised a challenge to my threshold jurisdiction that appears to have some merit. It says that the scaffolds described in Item 1 of the claimant's quotation Q/7376RJ, dated 16 May 2006, relate to the main house and not to the pool. The dispute referred relates to a scaffold erected to the pool. Moreover, it submits there is no contract in writing for the pool scaffolds." (letter of 13 September 2008 from Adjudicator-emphasis added)

(c) On 16 September 2008, SLLB by MCMS indicated that they would not object to the introduction of a new claim in respect of the pool scaffolding not arising out of the May 2006 contract but it made a reservation:

"Please note, however, that SLLB's agreement for [Euro] to introduce these two documents shall be without prejudice to its right to raise jurisdictional objections as it sees appropriate in regard to the existence of a "compliant" contract in writing".

(d) It is clear from his letter of 18 September 2008 that the adjudicator believed that SLLB had reserved its right to make a jurisdictional objection to an adjudication in relation to what I have called the *"pool scaffolding contract"*:

"...I understand that the claimant, with the agreement of the respondent, wishes to amend the Notice of Adjudication and the Referral so as to submit evidence to show that there is a contract between the parties concerning the pool scaffolds. I note that the respondent reserves its right to raise such jurisdictional objections as it sees appropriate in regard to the existence of a compliant "contract in writing".

(e) In that context, SLLB through MCMS submitted as it did in its letter of 19 September 2008. It had already reserved its position in its letter of 16 September 2008 and the adjudicator had understood it to be an effective reservation on the jurisdictional aspect. Although SLLB did not as such again explicitly reserve the jurisdictional position, the substance of the letter argues that the Pool Scaffolding Contract is not a contract in writing for the purposes of Section 107 of the HGCRA because it had an agreed oral term.

(e) As soon as the adjudicator forwards his view in his letter of 22 September 2008, which is clearly not his adjudication Decision (which comes later), MCMS again reserve its client's position:

"We note that you have decided that the contract is wholly in writing ... SLLB stands by its previous objections to your jurisdiction to proceed with the adjudication and reserves all of its rights in this regard."

Thus, there was an effective reservation of rights on jurisdiction by SLLB. The adjudicator did not assume that he had been given jurisdiction to decide his own jurisdiction; he investigated his own jurisdiction with the assistance of the parties and concluded that he did have jurisdiction. There was no agreement between the parties that the adjudicator could decide in a binding way that he did have jurisdiction. The fact that MCMS' letter of 19 September 2008 did not again expressly reserve its rights is immaterial in these circumstances.

Did the adjudicator have jurisdiction?

30. In my judgment, the adjudicator had jurisdiction, albeit not necessarily for the reasons which he thought gave him jurisdiction:

(a) The Courts are encouraged, as are adjudicators, to examine critically assertions that an adjudicator did not have jurisdiction. For instance, Ward LJ's observation in the ***RJT*** case is as apposite to judges as it is to adjudicators:

"*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.*"

(b) When one analyses the defence which SLLB was running, it was (on analysis) based on an implied term of fitness for purpose; whilst that was a wholly respectable argument to advance, it was based on the oral communication of the purposes for which the scaffolding was required by Mr Smith to Mr James on 14 and possibly 12 December 2008.

(c) Mr Smith's evidence before the Court and indeed before the adjudicator is wholly consistent with this approach. The language which he uses is consistent with this (my emphasis added):

"I therefore called Mr James to confirm that he <u>could</u> provide a sufficiently robust solution to hold back the earth and allow us to build the basement safely. Mr James made it clear that he <u>could</u>. I then gave him the go ahead and he thanked me for the order." (Paragraph 13 of Court statement)

The word used is *"could"* not *"would";* it is not the language of agreeing an express term. His statement concentrates in this area on making "*the function of the scaffold clear"* to Euro's Mr James, which is wholly comprehensible in the context of the communication of the purposes as opposed to there being a binding express term about fitness for purpose.

(d) Mr Smith's statements about the conversation on 14 December 2007 are not the same as what he wrote to Euro on 4 February 2008 when the problem with the scaffolding had occurred:

"I contacted you that evening and you confirmed to me that you could build the birdcage scaffolding. You thanked me for the work."

(e) I can see some real force in the adjudicator's view that the language of the 14 December 2007 quotation is not consistent and is positively inconsistent with an oral requirement from Mr Smith before the quotation was submitted that the scaffolding should support the sides of the pool excavation.

(f) Whilst it is not for the Court to pass judgment on the reliability of a witness at this stage, the onus is on SLLB to show that on the issue of whether there was an oral term agreed it has a real prospect of establishing its case on the point said to be in issue. That can only be judged on the written evidence put before the Court. I am satisfied that, on that evidence and on how it put its case on the point before the adjudicator, there is no such prospect as a matter of reality.

(g) There is no issue before me that, if the fitness for purpose term was only implied, this renders what would have been a contract in writing for the purposes of Section 107 of the HGCRA not such a contract. In those circumstances, the quotation of 14 December 2007, which was undoubtedly accepted, contained all the agreed terms, on the evidence before the Court.

Conclusion

31. The adjudicator's Decision should be enforced. There will be judgment for Euro for £22,496.60, interest of £2,209.60 (and continuing) and the adjudicator's fees of £3,983.66.

Jessica Stephens (instructed by C J Hough & Co Ltd) for the Claimant. Jonathan Selby (instructed by Silver Shemmings LLP) for the Defendant