JUDGMENT : MR. JUSTICE COULSON: TCC. 16th September 2008

1. At this case management conference a point of principle has arisen with which I propose to deal by way of a short judgment. The point is this: does the TCC have jurisdiction to decide a dispute as to the existence and/or terms of a contract, in circumstances where it is said that the court's decision will determine whether or not the claimant has the right to adjudicate, but where there is presently no adjudication (or even reference to adjudication), and there has instead been an almost completed pre-action protocol process? Depending on my answer to that question there are a number of other procedural points that also arise for determination before I go on to consider the detailed directions that may be necessary.

2. For present purposes the background facts can be simply stated. In March 2006 the defendant invited tenders for building works to convert 171 Old Brompton Road, London from a hotel back into the family house that it originally was. The claimant's tender was successful and the claimant commenced work on or around 6th July 2006. There was no contract in place at that point. Thereafter, as the works progressed, there were negotiations between the parties as to price, workscope and contract terms.

3. It is the claimant's case that:
   (a) At a meeting on 12th January 2007, the parties agreed that the contract would incorporate the JCT Intermediate Form, 2005 edition (the IFC Form);
   (b) There were then further e-mails from the defendant's agent, Mr. Bennett, dated 13th and, more importantly, 18th January 2007, the latter of which is said to confirm the detailed arrangements that had been agreed at the meeting of 12th January;
   (c) Thereafter, at a meeting on 21st February 2007, the claimant says that it was noted, in respect of the IFC Form, that the defendant had sent a letter confirming the contract, and that this was a reference back to the e-mail of 18th January.

4. I note that much later, in a formal response letter in the pre-action protocol process dated 26th February 2008, the defendant's solicitors stated:

   "As agreed at the site meeting on 12th January 2007 ... the contract was to be by exchange of letter. On 18th January 2007 Mr. Samen sent such a letter by means of an e-mail to Vitpol in which he set out the agreed terms of the contract for the complete building renovation works at the property ... the scope of work was to be based on the schedule of works Rev 9 but in the event of dispute the IFC 2005 contract terms and conditions would apply ...".

   In the same letter, the defendant's solicitors pointed out that *"there was never any formal contract document ..."*

5. On 14th March 2007 the defendant instructed the claimant to vacate the site the following day. The circumstances in which that happened are not relevant to the present application but it is pertinent to note that, from the pre-action protocol letters, those circumstances, and the claims that may arise from them, are disputed.

6. The parties have engaged in a pre-action protocol process as follows:
   (a) There was a letter of claim dated 21st December 2007;
   (b) There was a letter of response from the defendant dated 26th February 2008. That was the letter to which I have already referred at paragraph 4 above;
   (c) There was a letter of reply from the claimant dated 25th May 2008.

   There has not yet been a pre-action meeting but that is currently fixed for next week, 23rd September.

7. The pre-action protocol letters were handed up at the outset of the hearing this morning and I have been quickly through them. It is clear from those letters that they deal with the entirety of this dispute; thus, as one might expect, they concentrate upon the detail of the claimant's claim for £176,000 odd, and the potential counterclaim for defects raised by the defendant. Indeed the question of the contract itself, the terms that might have been agreed, and the potential issues that might arise in respect of such matters, form a very small proportion of the material in those letters. That is a point to which I shall return.

8. On 15th August 2008, before the end of the protocol process and without any notice, the claimant began proceedings under Part 8. In those proceedings, the claimant seeks three declarations in respect of the existence of the contract and the contract terms. Declarations 1 and 2 are widely framed and relate to the existence of the contract and the terms that the claimant maintains that contract incorporated. The third declaration sought is specific, because it seeks a finding that clause 9.2 of the IFC Form was incorporated into this contract.

9. Why does that matter? It matters because the claimant now wishes to adjudicate the substance of its disputes. The claimant therefore needs a finding that clause 9.2 of the IFC Form was incorporated into the contract, because that would then give the claimant the right to refer its claims to adjudication. It is common ground that if the claimant is wrong and the IFC terms were not incorporated, or they were incorporated but clause 9.2 for some reason was not, then the claimant would not have the right to adjudicate, because the building works related to work for a residential occupier: see section 106 of the Housing Grants, Construction and Regeneration Act 1996 and ***Picardi v Cuniberti & Cuniberti*** [2003] BLR 487.

10. The claimant's detailed case as to the contract is set out above. Mr Hickey submits that, because the disputes as to the contract identified during the pre-action protocol process were apparently limited, the claimant commenced these proceedings under Part 8. However, it now appears that, at least potentially, the disputes in relation to the

contract are wider and more fundamental than the claimant appreciated. In her helpful skeleton argument for the purpose of this morning Ms Mirchandani states:

"6. There was never any formal contract document and therefore never any formally agreed terms of contract on the terms of the latest edition of the JCT standard form for Minor Works or the JCT Intermediate form of contract.

7. The Schedule of Works formed the basis of the defendant's invitation to tender and the terms therein were proposed conditions of contract. However, the proposed conditions did not become conditions of contract as no contract was ever agreed or executed.

8. Accordingly, it is the defendant's position that the claimant has no contractual entitlement to seek adjudication."

I note that, whilst paragraph 6 above reflects the defendant's letter of response of 26th February 2008, the contentions in paragraphs 7 and 8 go considerably further than anything that can be found in those letters.

11. Be that as it may, it is clear that there is a dispute between the parties as to the existence of any contract at all and, if there was a contract, what its terms were. That is a dispute which the claimant wishes the court to determine. It is therefore necessary to consider why it is said by the defendant that the court does not have the jurisdiction to hear that dispute.

12. Ms Mirchandani reminds me of paragraph 9.4.1 of the **TCC guide** (second edition), which provides:

"9.4. Other proceedings arising out of adjudication.

9.4.1 As noted above the TCC will also hear any applications for declaratory relief arising out of the commencement of a disputed adjudication. Commonly, these will concern…b) disputes over whether there is a written contract between the parties…."

She then goes on to say in her skeleton argument that in the present case there are no c*ommenced* adjudication proceedings, and that therefore the claim does not arise out of the commencement of a disputed adjudication and does not fall within the scope of this paragraph of the **TCC guide**. She therefore concludes that *"the court is therefore without jurisdiction to hear this matter"*.

13. I reject the suggestion that the court's jurisdiction can be defined by reference to the **TCC guide**, construing that document as if it were a statute or a contractual exclusion clause. That is not the nature and purpose of the guide, which is designed only to set out in simple terms how the TCC can answer or assist the parties to resolve their disputes. Paragraph 9.4.1 is intended merely to illustrate the point that, in appropriate cases, the TCC may make orders in a dispute where there is an ongoing adjudication. This is what happened, for example, in ***ABB Power Construction v. Norwest Holst Engineering*** [2000] TCLR 831 and ***John Mowlem Ltd v. Hydra-Tight & Co. Plc*** [2001] 17 Const LJ 358.

14. The **TCC guide** is emphatically *not* designed to define the TCC's jurisdiction in every case. Its provisions do not shut out a bona fide dispute between the parties as to the existence of a contract, which might give the claiming party the right to adjudicate: indeed, paragraph 9.4.1 b) of the guide, noted above, expressly covers that very situation. It makes no difference to the court's jurisdiction whether the disputed adjudication has been started or not.

15. For completeness I should refer to (but do not set out) sections 1.1.1, 1.1.3 and 1.1.4 of the guide, all of which make plain that the guide is not to be taken as an alternative or replacement for the CPR. Although Ms Mirchandani is quite right to point out that paragraph 9.4 of the TCC guide is expressly referred to on the front of the particulars of claim in this case, it seems to me that, if I concluded that this was a dispute which the court had jurisdiction to entertain, then the fact that the reference to paragraph 9.4 may be wrong, because there is not a commenced adjudication in this case, could not affect, let alone wipe out, the court's jurisdiction.

16. Accordingly, absent the words from the **TCC guide** in paragraph 9.4, is there any other reason why the court does not have jurisdiction to deal with the Part 8 proceedings concerning the contract? I cannot think of any. As I have indicated, there is a bona fide dispute about the existence and terms of the contract. Until that is resolved the claimant will not know if it has the right to adjudicate. The claimant is entitled to have that issue resolved in advance of any subsequent adjudication. In one sense, it is more convenient for the point to be dealt with now rather than it being allowed to cause delay and possibly procedural muddle when a reference to adjudication is about to be made.

17. It seems to me that this is no different to the position where two parties to a contract dispute whether or not that contract incorporated an arbitration clause. Often in those circumstances the TCC is required to decide whether or not there was such an arbitration clause because, if so, the underlying disputes are then stayed for arbitration. That dispute will often arise as part of a wider debate about the contract terms generally, which the court will decide in advance of any arbitration. In those circumstances I conclude that this court has the jurisdiction to determine the dispute between the parties as to the existence and/or terms of their contract.

18. The next point taken by Ms Mirchandani is that Part 8 is inappropriate in this case because there is a substantial dispute of fact relating to the question of the contract. That is a point that we have discussed this morning and it seems to me that there are two answers to that:

(a) Whilst, for the reasons noted above, there is a clear dispute as to the existence and terms of the contract, it is much less clear to me that that dispute would regard any significant oral evidence. The pre-action protocol material reflects a large degree of unanimity on the facts surrounding the alleged contract. No specific factual disputes have been identified. As things presently stand, I am bound to say that this looks to me like a

relatively straightforward contract dispute where all (or almost all) of the relevant material will be found in the contemporaneous documents. In those circumstances paragraph 3.3.2 of the **TCC guide** would seem to apply, making this an appropriate case for Part 8.

(b) However, I quite accept that, as things develop, that conclusion may turn out to be wrong, and there may be issues which can only be determined by the hearing of oral evidence. That again is not an uncommon situation in the TCC. However, if that situation arises, in my experience it is never necessary to make detailed amendments to the claim form, much less insist on the production of a second claim under Part 7. The **TCC guide** emphasizes that the court is there to deal, in a flexible way, with the disputes as they arise and develop. There have been a number of cases in this court in recent years, many presided over by Jackson J, in which the parties have agreed a hybrid between Parts 7 and 8 so as to ensure that any necessary oral evidence can be accommodated within the final hearing.

19. Therefore, although I propose to make directions which envisage at least the possibility of oral evidence, I do not see that this gives rise to any procedural difficulty. Indeed, as I have said, it happens in the TCC all the time. I do think that it is important that the procedure serves the individual needs of the case, rather than itself becoming the dominant element of the proceedings.

20. Ms Mirchandani's final point was to seek a stay of one month so as to allow the proposed pre-action protocol meeting to go ahead on 23rd September, a week today. I certainly agree that the pre-action protocol meeting must go ahead and that no direction should take effect until some time after that meeting has taken place, so that the parties have had the opportunity to reflect on what is said there. The TCC is the only court which requires such a meeting, and I consider it to be a vital part of the protocol process. However, that said, I do not believe that it is necessary to stay these proceedings. I do not think that it could be said that in some way, if I do not grant a stay, the claimant is obtaining some sort of unfair advantage or pressure point or hold over the defendant. On the contrary, I conclude that, if the disputes are not compromised at or after the meeting, these proceedings ought to be progressed as quickly as possible, particularly given the leisurely way in which the pre-action protocol process has progressed thus far.

21. In conclusion, I should make two points, which I believe are related. The first is the point that underlay a number of Ms Mirchandani's submissions, to the effect that it was wrong and unfair for the claimant to have started and maintained a pre-action protocol process dealing with the entirety of its claims, only now to change tack unilaterally, and to focus instead on the contract issue, with the threat of an adjudication in the background.

22. I have sympathy with that submission, because it does seem to me that unnecessary cost has been incurred as a result of the decision to embark on a nine-month pre-action protocol process, dealing with everything, only for the claimant now to require the court, and the defendant, to focus solely on the contractual element of the dispute. However, it seems to me that, if I took the defendant's submissions on this point to their logical conclusion, and refused to allow the claimant to reduce the scope of the matters to be dealt with by the court if the pre-action process failed, I would be depriving the claimant of its right (or at least its potential right) to have its claims addressed in adjudication. Whilst I can see that, in the round, it would make much more sense for this case to go ahead with all of the disputes, both contractual and financial, being dealt with in one place, I note that that is not what the claimant wants. Critically, if the claimant has a right to adjudicate, then it is not for the court to deprive the claimant of that right.

23. The second point, which is, of course, related, is that because I am concerned about the potential costs that have been incurred and will be incurred in adopting this process, I will be vigilant to ensure that any costs orders that are made reflect my conclusion that, from a case management point of view, it would have been better if all of these disputes had been dealt with together.

24. For the reasons which I have given, I cannot deprive the claimant of its right (or potential right) to adjudicate. In those circumstances I should make directions which lead to the resolution of the contractual issues. I would want the timetable to be as speedy as possible but reflecting:

(a) The point that I have already made that the directions cannot start to be effective until after the pre-action protocol meeting, and a time for the parties to reflect; and

(b) The requirement that any timetable must allow the defendant proper time to prepare his evidence to deal with the issues relating to the contract.

25. Subject to these considerations, however, I would propose now to go on and make directions in relation to the underlying dispute about the contract and/or its terms.

Mr Alexander Hickey (instructed by Fenwick Elliott) for the Claimant
Ms Sian Mirchandani (instructed by Judge Sykes Frixou) for the Defendant