[2020] EWHC 2854 (TCC)

<u>IN THE HIGH COURT JUSTICE</u>
<u>BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES</u>
<u>THE TECHNOLOGY AND CONSTRUCTION COURT (QBD)</u>

Case No: HT-2020-000007

Rolls Building
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Fetter Lane
London
EC4A 1NL

Thursday, 2nd April 2020

Before:

THE HONOURABLE MR JUSTICE WAKSMAN

B E T W E E N:

OD DEVELOPMENTS

Claimant

and

OAK DRY LINING LIMITED

Defendant

MR A SINGER QC (instructed by Collyer Bristow LLP) appeared on behalf of the Claimant
MR A HICKEY QC (instructed by Pinsent Masons LLP) appeared on behalf of the Defendant

APPROVED JUDGMENT

WAKSMAN J:

Introduction

1. I am concerned here with a decision of the adjudicator dated 19 December 2019. The claimant, OD Developments & Projects Ltd, to which I shall refer as OD, was the employer and main contractor and the defendant, Oak Dry Lining Ltd, to which I shall refer as Oak, was the subcontractor.
2. The works in particular concerned a project at 19 Bolsover Street in London, and Oak, as the subcontractor, was carrying out dry-lining works. By his decision, the adjudicator awarded to Oak £431,291.81 and directed that OD should pay his fees. Following that, OD issued a Part 8 claim on 9 January 2020. This contended that the adjudicator had been wrongly appointed and, therefore, lacked jurisdiction, so his decision was invalid and unenforceable. It further contended that there was in fact no dispute between the parties by reason of the issue of OD's final payment notice and the lack of any challenge to it within 10 days. Alternatively, the final payment notice was validly issued, and its effect is to bar the adjudication brought by Oak. Finally, that the sum of £595,479.11 was due to OD from Oak, alternatively, a slightly power sum after deduction of a retention.
3. That claim is resisted by Oak, who made a cross-application on 17 March for summary judgment to enforce the adjudicator's decision. This is a case where there was, on any event of its common ground, a binding Letter of Intent, whatever else there may have been. I shall refer to this in more detail later on. However the first paragraph of it states that was the intention of the parties to enter into formal contractual relations for a dry lining contract based on JCT 2001 Design and Build subcontract and then it lists information which would form part of the order. The only other term of the letter of intent which I propose to deal with, at this stage, is that on the second page it says that any dispute or difference arising out of, or in connection with, this Letter of Intent will be determined by adjudication under the current scheme. The adjudicator will be appointed by a president or vice president of the RICS.
4. It is common ground that no complete JCT subcontract form was ever executed or assigned and none of the requisite particulars, which preface the underlying terms, were filled in. Nonetheless, the works took place.

The Dispute

5. Oak made a series of requests for payments using the interim payment procedure. They more or less followed the JCT procedure but not entirely.
6. Practical completion was by no later than 5 December 2017.
7. There are then a series of documents concerning payments, of which I must read. The first one is an interim payment notice from Oak dated 29 March 2019. It states payment application number 21, for the gross sum of £1.711 million. That is the total sum, but to date, they have received £983,000, leaving a balance due of £728,000. The application is particularised by reference to, for example, measured works, variations, overheads, recovery and so on, ending up with the sum claimed.
8. OD's Pay Less notice in response to that was sent, in its first incarnation, on 12 April 2019. It said that, in fact, no sum was due and on the following page it claimed a payment due to it, at that stage calculated at £123,000. In other words, by that stage the position was that Oak had, in fact, been overpaid: far from any sums being due to it, there was a balance due to OD.
9. That was then followed by a further Pay Less Notice dated 13 May equally saying that no sum was due to Oak but adding that as a result of the overvaluation of the works there was a sum due to OD of £509,000. That was on the basis of a gross valuation of the subcontract works of some £511,000.

10. On 22 July 2019, OD wrote to Oak to say as follows: "Further to the letter of 17 May when we asked Oak to submit its final subcontract application within the next 4 weeks, we have had had no response....in accordance with clause 4.6.3, we enclose our calculation of Oak Dry Ltd.'s final subcontract sum". Here, the value of Oak's subcontract work had been reduced further by OD, leading to an increased amount due to it by Oak of £625,000. On 2 August, Oak disputed this and then, on 26 September, OD sent the final payment notice which was featured heavily in the proceedings before me but, repeated the valuation which had been carried out on 22 July, and claiming again, the sum of £625,000.

11. That, in turn, was disputed by Oak in its letter of 30 September 2019. Oak then served its Pay Less notice in response to the final payment notice on 14 October and, at that stage, it claimed that it was owed £765,000 from OD.

12. By a separate letter of the same date, Oak also said that OD's final payment notice was itself invalid so that Oak was entitled to, and did, serve its own default payment notice, again claiming £765,000. In response to that, Oak served its Pay Less notice dated 16 October, again claiming £625,000 to <u>it</u>.

13. On 8 November, Oak referred the dispute to adjudication. I read out several features of that notice now. Paragraph 6 onwards read as follows:

> "6. Regarding the possible Conditions of sub-Contract, the LOI states the intention is that the JCT 2011 Design & Build Sub-Contract will apply. To an extent ODL and OD proceeded on the basis that the JCT 2011 Design & Build Sub-Contract Conditions applied during the delivery of the Sub-Contract Works occasionally referring to the conditions albeit absent of reliance on any completed Sub-Contract Particulars.
> 7. The sub-contract sum was subsequently adjusted to £11,244,901.90 under Site Instruction No, 10 dated 22July 2016.
> 8, However, the JCT 2011 Design & Build Sub-Contract was never executed and the woks proceeded with no regulated terms and conditions.
> Adjudication Provisions
> 9' There were no Contract Particulars executed and no regulated terms and conditions and therefore ODL's option for adjudication falls to be regulated under part 1 of the Schedule to The Scheme for Construction Contracts (England and Wales) Regulations 1998 (Amendment) (England) Regulations 2011.
> The Dispute
> 10' Although a formal contract was never executed the Parties acted as though clause 4.9, 4.10, 4.13, 4.19 and 4.20 of the intended sub-contract (JCT 2011 Design and Build Sub-Contract, applied for the purposes of Interim payments."

<u>The Adjudication</u>

14. The adjudicator had to deal first with two jurisdictional points by OD which were also taken before me. The first was that he had no jurisdiction because he was not appointed in accordance with the terms of Letter of Intent, albeit that the method of appointment (ie by RICS), was in any event correct. He dismissed that objection.

15. Secondly, he dismissed the argument that he had no jurisdiction because there was, in fact, no dispute between the parties because under a JCT terms, a final notice was itself conclusive, admitting of no other arguments in an adjudication. He rejected that and held that this was a matter for the merits, not jurisdiction.

16. On the substance, he held as follows, in relation to contract formation, having had differing arguments put before him by both of the parties:

> "244. The Letter of Intent states the intention that the 2011 JCT Design and Build Subcontract will apply.
> 245. It is clear the parties proceeded on the basis that the 2011 JCT Design and Build Subcontract Condition applied, referring to the Conditions albeit absent any completed subcontract particulars.
> 246. I further agree with OD Developments that whilst parties did not complete the Subcontract Particulars, there was nothing further to be agreed and hence a contact was formed.

> 247. I therefore agree with the Parties that the Conditions of the JCT Design and Build Subcontract are incorporated and apply."

17. He then held as a matter of substance that the final payment notice from OD was invalid and so did not represent a conclusive determination of the monies due. He then assessed the true total value of the works at £1.41 million, somewhat less than the valuation of £1.7 million placed upon them by Oak in its interim payment application 21. After deducting payments already made, that left a balance due to Oak of £431,291.81 as I referred to at the beginning of the judgment, and all that is set out in paragraph 3.3.8 and 3.3.9 of the adjudication decision. That is all I need to say about the decision at this stage.
18. The core points made by OD, are on the two jurisdiction points and the question of the binding final payment notice which has been argued before me. Let me set out in more detail the issues as they emerged.
19. In the Part 8 claim, OD said first that the sub-contract did incorporate by reference the JCT terms. Secondly, its final payment notice was served pursuant to the JCT terms and was valid. Thirdly, because Oak issued no proceedings to challenge the final payment notice within 10 days, as per the JCT terms, the notice became conclusive and, therefore, OD is entitled to judgment from Oak in the sum of £625,000.
20. By its response, Oak said that the contract did not incorporate JCT terms and so there is no claim based on the final payment notice and the Part 8 claim fails on that basis. Secondly, and alternatively, if the JCT terms were incorporated then,
    a. The final payment notice was itself non-compliant and had no effect.
    b. If it was compliant, it was not conclusive because the conclusively terms within clause 1.8 invoked by OD conflict with clause 4.12 of the terms and, in any event, conflicted with section 1.1.1. of the Act as amended, so that clause 1.8 must be disregarded.
    c. A further consequence of the non-compliance of OD's final payment notice was that Oaks' deferred payment notice was itself valid and became conclusive, meaning that Oak is now owed from OD, the sum claimed of £765,000. That argument did not run if clause 1.8 were to be removed.
21. By way of counter-argument, OD says that if, which it denies, it is the case that the JCT terms were not incorporated, then that outcome necessarily means that the adjudicator had no jurisdiction for a different reason, namely that he purported to evaluate the claim on the basis that the JCT terms <u>did</u> apply. As against that, Oak stated even then the adjudicator still had jurisdiction because what he effectively did was to undertake a true valuation as if it had been a final account claim made pursuant to the scheme and, therefore, nothing really turns on the issue of whether the JCT terms were incorporated.
22. As for the adjudication itself, Oak says that, subject to the points above, the adjudicator's decision should be enforced. OD says that it should not in any event be enforced for the following reasons.
    a. His appointment was invalid because it was not made in accordance with the adjudication provision in the LOI, which in any event applied.
    b. The final payment notice was itself conclusive at the outset and, therefore, there was no true dispute.
23. These were the two points that were taken before the adjudicator as preliminary matters. I will deal with them first before turning to the Part 8 claim.
24. The LOI provided that any dispute or difference concerned with the Letter of Intent should be determined by adjudication under the current scheme for construction contracts, and the adjudicator should be appointed by president or vice president of the RICS.

25. The notice of adjudication referred to the LOI and then said that:

> "There were no Contract Particulars executed and no regulated terms and conditions and therefore ODL's option for adjudication falls to be regulated under Part 1 of the Schedule to The scheme for construction contracts (England and Wales) Regulations 1998."

26. The notice of adjudication thus clearly proceeded on the basis that the JCT terms were not incorporated. Therefore, there was no reference to the different adjudication clause within the JCT terms themselves. However, neither did it make any reference to the LOI's express adjudication clause. In fact, the notice of adjudication given was wholly consistent with the LOI's adjudication clause because either way, the adjudication was simply sought under the Scheme and secondly, it sought appointment by the RICS which is also what the LOI had provided.

27. In my view, Oak did exactly as the Letter of Intent required. It is perfectly true that it did not refer to the LOI adjudication provision in terms in the notice, but I do not consider that it had to, though what it did was completely in accord with it. Since, in my view, Oak actually did comply with the adjudication provision in clause 9 of the LOI, this is not a case which is comparable to the facts in Twintec *Ltd v Volkerfitzpatrick Ltd* [2014] EWHC 10 (TCC). Oak is not relying on the fact that, as a matter of coincidence, the adjudicator ended up being appointed by the right body, which might still be enough to save the adjudication - see paragraphs 58 – 61 of the judgment of Mr Justice Edwards-Stuart to which I shall return.

28. In the *Twintec* case, the difficulty was that the adjudicator was appointed pursuant to a contractual provision which did not, in fact, exist. This had been contained in a set of standard terms which provided for adjudication and which gave a series of choices to the parties as to which appointing body should be used. On the version of the terms which the party seeking adjudication relied on, all of the options had been crossed out leaving only as the default, RICS and on reliance on that provision the party seeking the adjudication served the notice to adjudicate. Mr Justice Edwards-Stuart held that none of these terms had been agreed by the other party at all and, therefore, there were not incorporated into the contract. This formed the basis for the challenge to a forthcoming injunction and *Twintec's* claim for an injunction to prevent it. It was argued that, in fact and in principle, both parties had agreed on a nominating body because under the scheme the appointing body was in fact RICS. The judge said that made no difference because Twintec had not agreed the contractual provision pursuant to which the appointment was actually made.

29. At paragraphs 58, 60 and 61 of his judgment, the judge noted the submission that *Twintec* was seeking to promote form over substance and the position is entirely artificial. He said that while on a practical level, he had some sympathy with this, it could make no difference because the validity of the procedure by which the adjudicator was appointed goes to the heart of the jurisdiction.

30. The Judge here quoted from the decision of the Court of Appeal on *Pegram Shopfitters v Tally Weijl* [2004] 1 WLR 2082 of which he said at paragraph 60, 'It is clear from the passage of the judgment of May LJ, that unless the adjudicator was appointed under the correct contractual provisions, his appointment would be a nullity,' and he agreed, that the jurisdiction of the adjudicator derives from the agreement of the parties. The adjudicator could not be validly appointed under a contractual provision that does not exist. A dispute cannot be validly resolved by an adjudicator other than one appointed in accordance with the terms of the contract or the scheme if it is incorporated under the contract expressly or by operation of law.

31. *Twintec* should be distinguished, if it is relevant at all, first because this case is a case of the appointment of the adjudicator under a contractual provision. It is not a case of an

adjudicator appointed under provisions which did in fact, exist as a matter of contract. Here, the appointment is wholly consistent with the contract that did exist. Secondly, it actually gave effect to the contractual provision. The argument against there being jurisdiction here crosses the line into a formalism which does not sit well with the adjudicator's regime and I reject it.

32. I then came to the second jurisdiction point, based on the contention that the final payment notice served by OD had become conclusive. It is true that if the JCT terms were incorporated and the final payment notice was validly issued, and all the other elements of conclusively arose, Oak would not, in any adjudication, be able to adduce evidence to contradict the figures. That is because of the effect of the conclusivity. See paragraph 37 of the judgment of Mr Justice Coulson, as he then was, in *Marc Gilbard 2009 Settlement Trust (trustees of) v OD Developments and Projects Ltd* 159 Con LR 150, [2015] BLR 213, [2015] EWHC 70 (TCC), in which je said that the conclusivity of the provision does not stop the commencement of the adjudication. Rather it prevents the admission of any contrary evidence. Furthermore, here, the parties are in dispute as to whether the final payment notice was valid at all. If not, it would not be conclusive. In addition, Oak's position as to the contract, and taken at the adjudication was that the JCT terms were not incorporated anyway. It cannot be right that a mere claim by one party to be able to rely on a conclusivity provision is sufficient to deprive the adjudicator of adjudication at the outset. Otherwise these kind of not uncommon disputes would never go to adjudication at all. That is clearly an absurdity.

33. Accordingly, I reject this jurisdiction point also.

34. I therefore turn to Part 8, incorporation of JCT terms. OD argues that the JCT terms were incorporated into the LOI itself at the outset. It had previously run an argument that they were incorporated by reason effectively of estoppel by convention, having regard to how the parties actually conducted themselves subsequently with the works, but that argument is not now pursued. That is realistic, not least because it would possibly involve me making findings of fact, which I cannot do on this Part 8 trial. I should, however, make clear that the other Part 8 points I can deal with under that procedure. Accordingly, the question of incorporation is a question of an analysis of the documents at the time of the LOI.

35. Let me, therefore, return to the detail of that document and make some comments about it. It begins by saying**,**

> 'We confirm that it is our intention to enter into formal contractual relations with yourselves, for the Dry Lining, as domestic subcontractor based on JCT 2011 Design & Build. The following information will be incorporated into, and form part of, any order with ourselves.'

Let me stop there. The intention was to enter into formal relations as per the JCT contract. The reference to 'order', clearly to the contemplated executed JCT contract. This is then followed up with the next paragraph which contains a "List of correspondence forming the basis of the order documentation". That list included a subcontract, the sub-contract sum of £1.2 million, the timetable, a post-tender interview and a schedule of tender information.

36. Again, that is a list of documents which would form part of the contract if, and when, it is executed. Obviously, it makes sense that the parties had agreed, in advance, for example, a specification for the works and the price, but nonetheless, the contract had not yet been entered into. The reference in that paragraph to "order documentation" again reflects the use of the word "order", which is the completed, executed, JCT subcontract. It is hardly surprising that individual documents had been agreed in advance, because one would expect prices and specifications on major subcontract works to be agreed in advance. But this does not mean that at one and the same time, the JCT terms themselves were incorporated. It is

one thing to agree what particular documents you will have if you execute a JCT contract; it is quite another to say that you have, therefore, incorporated all those JCT terms and conditions at the outset and at the same time.

37. I then refer to the next paragraph:

> 'This Letter of Intent is based on your knowledge and acceptance of the JCT contracts stated'.

This was heavily relied upon by OD. It submitted that this means that Oak was agreeing there and then to the incorporation of the JCT terms. I disagree. What it means is that Oak agreed in advance that any form of subcontract will indeed be on the basis of JCT Design and Build 2011 subcontract and that Oak if familiar with such terms. I do not regard that as helping OD at all, I am afraid.

38. We then go to the next paragraph. That says,

> 'If the contract is cancelled for any reason prior to your subcontract issue, you will be reimbursed on a quantum meruit basis. This Letter of Intent shall expire on 30 July 2016, on the basis that the subcontract shall be entered into by this time.'

39. Where it says the contract is cancelled, in my judgment, in context, this means the main contact being cancelled, because obviously if that contract is cancelled the subcontract works will fall away. What it is saying is that if that happens before the formal subcontract is issued, then this is how reimbursement will take place. Obviously, if the main contract is cancelled <u>after</u> the JCT terms had been executed, the parties would then be bound by the particular JCT terms which would be applicable in those circumstances.

40. One then goes to the next paragraph,

> 'If at any time prior to receipt of the official Contract, it is foreseen that the value will be exceeded, you must request an extension of this instruction'.

Again, reference to the "receipt of the official Contract" must be to the executed JCT contract.

41. Over the page, it says that should there be any reason the works not proceed to formal relations, any amounts due would be evaluated and reimbursed to be on a fair and reasonable basis. No consideration will be made of loss of other contracts or for loss of profits. Again, the reference to "formal relations" is the execution of the JCT contract.

42. The formula for reimbursement and evaluation on a fair and reasonable basis is really another way of saying quantum meruit but it is spelt out a little more here. This is contemplating that where works have been carried out without the JCT contract in place, they then need to be evaluated.

43. Moreover, and as I have already noted, at the beginning of this judgment, none of the JCT particulars were filled in, including how to calculate the sums to be paid to the subcontractor, (including whether on the basis 3a or 3d of the articles and whether on 4.3 and 4.4 of the terms that is to say, whether this was going to be conducted on a "measurement" basis or an "adjustment" basis).

44. Mr Singer's riposte to that was to say that this uncertainty this was not a problem because the initial minutes show where parties agreed. I do not agree, because on the face of it, the minutes were only meant to go to the JCT contract once executed. Of course, in some cases, it is possible, that due to the conduct of the parties, they have incorporated either some or perhaps all of the JCT terms. That is an estoppel by convention argument. But that is not what is being argued here. Here we are confined to what one can get out of the proper interpretations of the LOI itself.

45. It is plain from all of this, in my judgement, that the LOI contemplated only two possibilities. Either it applied by itself and on its own, with the provision for payment and relevant particular terms contained within it or a JCT contract is actually executed and signed with all the particulars filled in. There is, in my judgement, no third way, i.e. that in

the meantime there is an adoption of the JCT terms. Neither the language nor the context of the LOI provides for that and nor it is, in any way necessary; as I indicated above the third way might have been an option on the basis of the estoppel by convention by reference to subsequent conduct, but this argument is not now being run here.

46. The conclusion, therefore, is that the JCT subcontract terms and conditions were not incorporated into the LOI and on that basis, the Part 8 claim must fail altogether. Pausing there, it would then, on the Part 8 claim, have been open to me to make alternative findings, on the hypothesis that, in fact, the JCT terms had been incorporated and the parties advanced arguments to me on that basis. I do not do so here, however. First, because in my view, it is so clear that the JCT terms are not incorporated. Second, because any alternative analysis would entail at some point a consideration of the question of the alleged inconsistencies between clause 1.8 on the one hand, and clause 4.12 under section 11 of the Act, on the other. That is a point of some importance which I consider should be decided only when a case actually turns upon it.

47. The effect of the Part 8 ruling on the adjudication has now to be considered. The correct contractual analysis is that Oak's work should be evaluated and paid for on a fair and reasonable basis whereas the adjudicator proceeded on the basis that the JCT terms were incorporated- see paragraphs 2.4.4 to 2.4.6 of the Decision. There is nothing in it to suggest otherwise. The best evidence of this, is the treatment of OD's claim under the supposed final payment notice, which could only arise if the JCT terms were incorporated. The adjudicator dealt with that claim on the merits. He found that, as issued, that final payment notice was invalid - he did not find that the relevant terms were not incorporated in the first place. I have now decided that those terms were not incorporated. Where does that leave the adjudication?

48. OD's argument is that the adjudication has proceeded upon the basis of a contact which in material respects was a non-contact. He should have proceeded on the basis of the terms of the LOI document itself, especially as to payment. Oak's response is to say that on the facts and on the adjudicator's findings, that is an irrelevance. Technically, what the adjudicator in substance did, was to undertake a true valuation which is exactly what would emerge on any adjudication based on a fair and reasonable evaluation. I must say that I have some sympathy with this argument. When one looks at what the adjudicator actually said and did, the principal occasion when he had to make a decision clearly founded on the JCT terms, was in relation to the final payment notice, but that is irrelevant since he rejected it, and I find there were no such provisions anyway.

49. Much of what the adjudicator did award to Oak, looks to me as if it would arise equally on a fair and reasonable basis. I can also see fairness in the related argument that it is pointless to have another adjudication if it was likely to come to the same result. Nonetheless, I am persuaded that this is a question of jurisdiction. It is not for me to try and fathom if, and to what extent, the decision would be the same on a fair and reasonable basis.

50. A further point made by OD here is in a question might arise about the right to payment under the interim payment notice if, in fact, the JCT terms did not govern. That may be a problem, it may not. Then again, it is not appropriate for me to try and rework the decision of the adjudicator to make it fit a fair and reasonable evaluated basis, and if parts of it did not, for example, for example on an expense claim, then I should sever it. I would regard any such severance as inappropriate. In my judgement, the only proper conclusion is to say that, because of my Part 8 finding, the adjudicator had, in fact, no jurisdiction to do what he did, because he proceeded on a contractual basis which did not result failing my substantive hearing. The result is that the adjudication decision cannot be enforced.

51. That is my judgement and I will revert to counsel on consequential matters in a moment, but

can I make a postscript to which I do not invite any response. It seems to me that both parties have now litigated enough about these matters. Their positions are somewhat polarised, but that does not mean that they are incapable of resolution. If they cannot be resolved, at the very least another adjudication will take place. There is even the possibility of litigation. I would, therefore, urge the parties now to consider actively and seriously resolving their disputes by ADR.