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Judgment: approved by the Court for handing down | *Delivered:* **28/05/2012**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL)

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SAM ABBAS and ANTHONY HAYES
trading as A H DESIGN **Plaintiffs**

-v-

ROTARY (INTERNATIONAL) LIMITED
Defendant

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WEATHERUP J

[1] This is the defendant's application for a stay of proceedings pending adjudication. Mr Mullan QC appeared for the defendant and Mr McMahon for the plaintiff.

[2] What should be the approach of the Court when a party bringing legal proceedings has disregarded a scheme for dispute resolution provided for in contractual arrangements between the parties? There may be provisions for dispute resolution that are determinative of the issues, such as arbitration or reference to a joint expert or the provisions may be non-determinative of the issues, such as mediation or a scheme for negotiation. The terms may introduce a mandatory scheme where the parties 'shall' refer the dispute or an optional scheme where a party 'may' refer the dispute. Alternative dispute resolution schemes that are sufficiently certain to be enforceable may result in a stay of Court proceedings pending completion of the alternative dispute resolution process. At one time agreements to negotiate or mediate were regarded as uncertain and unenforceable but such contractual arrangements have become more developed and may be enforceable. In 1993 the House of Lords dealt with Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334 where contract terms provided for a reference of disputes to a panel of experts and then to arbitration in Brussels. The

House of Lords stayed the legal proceedings, Lord Mustell stating that the parties, having chosen a method of dispute resolution, must show good reason to depart from that method and that it was also in the interests of the orderly regulation of international commerce that, having promised to take disputes to a panel of experts and if necessary to arbitration, that should be done.

[3] The same approach has been applied to other methods of dispute resolution, including adjudication with which the present is concerned, so that where an agreed method of dispute resolution is included in the contract the burden is on the party who would come to Court instead to show why the agreed method of dispute resolution should not operate. In DGT Steele and Cladding Ltd v Cubitt Building and Interiors Ltd [2007] EWHC 1584 (TCC), where there was an agreement to adjudicate, HH Judge Coulson QC reviewed the authorities and stated –

> "12. I derive from the authorities noted above the following three principles which seemed to me to be relevant and applicable to contracts containing a binding adjudication agreement:
>
> (a) The court will not grant an injunction to prevent one party from commencing and pursuing adjudication proceedings, even if there is already court or arbitration proceedings in respect of the same dispute (Herschel v Breen [2000]BLR 272).
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> (b) The court has an inherent jurisdiction to stay court proceedings issued in breach of an agreement to adjudicate (Cape Durasteel Ltd v Rosser and Russell Building Services Ltd[1995] 466 Con LR 75), just as it has had any other enforceable agreement for ADR (Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 334, Cott UK Ltd v FE Barbour Ltd [1997] 3 AllER 540 and Cable & Wireless Plc v IBM United Kingdom Ltd [2002] EWHC 2059 (Comm)).
>
> (c) The court's discretion as to whether or not to grant a stay should be exercised in accordance with the principles noted above. If a binding adjudication agreement has been identified that the persuasive burden is on the party seeking to resist the stay to justify that stance (Cott and Cable & Wireless)."

> "21 …. perhaps the only substantial different between the two potential situations (a mandatory agreement to adjudicate or one that is merely optional) is that if, as I have found, the adjudication provisions were mandatory, the court is likely to be even more willing to exercise its discretion in favour of the stay than would be the case if there was a simple right to adjudication."

[4] The plaintiffs are Mechanical and Electrical Consultants and the defendant is a firm of Mechanical and Electrical Engineers and Contractors. By a contract on 11 January 2008 between Inter-Health Canada Construction Services Limited as employer and Johnston International Limited as main contractor it was agreed that the main contractor would construct two hospitals in the Turks and Caicos Islands. By a subcontract of the same date the main contractor engaged the defendant to design and construct the mechanical, electrical and plumbing works for the hospitals.

[5] The plaintiffs claim fees due in respect of services rendered. The plaintiffs draw a distinction between the periods prior to and subsequent to 11 January 2008, that date being described as the date of 'financial closure', being the date of the main contract and the sub contract. In August 2006 the defendant engaged the plaintiffs to provide preliminary drawings for the scheme. In February 2008 the plaintiffs entered into negotiations with the defendant in respect of the plaintiffs' consultancy fees for the scheme. In May 2008 a breakdown of fees in respect of the work performed was provided at £62,660 plus VAT. Later in May 2008 the plaintiffs and the defendant entered into a consultancy agreement which was dated 10 April 2008 and provided for a fixed fee of £195,000.00. The plaintiffs claim to have performed certain additional works at the request of the defendant. Certain payments were made by the defendant to the plaintiffs. The plaintiffs claim fees due prior to 11 January 2008 in the sum of £62,660 plus VAT and fees due post 11 January 2008 in the sum of £52,710 plus VAT. The plaintiffs contend that only the latter sum is due under the consultancy agreement dated 10 April 2008.

[6] The defendant's affidavit indicates that all fees are due under the consultancy agreement. Thus there is a dispute as to the scope of the consultancy agreement, an issue that has been deferred by the parties. The defendant states that the consultancy agreement contains an exclusive adjudication clause and hence the defendant applies for this stay for adjudication. The plaintiffs' affidavit on the other hand states that only those fees due post 11 January 2008 fall under the consultancy agreement, that the adjudication clause is not incorporated into the consultancy agreement and that, even if it the adjudication clause is incorporated, the clause only applies to the fees post 11 January 2008 and in any event the Court, in the exercise of its discretion, ought to refuse a stay of these proceedings.

The Consultancy Agreement.

[7] The consultancy agreement dated 10 April 2008 was made between the defendant, there described as the sub-contractor, and the plaintiffs, there described as the consultant. The first recital refers to an agreement, described as the main contract, dated 11 January 2008 between the sub-contractor, who is the defendant, and Johnston International, described as the contractor, whereby the defendant agreed to provide certain services to the contractor in connection with the construction of the hospitals at the Turks and Caicos Islands.

[8] Paragraph 12 of the consultancy agreement, under the title "Disputes" states -

> "12.1.1 Any dispute or difference arising out of this agreement shall be referred to adjudication on the same basis as in the Sub Contract (SSC19.1) and the Adjudicator's decision shall be final."

12.1.2 provides that the consultant agrees to participate in any adjudication or arbitration involving the defendant and the contractor and 12.1.3 provides for a stay of any adjudication that relates to a dispute under the main contract and for the consolidation of any adjudication with any adjudication under the main contract.

Paragraph 16 provides that the applicable law of the agreement shall be the law of Northern Ireland and that the courts of Northern Ireland shall have exclusive jurisdiction.

The Sub Contract Special Conditions.

[9] Paragraph 12.1.1 purports to incorporate the adjudication provisions of "the Sub Contract (SSC19.1)". The sub-contract dated 11 January 2008 between Johnston International Limited, the main contractors, and the defendant, as sub-contractors bears the title "Schedule of Sub-Contract Special Conditions RIL Subcontract relating to the construction of hospitals on the Turks and Caicos Islands". There follows a schedule of sub-contract special conditions (hence 'SSC') amending the FIDIC Conditions of subcontract for works of civil engineering construction first edition 1994.

The new sub clause 19.1 bears the title 'Notice of Dispute' and is in three parts. The first part provides that if any dispute arises either party may issue a Notice of Dispute, the second part provides for a response in writing in 7 days and the third part provides that the obligations under the contract shall continue.

A new sub clause 19.2 bears the title 'Amicable Settlement' and is also in three parts. The first part provides that after receipt of a Notice of Dispute the senior

executives shall confer to seek an amicable settlement of the dispute, the second part provides that the senior executives shall have authority to agree a resolution and that the conference shall be privileged and the third part provides for the format of the conference.

A new sub clause 19.3 is headed 'Adjudication' and is in eleven parts. 19.3.1 reads as follows –

> "Subject to Sub-Clause 19.3.11, any Dispute in respect of which amicable settlement has not been reached within 16 days of service of the Notice of Dispute (or such other periods may be agreed by the parties) shall be referred to adjudication in accordance with this Sub-Clause 19.3 by either party ("the Referring Party") by written notice of its intention to refer the Dispute to adjudication ("Adjudication Notice"), with a copy of the Adjudication Notice together with the Notice of Dispute issued under Sub-Clause 19.1.1 and response issued under Sub-Clause 19.1.2 to the Adjudicator."

Two matters require comment. First of all the reference to 19.3.11 excludes disputes that have already arisen under the main contract and disputes that require to be resolved under the main contract. The second matter concerns the identity of the 'Adjudicator'. The definitions clause states that 'Adjudicator' means Simon Kolesar or such other partner from EC Harris LLP nominated by the head of EC Harris's dispute services sector from time to time.

The other sub clauses in 19.3 deal with procedures in relation to any adjudication and 19.3.10 reads –

> "The decision of the Adjudicator shall be binding on the Parties unless and until the Dispute is finally determined by arbitration in accordance with Sub-Clause 19.4."

A new sub clause 19.4 is headed "Arbitration" and is in three parts. The first part provides that if a party is dissatisfied with the adjudicator's decision that party may within 56 days refer the dispute to arbitration, the second part provides that an arbitration shall be under the ICC Arbitration Rules by a three member tribunal and the third part provides that the law governing the dispute shall be the law of the Turks and Caicos Islands.

There is then stated to be a further clause 19.4 headed "Connected Disputes". The numbering in the text of the amendments is mistaken and should read 19.5. The additional 19.4 concerns the joint arbitration of disputes that are substantially the same.

There follows a new sub clause 19.5, which should read 19.6, with the title "Joinder" and which also relates to arbitration. The first part, wrongly numbered 19.1.6, provides that all parties to the agreement (the sub contract) agree to enter into a separate arbitration agreement in a specified form.

Thus, as appears from the above, there are four stages under SSC19 in that 19.1 deals with the Notice of Dispute, 19.2 deals with a conference as a means of achieving amicable settlement, 19.3 deals with adjudication and 19.4 deals with arbitration.

Incorporation of the adjudication process.

[10] The first issue is whether or not the adjudication clause has been incorporated into the consultancy agreement. In relation to the interpretation of documents I refer to the Investors Compensation Scheme v West Bromwich Building Society [1998] where Lord Hoffman summarised the principles in relation to the interpretation of documents. The first principle was stated to be that "Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". The fourth principle included reference to the meaning of the document being "…. what the parties using those words against the relevant background would reasonably have been understood to mean". Thus it is an objective test. The fifth principle is relevant for present purposes as it includes the following "…. if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had".

[11] The nature of incorporation is explained by Oliver LJ in Skips A/S Nordheim v Syrian Petroleum Co Ltd [1984] QB 599 – "The meaning and effect of the incorporated clauses has to be determined as a matter of construction of the contract into which it is incorporated having regard to all the terms of that contract". The consultancy agreement is the governing contract, of which the incorporated terms from the sub contract becomes a part.

[12] Clause 12 comprises a number of elements. First of all any dispute or difference arising out of the consultancy agreement shall be referred to adjudication. There is mandatory provision for reference to adjudication. Secondly the reference to adjudication shall be on the same basis as Sub Contract (SSC 19.1). This must be a reference to the sub-contract relating to the hospital works to which I have referred above. Thirdly the adjudication process is stated to be based on the sub contract clause 19.1. This appears to be a mistake as 19.1 is concerned with a Notice of Dispute as a preliminary to adjudication. The opinion of Lord Hoffman indicates that the Judge should not be unduly bound by the precise wording if it appears that

the wording cannot have been intended. Clause 19.1 does not refer to the adjudication process, which is contained in clause 19.3, but only refers to a first step leading to adjudication, namely the Notice of Dispute. Fourthly, the Adjudicator's decision is stated to be final. This suggests that the agreed dispute resolution process concludes with the adjudication and was not intended to extend to arbitration as provided under clause 19.4.

[13] I am satisfied that the reference to SSC 19.1 is a mistake and the reference should be to the adjudication provisions, which include SSC 19.1, 19.2 and 19.3. As the Adjudicator's decision is stated to be final there is no provision for arbitration and neither clause 19.4 nor the other clauses dealing with arbitration apply. Equally clause 19.3.10 will not apply as that too is an arbitration provision.

Enforceability of the adjudication process.

[14] Mr McMahon on behalf of the plaintiff contends that the outcome of any purported incorporation is so unclear as to be unenforceable. The grounds for such lack of clarity can be grouped into five. The first grounds relate to the contracts. The plaintiffs contend that the sub-contract which Clause 12.1 purports to incorporate is not identified, that the contractor, Johnston International Ltd, and the defendant are referred to as being parties to the main contract and that sub-clauses 12.2 and 12.3 refer to adjudication or arbitration under the main contract.

[15] The sub-contract has been identified as SSC, which in the context is the sub-contract between the contractor and the sub contractor in relation to the relevant works. The contract between contractor and sub contractor may be described as the main contract but it is apparent that it has been entered into between a contractor and a sub contractor. The overall contractual structure is clear as is the document being referred to in the consultancy agreement.

[16] The second grounds relate to the Adjudicator. The plaintiffs contend that the Adjudicator has not been identified. However if one refers to the definition clause in the SSC the Adjudicator is there identified. The plaintiffs contend that the definition clause cannot be relied on because only clause 19.1 is incorporated. When a provision is incorporated the meaning to be attributed to the incorporated words must also be considered and that meaning may be informed by such definitions as may apply. The Adjudicator has been identified. Further it is said to be unlikely that it was intended to provide for an Adjudicator from outside Northern Ireland given the performance of the contract within Northern Ireland, the residence of the parties and the application of Northern Ireland law. I do not find that the factors referred to bear on the matter at all. It is for the parties to agree the Adjudicator. In any event I do not find it unusual that the Adjudicator should be from outside Northern Ireland for any of the reasons stated.

[17] The third grounds relate to SSC 19.1. The plaintiffs contend that the reference to SSC 19.1 limits the process to the service of a Notice of Dispute and therefore what has been incorporated is a mechanism for settlement by negotiation rather than by adjudication. As stated above I am satisfied that a mistake has been made in the text because there is no adjudication under clause 19.1 but rather adjudication arises under 19.3 with preliminary steps specified in 19.1 and 19.2. Thus the reference should be to the adjudication process under SSC 19.1, 19.2 and 19.3.

[18] The fourth grounds assume incorporation and refer to what are described as irreconcilable conflicts arising from such incorporation. The plaintiffs contend that it is simply not feasible to disregard the clauses in SSC19 which do not refer to adjudication; that the different stages of the dispute resolution process involve the Notice of Dispute, the Adjudication Notice and the Arbitration Notice and the entire process is optional in that the Notice of Dispute is optional; that under clause 19.4.1 either party may refer the dispute to arbitration and this is in conflict with clause 12 which states that the Adjudicator's decision shall be final; that the arbitration procedure incorporates the ICC Arbitration Rules and this entails the possibility of hearings in the Turks and Caicos Islands and that the governing law is that of the Turks and Caicos Island which is in conflict with clause 16 of the consultancy agreement providing that the governing law is that of Northern Ireland.

[19] I am satisfied that there is incorporation of the adjudication process and this does not extend to the arbitration process. Under SSC the Notice of Dispute is stated to be optional, however once the Notice of Dispute is issued and there is no amicable settlement the reference to adjudication becomes mandatory. Under the consultancy agreement I am satisfied that there is indeed a mandatory process provided for under clause 12 which provides that the dispute 'shall' be referred to adjudication. There are preliminary steps by Notice of Dispute and amicable settlement to be taken for the purpose of the adjudication process. The reference to the Adjudicator's decision being final has the effect that the dispute does not proceed to arbitration. Thus the provisions related to the arbitration process do not arise.

[20] The fifth grounds relate to clauses 12.2 and 12.3 of the consultancy agreement dealing with adjudication or arbitration involving the contractor and the sub contractor and participation in any adjudication or arbitration arising under the main contract and the consolidation of proceedings. There may be complications that would arise were there to be such proceedings between the contractor and the sub contractor but were that to arise it would create a separate issue that does not affect the clarity and enforceability of the adjudication process.

[21] I am not satisfied on any of the plaintiff's objections to incorporation. I do not accept that the incorporation is so unclear as to be unenforceable. I conclude that clauses 19.1, 19.2 and 19.3 (save for 19.3.10) have been incorporated into the consultancy agreement and are enforceable.

Stay of proceedings.

[22] The next issue is to determine whether or not there should be a stay of the Court proceedings. The process is stated to be optional as far as the Notice of Dispute is concerned but that is a pre-condition of mandatory adjudication as clause 12, which is the governing clause, provides that any dispute or difference 'shall' be referred to adjudication.

[23] The burden falls on the plaintiffs who have resorted to legal proceedings to establish that there should not be a stay for the dispute to proceed under the adjudication agreement. In DGT Steel the Court ordered a stay on two grounds. The first ground was failure to comply with the TCC pre-action protocol which requires face-to-face without prejudice meetings between the parties. Even if there had been no adjudication agreement the Judge would have ordered a stay of the proceedings pending compliance with the pre-action protocol. The second ground was the suitability of the alternative tribunal. The dispute concerned a final account in a construction dispute and a construction professional, in particular an experienced quantity surveyor, was considered a better tribunal for such a dispute, at least in the first instance, than a Judge.

[24] Neither of the above considerations arises in the present case. However the plaintiffs have listed a number of matters on which they rely to avoid a stay of these proceedings. There are two particular factors to which I draw attention. The first is that if the plaintiffs' submission in respect of the pre-financial close fees is correct then this element of the claim is not subject to the consultancy agreement and cannot be stayed. Parallel adjudication and litigation would therefore arise and would merely serve to increase costs resulting in wasted time and be contrary to the interests of justice. The issue as to the whether or not the consultancy agreement covers both parts of the fees was originally to be a preliminary issue in these proceedings but did not proceed. At the moment it is an issue that has not been decided and therefore the possible outcome is that there would be a split between two different tribunals deciding the fees due at the two different stages.

[25] The second matter is that the plaintiffs claim for fees has been outstanding for a very considerable time. The claim was summarised in a letter on 8 June 2010 and was disputed at that time by the defendant but no reference was made to adjudication. The Writ of Summons was issued in May 2011 and the defendant has not invoked the dispute resolution procedure either in respect of the plaintiffs' claim for fees or its own claim for damages. The absence of any attempt to refer to adjudication during the period since the claim arose is a ground on which the matter should not be stayed.

[26] On the two grounds referred to above I am persuaded that there should not be a stay for adjudication. I refuse the application.