JUDGMENT : HH Judge Thornton QC: TCC. 10th July 2006.

Introduction

1. This judgment is concerned with two separate applications for summary judgment to enforce two separate decisions of two separate adjudicators. The parties to each adjudication are the same but the contracts were different. Management Solutions and Professional Consultants Limited ("Management Solutions") is the claimant in the first application for summary judgment and the defendant in the second. Management Solutions specialises in the installation of information technology and electrical systems and is based in Colchester, Essex. Bennett (Electrical) Services Limited ("Bennett") is the defendant in the first application for summary judgment and the claimant in the second. Bennett specialises in the installation of electrical systems and is based in Luton, Bedfordshire.

2. The contract out of which the claim arises was entered into in September 2004 and was for electrical installation sub-sub-contract works to be carried out by Management Solutions for Bennett as part of Bennett's sub-contract with Apollo London Limited to carry out electrical sub-contract works in connection with electrical upgrading works for family houses at the RAF base in Colchester. The sub-sub-contract works were completed in July 2005 and Management Solutions were left with a sum of £31,843.08 that had been applied for but which remained unpaid. Management Solutions started adjudication proceedings claiming this sum and an adjudicator was appointed. His decision was published on 25 January 2006 and he decided that Bennett should pay Management Solutions £36,937.25 plus any applicable VAT plus £2,701.61 plus any applicable VAT release of retention. Bennett was also ordered to pay interest and the adjudicator's reasonable fees. None of the sums directed to be paid has yet been paid.

3. The contract out of which the claim arises was entered into in November 2004 and was for electrical installation sub-sub-contract works to be carried out by Management Solutions for Bennett as part of Bennett's sub-contract with William Verry Limited in connection with a project for the construction of a Children and Family Centre in Sheerness. Management Solutions stopped work under the sub-sub-contract in April 2005 following disputes between the parties. Bennett arranged for the sub-sub contract works to be completed by others and started adjudication proceedings claiming the additional cost of completing the sub-sub-contract works that had resulted from Management Solution's alleged repudiation of the sub-sub-contract. The adjudicator decided in a decision published on 9 March 2006 that Management Solutions had repudiated the contract and that it should pay Bennettt a total of £18,052.74 plus applicable interest plus the adjudicator's reasonable fees. None of the sums directed to be paid has yet been paid.

4. Management Solution's claim for summary judgment was heard at a hearing held on 17 March 2006. The hearing was concluded and I reserved judgment. However, it was clear that one issue arising out of this claim was whether Bennett could set off against any judgment sum the sum awarded by the second adjudicator or could seek a stay of any judgment on that first claim pending an enforcement application being heard in relation to the second adjudicator's decision. By the time of the hearing, Bennett was in receipt of the second decision but had not had sufficient time to start a Part 20 claim in the proceedings brought by Management Solutions.

5. The parties acceded to my suggestion that a proportionate and cost-effective solution to the procedural difficulty that had arisen should be adopted. This was that I should reserve judgment until after the Part 20 claim had been brought in the same proceedings and that I should determine the Part 20 claim on paper with the benefit of witness statements and written submissions from both parties. This procedure has been followed and this judgment deals with both the claim, heard on 17 March 2006, and the cross-claim brought in the Part 20 proceedings that has been the subject of exchanges of pleadings, witness statements and written submissions.

Management Solutions' Claim

6. The sub-sub-contract was made by Management Solutions' quotation dated 17 May 2004 and Bennett's acceptance contained in a letter dated 30 September 2004. This contract provided for the provision of defined electrical works in 34 Type C dwellings and 26 Type D dwellings for a defined lump sum per dwelling. This sub-sub-contract was undoubtedly contained in a written contract. On 6 December 2004, Management Solutions, as stated in the adjudication referral document, was instructed orally to undertake certain additional or extra work. A further oral instruction added further work by way of rechasing and rewiring of work already carried out using a different form of boxing and mini trunking. A third oral instruction added yet further work, by way of the installation of white goods to each property.

7. Bennett disputed that these instructions had led to the agreed expansion of the scope of the work or that this work was additional to the scope of the sub-sub-contract works. However, its primary contention in the adjudication was that the effect of these instructions, which were oral in form, was that the sub-sub-contract was not in writing and was not, in consequence, subject to the adjudication provisions of the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA").

8. This submission was advanced because section 107 of that Act provides that those provisions only apply where:
"… the construction contract is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.
The expressions "agreement", "agree" and "agreed" shall be construed accordingly.

(2) There is an agreement in writing:-
(a) if the agreement is made in writing (whether or not it is signed by the parties),
(b) if the agreement is made by an exchange of communications in writing, or
(c) if the agreement is evidenced in writing.
(3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.
(4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement."

9. The effect of these provisions has been decided by the Court of Appeal in ***RJT Consulting Engineers Limited v DM Engineering (Northern Ireland) Limited*** [2002] 1 BLR 217. The majority reasoning of Ward and Walker LJJ in that case was to the effect that the whole of the agreement had to be evidenced in writing and not merely part of the agreement.

10. Bennett contended that the effect of the oral instructions which varied the scope of the work or added extra work to the sub-sub-contract works was to remove the sub-sub-contract from the scope of section 107 of the HGCRA because the whole of the agreement was not in writing or evidenced in writing. Management Solutions contended that the entire sub-sub-contract was in writing, that sub-sub-contract contained a written variations clause allowing Bennett to add to or subtract from the scope of the work and that any such addition or omission did not vary the contract but merely amounted to a redefinition of the contract work by virtue of a contractual term providing for such a redefinition.

11. The relevant contractual term in this case provided that no variation to the work was to be carried out without Bennett issuing a written instruction to carry out that variation. That clause clearly provided for variations and the requirement that such variations had to be in writing could be waived by agreement. In other words, the requirement for a written variation was not a precondition to a variation instruction being issued or taking effect where the parties agreed, expressly or by implication, that the varied work should be carried out as instructed orally.

12. The effect of the contract not being wholly in writing, as Bennett contended, was to take the adjudication outside the provisions of the HGCRA with the result that the adjudication was not authorised by that Act and was therefore one where the adjudicator proceeded without jurisdiction so that his decision was neither valid nor enforceable.

13. This case raised squarely the question as to whether the words "made in writing" or "evidenced in writing" extend to variations ordered orally under a contract by virtue of an express contractual term allowing the ordering of such variations. In deciding this issue, I take account of the fact that virtually all construction contracts are subject to variations. A variation includes additional or omitted work, the provision of additional details to allow for ill-defined work to be executed or the ordering of work whose scope or quantity is only provisional in the contract documents. Very often these variations are ordered orally and not subsequently fully evidenced in writing.

14. I also take account of the fact that, if Bennett's contention is correct, this sub-sub-contract was originally, once accepted, a contract in writing subject to the adjudication provisions of the HGCRA. However, once the first variation was instructed orally, subject only to a de minimis argument, the sub-sub-contract changed its nature to become one which was neither in writing nor subject to the adjudication provisions of the Act. Although such a result is possible, it is not one which makes business sense nor is one which gives full effect to the nature and purpose of the compulsory statutory adjudication scheme provided for by the HGCRA.

15. In my judgment, Management Solutions' contentions are to be preferred. The entirety of this sub-sub-contract was in writing and took effect once Bennett's written acceptance was sent off to Management Solutions. That written sub-sub-contract allowed the scope of the work to be changed within the limits provided for by the written contractual provisions. Within those limits, the sub-sub-contract works could be varied. Such variations were not varying the contract, they were merely instructions issued under the contract and with the authority of the contractual provisions that related to the carrying out of the contract.

16. It follows that the disputed variations were undertaken under the terms of the original sub-sub-contract and were within its scope. Even if these variations were oral and not evidenced in writing, the work required by them was carried out and if it can be established that the instructions were issued by or on behalf of Bennett, the resulting work was carried out by agreement with the result that the contractual requirement that the variations should be evidenced in writing was waived by both parties.

17. The conclusion is that the adjudicator had jurisdiction to embark upon and decide the dispute referred to him that arose out of the sub-sub-contract. As it happens, he decided that Management Solutions was entitled to be remunerated for the disputed variations as well as for outstanding sums due for the original sub-sub-contract works. These decisions are not capable of being challenged in these enforcement proceedings and Management Solutions are entitled to the full sum that the adjudicator directed Bennett to pay.

Bennett's Claim

18. Bennett started the second adjudication on the basis of a sub-sub-contract which, if it was entered into, was clearly in writing. This sub-sub-contract was made by a Purchase Order dated 31 January 2005 sent by Bennett which Management Solutions accepted, an acceptance evidenced by the invoices it subsequently sent to Bennett which, in each case, expressly referred to this Purchase Order. The adjudicator concluded that these documents constituted or evidenced the sub-sub-contract and, having decided the disputes referred to him that arose out of this sub-sub-contract, decided the dispute in favour of Bennett.

19. Management Solutions contended that the sub-sub-contract relied on by the adjudicator and that Bennett had relied on to found its claims was never entered into. Instead, a preceding oral contract, or partially written and partially oral contract, formed the basis of the contractual relationship between the parties which was not, in consequence, one to which the adjudication provisions of the HGCRA applied. The subsequent written contract relied on by Bennett could not take effect since the sub-sub-contract had by then been concluded. Further, Management Solutions contended that if the sub-sub-contract relied on by Bennett was applicable, it was not one which included all the agreed terms and was one to which, again, the HGCRA was inapplicable. Finally, Management Solutions contended that it never accepted Bennett's Purchase Order since its invoices only referred to the Purchase Order for administrative convenience.

20. In order to determine whether the relevant sub-sub-contract was that contended for by Bennett or was, instead, that contended for by Management Solutions, it must first be decided what the starting point is for the determination of this issue. Bennett contended that the starting point was the contractual provisions it contended for. It was these under which it had referred the disputes to adjudication and if the sub-sub-contract documentation Bennett had used to found its reference to adjudication appeared, on its face, to constitute a valid sub-sub-construction contract, a valid reference had been made. It was, of course, open to Management Solutions to contend to the adjudicator, within his jurisdiction, that the relevant terms of that sub-sub-contract had not been agreed because there existed a preceding oral contract which had not been superseded by the subsequent written contract. Indeed, that contention was advanced to the adjudicator but rejected by him. Any error in dealing with that contention was one within jurisdiction and was not capable of being challenged in these enforcement proceedings.

21. Management Solutions contended that the starting point for determining whether or not a written sub-sub-contract had been entered into was the start of the contractual negotiations of the parties. In other words, the court, in determining whether or not the adjudication fell within the requirements for writing provided for by section 107 of the HGCRA, had to stand outside the adjudication reference and the adjudicator's decision and had to determine independently of these provisions whether or not there was a construction contract in writing out of which the dispute referred to the adjudicator had arisen.

22. In my judgment, Bennett's approach is the correct approach. Where there appears to be a construction contract in writing, the document gives rise to a construction contract under which an adjudicator may be appointed. The responding party, if it contends that the relevant contract does not contain the terms applicable to the dispute, may raise that contention as a ground of defence within the adjudication but cannot subsequently contend that the adjudicator lacked jurisdiction.

23. In this case, Bennett sent to Management Solutions a Purchase Order which clearly constituted an offer to carry out a construction contract. The subsequent invoices were either acceptances of, or written evidence of, a construction contract based on that Purchase Order.

24. In this case, Bennett's contentions would succeed even if the approach advocated by Management Solutions is adopted. This is because any contract formed in the way contended for by Management Solutions was capable of being superseded by a subsequent contract in writing. The appropriate contractual analysis would be that the oral contract was discharged and replaced by the subsequent written contract, a result occurring by virtue of the agreement or consensual arrangement of the parties to that effect.

25. Management Solutions' other contentions may be disposed of shortly. Its first contention was that the written contract contended for by Bennett did not constitute the entire contract agreed to by the parties since the written documentation did not contain any reference to the commencement date for the works nor to a full or accurate description of the scope of the works. Furthermore, the lump sum provided for was not an accurate statement of the agreed price and there was no indication in the documents as to how this sum had been arrived at. However, these contentions amount to contentions that the written documentation did not fully describe or set out the contact terms. The adjudicator had these contentions before him since Management Solutions referred to each of them in the written submissions placed before him and he decided against each of them. There is no need for a construction contract to take effect if it does not contain an agreed starting date or a full and complete description of the works to be performed. Equally, a lump sum contract sum need not be broken down. Thus, there was, as found by the adjudicator, a full construction contract contained in the written documentation.

26. Management Solutions then contended that although the Purchase Order referred on its face to Bennett's standard terms and conditions, these were not faxed through to Management Solutions. However, the adjudicator found that these were also sent through to Management Solutions. In any case, it is sufficient if the Purchase Order refers to a written document in terms sufficient to incorporate it into the contract. Such a reference brings the contract within the terms of section 107(3) of the HGCRA.

27. Finally, Management Solutions contended that its reference to the Purchase Order in its subsequent invoices was purely done on an administrative basis to assist Bennett's administration department by referring to a purchase number on its invoices. However, the test as to whether a document has contractual effect is an objective one. Any objective reading of the invoices would lead a reasonable person to conclude that they were, and were intended to constitute, an acceptance of Bennett's offer and were intended to have contractual effect.

28. I conclude that the adjudicator had jurisdiction to proceed and that the resulting decision is enforceable.

Conclusion

29. Management Solutions is entitled to judgment for £41,908.48 plus interest awarded by the Court from 25 January 2006, the date of the adjudicator's decision, until the date of this judgment, 10 July 2006. Bennett is entitled to judgment for £26,340.18 from 9 March 2006, the date of the adjudicator's decision, until the date of this judgment, 10 July 2006. Interest should be awarded on each sum at 4.5%, being the appropriate rate to be awarded under the Law Reform Act for a commercial debt.

30. In my judgment, the two sums should be set against each other with the effect that Management Solutions should recover £15,568.30 plus interest on that sum from 25 January 2006. The balance of Management Solutions' claim and the balance of its interest claim are off set and extinguished by Bennett's cross-claim which is being set off against it.

31. Both Management Solutions and Bennett claim their costs of their respective claims and have submitted statements of costs for the purposes of a summary assessment. However, in my judgment, each side should bear its own costs. The two disputes were closely entwined and the issues raised by each dispute were very similar. Each claim had been left unpaid pending the result of the other claim and both claims were relatively small. The marginal victory resulting to Management Solutions does not warrant it in succeeding in recovering its costs for its claim, wholly or in part. In truth, both parties won and lost in equal measure on the issues being contested and that overall result is most fairly and proportionately reflected in a no costs order.

32. Management Solutions should draw up an order which reflects these conclusions and provides for the interest being paid as a result of my order. That interest should be calculated on the entire judgment sum less the interest element of it since, otherwise, interest would be awarded on interest. The interest calculation should be agreed with Bennett before the order is submitted for entry.

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