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Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

D G WILLIAMSON LIMITED

Plaintiff;

-and-

NORTHERN IRELAND PRISON SERVICE
AND
NORTHERN IRELAND OFFICE

Defendants.

McLAUGHLIN J

Introduction

[1] The plaintiff is a Northern Ireland company with registered offices at Lisburn, County Antrim; its principal business is in building construction. The defendants are respectively an agency and department of the Government of the United Kingdom. For very many years the plaintiff has carried out construction works on behalf of the defendants, mainly in its prisons estate. Prior to October 2001 the works were carried out by the plaintiff on an essentially ad hoc basis but after that date a formal contract was entered into between the parties. The contract was time limited initially but the relationship continued over the ensuing years. There is now a dispute about whether the contract was in fact extended to cover the relevant period but I shall return to that in due course. Works were carried out by the plaintiff on behalf of the defendant during 2007/8 giving rise to the issuing of some 54 invoices which became the subject of a dispute or difference as to whether all or any of the sums were due.

[2] The plaintiff then initiated the adjudication procedures contained in the Construction Contracts (NI) Order 1997. The Order created the right of

any party to a construction contract to refer any dispute to adjudication and provided that where such a contract did not contain an adequate agreed procedure then the scheme provided for by the Department of the Environment would apply. The statutory default scheme applied to the contract between the parties in this case. The purpose of the contractual or statutory schemes was to provide a quick and impartial investigative procedure for the interim settlement of disputes or differences as they arose rather than that the parties should have to await a final determination of their rights by arbitration or litigation. In due course Mr Raymond Nash, Barrister-at-Law, formerly Quantity Surveyor, was nominated by the President of the Royal Institution of Chartered Surveyors to act as adjudicator. In due course he reached a decision, dated 29 March 2008 wherein he ordered the defendants to pay within seven days to the plaintiff the sum of £261,898.76 comprised as follows:

1)	The Award	£212,874.80
2)	VAT@17.5%	£37,253.09
3)	The Adjudicator's Costs	£6,289.19
4)	Interest	£5,481.68

[3] The defendants objected to the adjudication taking place alleging that the adjudicator did not have jurisdiction. Mr Nash decided he had jurisdiction, issued his decision and the defendants have refused to pay the sums of money directed in the award. The plaintiff has responded by issuing a writ for the amount awarded by the adjudicator and followed that up with a summons dated 19 September 2008 seeking summary judgment against the defendants under Order 14 RSC. After the summons was issued it was realised that summary judgment against the Crown was not available and by consent the proceedings have been amended to seek a Declaration and to treat the hearing before me as a final determination of the issue.

The contentions of the defendants

[4] The defendants have put forward a number of grounds to resist enforcement of the award. In summary these are:

(i) That the adjudicator had no jurisdiction to determine the dispute on the ground that the Notice of Adjudication issued by the plaintiff referred only to the original contract concluded in October 2001 and not to any further or extended contract applicable beyond 31 December 2006.

(ii) That the contract was not a "contract in writing" as required by the 1997 Order and therefore was not subject to the provisions of the Order.

(iii) That if the adjudicator had jurisdiction and made a valid award I should refuse enforcement of same on the ground that the defendants have entitlement to a Set Off in a sum greatly in excess of that due to the plaintiff.

(iv) That if the adjudicator had jurisdiction to make a valid award, and the defendants were not entitled to a Set Off, I should grant a stay of any judgment which I might otherwise issue pending resolution of the Set Off claim at arbitration. Proceedings in respect of the Set Off have been the subject of a referral to arbitration although proceedings are at an extremely early stage and will clearly not be determined for a very considerable period of time.

[5] As an award of an adjudicator which is made without jurisdiction is void, and therefore unenforceable, I shall consider the objections to jurisdiction raised by the defendants in the first instance.

History of the contractual relationship

[6] The formalised contractual relationship between the parties dates from August 2001 when the plaintiff was invited to tender, as part of a public tendering process, for a three year Daywork Term Contract to carry out building and maintenance work at seven of the defendants' installations commencing 1 January 2002. The plaintiff submitted its tender on 11 September 2001, was declared the successful bidder and awarded the contract in October 2001. The contract came into effect on 1 January 2002, it was to run for three years until 31 December 2004 but could be renewed for one year on two occasions; the parties agreed such extensions and accordingly it was due to expire on 31 December 2006. The workings of the Daywork Term Contract were explained in the affidavit of Mr Brian Jamison in the following terms:

> **"A. DAYWORK TERM CONTRACTS**
>
> 7. This dispute originated from a contract that D G Williamson had entered into with the NI Prison Service. It was a 'Daywork Term' contract for undertaking maintenance and minor building works. This type of contract is in common use within the construction industry and can be suitable for cases where the employing party has a budget to spend but is unable to predict the exact detail of the work to be done over the term of the contract.
>
> 8. In order to obtain competitive tenders, the employer states the extent of his budget over a set

term. The contractor competes by offering to undertake any work commissioned under the contract at direct cost, plus a tendered 'percentage addition' to cover overheads, profit and the cost of complying with all statutory requirements.

9. Works are initiated by the employer issuing a 'works order' describing the nature and extent of maintenance or minor building works that are required. Whilst completing the works, the contractor is required to keep accurate records of labour, material and plant employed in executing the works.

10. The contractor then presents a 'daywork sheet' to the employer detailing the 'prime costs' incurred and showing the tendered percentage addition to the prime costs. The total becomes a debt due from the employer to the contractor. It is normal for the contractor to attach the daywork sheet to a VAT invoice so that charges for VAT are properly accounted for.

11. Under this type of arrangement the contractor is reimbursed on a simple 'cost plus' basis. It follows that the invitation to tender must define the method of calculating base costs, known in the industry as 'prime costs'. It must also state what the percentage addition is expected to cover.

12. It is almost impossible for the contractor to make a financial loss as all commercial risks relating to productivity of the workforce and wastage of materials are borne by the employer."

[7] After 1 January 2007 the plaintiff continued to carry out works which had been ordered before and before 31 December 2006 and the defendants continued to pay for the work and to order other works. On 4 April 2007 an important letter was written to the plaintiff from the defendants stating:

> "The contract for building maintenance expired on 31 December 2006. Prison Service would like to extend this until 31 March 2008. If this is acceptable to you, please confirm in writing as soon as possible."

[8] On 7 June 2007 a meeting took place between the parties represented respectively by two of the Williamsons and Mr Ray Connery, Mr Brian

Jamison the defendants' senior Quantity Surveyor and others. It was also attended by Mr Ed Moody, contract consultant, on behalf of the plaintiff. The purpose of this meeting was to discuss the extension of the contract until 31 March 2008. Discussion took place about the rates to be paid under the terms of any such extension. Mr Moody and the Williamsons were satisfied agreement had been reached about the terms for the extension of the contract to cover the period 1 January 2007-31 March 2008, and that Mr Jamison asked for the new agreed rates to be reduced to writing and confirmed by the plaintiff which would then be accepted by the Prison Service. Mr Moody, acting on behalf of the plaintiffs, then sent an e-mail to Mr Jamison which is dated 12 June 2007 in the following terms:

> "We refer to your invitation to extend the term of this contract to 31 March 2008 and to our subsequent meeting in your office on 7 June 2007.
>
> We are pleased to confirm our willingness to extend the term of the contract to 31 June 2008 (sic). However the unit rates and percentages stated in the Schedules of Prime Cost Rates for Labour and Plant quoted in the original letter dated 11 September 2001 are now almost six years old and have been subject to inflationary increases since the original date of tender. In particular the cost of maintaining and operating plant has increased significantly due not least to the significant increase in fuel prices during the intervening period. Consequently, we must seek a review of the schedule of cost rates before we can agree to continue with the works. We propose the following: …….. (new percentage uplifts were then set out)
>
> In the event that you find our offer acceptable we propose that the new rates and prices take effect from 1 June 2007 and are applied to the valuation of all relevant works executed from that date."

There followed some e-mails correcting the typographical error of "31 June" which should have read 31 March 2008.

[9] The formal correspondence relating to the completion of the contract ended at that stage. Mr Moody then left on holidays and only learned in August 2007 that no response had been received to his letter of 7 June (save for the e-mails correcting the date of termination). He asserts in his statement, which is not denied, that he then spoke to Mr Ray Connery of the Prison Service who assured him that the contract had been extended until 31

March 2008, as per the terms of the letter of 7 June and this was confirmed by the orders which had been issued since, that there had been an administrative oversight and this would be corrected.

[10] The defendants had indeed issued new purchase (work) orders and variations, which the plaintiff carried out. The plaintiff submitted its invoices calculated upon the basis of the rates and prices which had been agreed at the meeting on 7 June 2007 and which had been referred to by Mr Moody in his letter of 12 June 2007. These invoices were paid. By way of example the plaintiff cites the following:

> (i) Purchase order number 170001185 dated 11 October 2007 issued "in accordance with your day work" and referred to various items of work to be carried out at HM Young Offenders Centre "all based on current day work rates".
>
> (ii) Variation instruction number 170001185 dated 30 November 2007 issued in respect of the prison at Hydebank Wood "under the terms and conditions applicable to the contract … as a variation to the works".

[11] The plaintiff then submitted a total of 54 invoices for work done at the request of the defendants which comprises the subject matter of this claim and which were found to be due and owing to the plaintiff by the defendant in the course of the adjudication conducted by Mr Nash. The refusal of the defendants to pay on foot of same has resulted in the proceedings before me.

The first jurisdictional issue

[12] An important feature of the negotiations as detailed in the correspondence and evidence which I have quoted above is that Mr Moody did not receive a written confirmation of the acceptance of the offer which is set out in his letter of 12 June 2007. It is the absence of such written confirmation that has given rise to the assertion by the defendants that this is not a contract in writing. Indeed at one point, perhaps even yet, the defendants sought to argue that the original day works term contract expired on 31 December 2006 and that any work carried out thereafter was conducted purely on an ad hoc basis. I am satisfied that this argument is incapable of being sustained. The original letter from the defendants referred to a contract which expired on 31 December 2006 and which it was hoped to extend until 31 March 2008. The contract expiring in December 2006 was the contract which had been extended in turn after its initial grant in October 2001. It is also impossible for the defendants to deny that purchase and variation orders were issued "in accordance with" or "under the terms and conditions" of the contract, meaning the contract extended beyond 31 December 2006. I am satisfied on the evidence that anyone called upon to determine disputes

between the parties, e.g. by way of litigation or arbitration, beyond 31 December 2006 would have little difficulty in deciding that such a contract which commenced on 1 January 2002 and was existed and what its terms and conditions were. Those terms and conditions can be gleaned from the paperwork which exists and the conduct of the parties thereafter. That appears to be the approach adopted by Mr Nash. I am clear therefore that there was in force at all relevant times a contract which was entirely valid and enforceable between the parties. That however does not answer the jurisdictional question. Mr Henshaw (of the Bar of England and Wales), who appeared for the defendants, has emphasised correctly that the 1997 Order is only applicable if there is not just in force a contract, such as that which I have just mentioned, but one which is "in writing".

[13] Article 6 of the 1997 Order is in the following terms:

> **Provisions applicable only to agreements in writing**
>
> 6.—(1) The provisions of this Order apply only 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 Order only if in writing.
>
> The expression "agreement" 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 exchange of communications in writing, or
> (c) if the agreement is evidenced in writing.
>
> (3) Where pasties 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.
>
> (5) An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement

> otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.
>
> (6) References in this Order to anything being written or in writing include its being recorded by any means.

[14] Before proceeding to consider the authorities it is appropriate to set in context the argument now advanced by the defendant that this is not a contract "in writing". This point had been pursued by the defendants at the time of the reference to adjudication and thereafter. The hearing of this application for enforcement of the adjudicator's award was originally listed for hearing on 26 November 2008 but was subsequently adjourned until Monday 15 December. In a skeleton argument dated 25 November 2008 Mr Henshaw specifically abandoned the argument that this was not a contract "in writing" for the purposes of the 1997 Order. At paragraph 44 thereof he stated the following:

> "Paragraphs 2 and 3 of the Defence allege the adjudicator lacked jurisdiction to determine the matter on two grounds. The defendants do not rely on the first of these grounds for the purposes of this adjudication, namely, that no construction contract containing any or all of the terms material to the plaintiff's alleged right to payment was concluded in writing between the parties."

The matter then proceeded to a hearing on Monday 15 December and at that point Mr Henshaw indicated that he had notified counsel for the plaintiff that he intended to reverse his abandonment of the point and wished to reinstate it at the hearing. This caused considerable disruption of the proceedings because the plaintiff had been "wrong footed" and the intention to continue arguing the point had only been communicated a short time before the hearing. Further, no skeleton argument was made available to the court in advance and was submitted only on Tuesday 16 December after a specific direction from the court.

[15] The effect of the wording of Article 6 is that whilst the intention of the legislation is to provide for adjudication in construction contracts, and to impose a scheme where the contract does not provide for adjudication, it has no application if the contract is not "in writing". A potential difficulty is created however as an agreement in writing means more than might be taken from a literal interpretation of those words. This point was well illustrated by Ward LJ in <u>RJT Consulting Engineers Limited v DM Engineering (Northern</u>

Ireland) Limited [2002] 1 WLR 2344 when he summarised the effect of Section 107 of the Housing Grants, Construction and Regeneration Act 1966, which is in identical terms to Article 6 of the 1997 Order, as follows:

> "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.
>
> 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 ejusdem generis rule that the third category will be to the same effect namely that the evidence in writing is evidence of the whole agreement.
>
> 14. Subsection (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.
>
> 15. Subsection (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

subsection (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.

16. Subsection (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. …

…

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."

[16] In his skeleton argument supporting the challenge to jurisdiction on the ground that the contract was not "in writing" Mr Henshaw has relied heavily upon the conclusion of the Court of Appeal in the cases of RJT Consulting Engineers, referred to earlier, and Carillion Construction Limited v Devonport Royal Dock Yard Limited Case No. 02-395, Technology and Construction Court of the High Court of England and Wales, judgment dated 27 November 2002. Mr Henshaw described RJT Consulting as "the key authority" in support of his argument and claimed the case showed that in light of the requirements of certainty for an agreement to be evidenced in writing for the purposes of the Act it was necessary "that the evidence in writing is evidence of the whole agreement". He argued further that the legislation envisaged that all of the material terms should be in writing and that an oral agreement, if there was one, had to refer to that written record which should be a reference to the complete agreement, not a partial one. The Carillion case seeks to apply the principles of the RJT decision of the Court of Appeal to the facts of that particular case.

[17] RJT Consulting Engineers had been engaged by the owners of the Holiday Inn in Liverpool to carry out the design work in connection with the mechanical and electrical services in their hotel which was being refurbished. The main contractors were David Patton (Ballymena) Limited and they had engaged DM Engineering (Northern Ireland) Limited as the Mechanical of

Electrical sub-contractor. The relationships between the parties were such that RJT and DM Engineering had to work in direct co-operation with each other DM Engineering had agreed with the main contractor to carry out the work for £1.8m and they arranged with RJT to carry out the design work for £12,000. There was a direct contractual relationship between RJT and DM Engineering which became the subject matter of the dispute. Effectively DM Engineering alleged professional negligence and/or breach of contract on the part of RJT in carrying out their part of the design work. DM Engineering formulated a claim for £858,000 for direct losses and expenses due to disruption, for sums which were not satisfied, for other sums due on the mechanical ventilation works and other losses were also included; they sought to have this dispute referred to adjudication. RJT claimed the matter could not be referred to adjudication as the contract between the parties was not "in writing" in compliance with the 1996 Act. The Adjudicator decided the agreement was sufficiently evidenced by the drawing schedules and by a letter of 31 January 2001 and proposed therefore to proceed with the adjudication and to make a decision accordingly. RJT then applied to the Technology and Construction Court in Liverpool for a declaration that the agreement was not "in writing" for the purposes of the 1996 Act and could not be made the subject of adjudication. At first instance the application for the Declaration was dismissed and the matter came before the Court of Appeal which granted the Declaration sought. At first instance the judge had referred to the actual quantity of material which was available and which was said to form the substance of the contract. He put it as follows:

> "There is, for example, a fee account from RJT to DM on a number of invoices setting out the nature of the work, the names of the clients and the identity of the place of work. There are minutes taken during the meetings between the experts when the work was to be carried out which clearly identifies the parties and the nature of the work which needed, at those particular times when those minutes were made, to be done. There is also clear reference in the correspondence around the issue of the arbitration to the parties and to the nature of the work."

On the appeal counsel for RJT submitted that the judge had confused documents consistent with their being a contract with documents which constituted a record of the entirety of the oral agreement. He submitted that the whole agreement had to be evidenced in writing in order to provide the certainty which would enable the Adjudicator to decide the matter within the tight timetable laid down by the Act. Ward LJ analysed the potential scope of the expression "in writing" in the 1997 Act in the manner in which I have already set out. He concluded the judge had been wrong to decide that the

nature and extent of the documentation available was sufficient to conclude the agreement was "in writing". He stated:

> "17. In my judgment the judge was wrong to conclude as a matter of law that it was sufficient to give the jurisdiction to entertain an adjudication that there was evidence in writing capable of supporting merely the existence of the agreement, or its substance, being the parties to it, the nature of the work and the price.
>
> 18. Even if that were all that was required, the documents relied on in this case are wholly insufficient."

[18] The debate in that case has resonances with identifying an enforceable contract for the disposal of real property where a sufficient record in writing may exist where the three Ps may be identified – parties, price and property. I agree respectfully with the decision of the Court of Appeal of England and Wales that much more than that is required to enable a summary, and possibly draconian, system of adjudication to be called in aid. The whole purpose of the legislation is that Adjudicators can act promptly and with reasonable certainty as to the terms of the contract. For that reason Parliament has required the agreement should be "in writing". It was not envisaged that adjudicators should have to conduct detailed hearings, perhaps having to consider oral evidence, which might be disputed, as to the terms, conditions and warranties of a construction contract which would then result in summary payment of potentially large sums of money within a matter of 28 days of the dispute being referred. Clearly the terms of the contract, at least those which form the subject matter of the dispute, must be capable of being determined with relative ease by reference to written materials.

[19] I consider it is also important to bear in mind a distinction which appears to exist between the formulations of Ward and Robert Walker LJJ on one hand and to that of Auld LJ on the other as to whether each and every term of the contract must be capable of being identified by reference to written materials. That I think is something that can be decided on another occasion when it is specifically necessary to do so. In the present case the issue does not appear to arise. I note also that this was the course taken by His Honour Judge Bowser in Carillion Construction Ltd v Devonport Royal Dockyard Ltd. On the facts of that case the learned Judge decided the agreement was not "in writing" where the terms of the written contract had been varied orally and not evidenced in writing. In this case we have the terms of the original contract agreed in 2001 all of which are in writing and the terms of the proposed amendment of the schedule, which can be

identified in writing. We also have the written instruments relating to the extension of the contract to cover the material period. The sole question to be determined in this case is whether those materials are sufficient to bring this case within the terms of 1997 Order or not? There has never been any dispute as to the provisions of the pricing schedule upon which the plaintiffs were to be paid, although and whilst there has been some argument that from 1 January 2007 onwards the works was carried out on an ad hoc basis, I am satisfied that there is no merit in either of this point. The reality is that a binding contract existed between these parties which was the original Dayworks Contract with an amended pricing schedule which ran from 1 January 2002 until 31 December 2006 and which was extended until 31 March 2008 by mutual consent with retrospective effect in June 2007 and the sole issue to be determined is whether the terms have been sufficiently identified "in writing" to render it subject to the adjudication provisions of 1997 Order.

[20] I am satisfied that when the parties agreed to the extension of the contract beyond 31 December 2006, they agreed the new increased rates of remuneration and did so at the meeting on 7 June. I am satisfied further that having made that agreement the parties asked Mr Moody to record those terms in the form which he did and which are incorporated in his letter of 12 June 2007 written to Mr Jamison. It is clear there has been no express acceptance of those terms in writing but I am satisfied the defendants accepted those terms and communicated same orally through Mr Ray Connery when he spoke to Mr Moody in August 2007. Additionally, the existence of the agreement is further emphasised and evidenced by the purchase and variation orders which were issued after the contract was extended. I am satisfied further that the express oral acceptance of the terms as communicated by Mr Connery, and the context in which those words were uttered, namely the reference to the letter of 12 June, and the terms of the purchase and variation orders issued after 31 December 2006, all combine to evidence in writing an agreement which had been reached on 7 June. This is sufficient to enable the contract to be considered as one "in writing" and satisfies the requirements of Article 6(4) of the 1997 Order. I am also satisfied that the parties have reached an agreement "in writing" in terms which satisfy Article 6(3) of the 1997 Order because they reached an express oral agreement ("an agreement otherwise than in writing") and have done so by reference to the terms contained in the letter of 12 June 2006 ("by reference to terms which are in writing") and therefore the reference to adjudication is valid.

The second jurisdictional issue

[21] The defendants also rely on a second challenge to the jurisdiction of the adjudicator which is expressed in the following manner in paragraph 44 of the first skeleton argument:

> "The plaintiff's notice of adjudication … was based only on the original day work term contract ('an agreement entered into in or about October 2001') and not on any further or extended contract applicable to any period after 31 December 2006. The notice therefore did not effectively invoke any contract pursuant to which sums could be due under the invoices for which payment was claimed."

[22] The notice of adjudication does refer merely to the contract of October 2001. I consider however that I have in part disposed in part of this point by my determination that the 2001 contract did not expire on 31 December 2006, which is the basis upon which this challenge is predicated. I am satisfied the contract was extended with retrospective effect by mutual consent and therefore was operative until 31 March 2008. In other words the 2001 contract, albeit extended and varied, was still in force at all relevant times.

[23] Further, the reference to the 2001 contract is contained in what is referred to by the plaintiff in its skeleton argument, as the 'recital paragraph'. Even if this might be considered to be a deficit or defect in the notice Ms Danes QC, who appeared with Mr Michael Humphries for the plaintiff, has pointed out that the required contents of a Notice of Adjudication are specified in the Scheme set out in the Regulations made under the 1997 Order and provide as follows:

> "(3) The notice of adjudication shall set out briefly –
>
> (a) the nature and a brief description of the dispute and of the parties involved;
> (b) details of where and when the dispute has arisen;
> (c) the nature of the redress which is sought; and
> (d) the names and addresses of the parties to the contract (including where appropriate, the addresses which the parties have specified for the giving of notices)."

[24] All that is required is that the Notice of Adjudication should set out in brief the matters referred to at paragraphs (3)(a)-(d). I am satisfied the Notice of Adjudication served in this case satisfied the requirements of The Scheme as defined in the Regulations and accordingly I reject the second ground of challenge to the jurisdiction of the adjudicator.

[25] In the light of those findings I Declare that Mr Nash had jurisdiction to determine the issue of the liability of the defendants to pay the sums of

money claimed on foot of the invoices which he was asked to consider and that his award is valid and enforceable.

The Set Off claim

[26] It is common case that in ordinary circumstances a valid award of an adjudicator ought to be enforced by the court summarily if compliance does not take place within the specified time period. This was first explained in detail by Dyson J in Macob Civil Engineering Ltd v Morrison Construction Ltd [1999] BLR 93:

> "The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement: see section 108(3) of the Act and paragraph 23 (2) of Part 1 of the Scheme. The timetable for adjudication's is very tight (see section 108 of the Act). Many would say unreasonably tight, and likely to result in injustice. Parliament must be taken to have been aware of this. So far as procedure is concerned, the adjudicator is given a fairly free hand. It is true (but hardly surprising) that he is required to act impartially (section 108(2)(e) of the Act and paragraph 12 (a) of Part 1 of the Scheme). He is, however, permitted to take the initiative in ascertaining the facts and the law (section 108(2)(f) of the Act and paragraph 13 of Part 1 of the Scheme). He may, therefore, conduct an entirely inquisitorial process, or he may, as in the present case, invite representations from the parties. It is clear that Parliament intended that the adjudication should be conducted in a manner which those familiar with the grinding detail of the traditional approach to the resolution of construction disputes apparently find difficult to accept. But Parliament has not abolished arbitration and litigation of construction disputes. It has merely introduced an intervening provisional stage in the dispute resolution process. Crucially, it has made it clear that decisions of adjudicators are binding and are to be complied with until the dispute is finally resolved."

[27] That statement has been cited with approval repeatedly in numerous cases and has never been doubted. There have however been instances where a valid award has not been enforced.

[28] It is worth emphasising at this stage that whilst the defendants' case is that there has been serious overcharging by the plaintiffs there is no allegation that this is based on fraud. Indeed Mr Henshaw acknowledged that fraud did not form part of his claim to deny enforcement. If there is merit in the defendants counterclaim, as averred to in the affidavit of Mr Jamison, then it arises from the misunderstanding or misapplication of the terms of the contract and is an "innocent" miscalculation.

[29] A prominent example of a situation where the court refused to grant summary judgment to a plaintiff is to be found in Parsons Plastic (Research and Development) Limited v Purac Limited [2002] BLR 334. In that case the sub-contractors, Parsons, sought payment of approximately £250,000 but the defendant main contractors, Purac, refused to pay on the basis that the sub-contractors had failed to comply with their contractual obligations. Parsons were subsequently ejected from the site. An application for payment of outstanding monies went to adjudication and the Adjudicator found in their favour in the sum claimed. His decision was published on 17 May 2001. Six days later, on 23 May, Purac served an intention to withhold payment of the sum awarded by the adjudicator by reference to its own claim for the reasonable costs of completing the sub-contract work which sum exceeded that awarded by the adjudicator. At first instance the judge refused Parsons summary judgment application for the said sum and granted Purac summary judgment on their counterclaim. The sub-contractors appealed. The Court of Appeal dismissed the appeal however concluding that the wording of the contract meant that the overriding general right that a party had to set off other sums claimed to be due was not lost or limited, despite the adjudication provisions. The court found that the parties in their contract had provided a specific procedure by which a claim to withhold payment was to be notified and detailed. Pill LJ, with whom Mummery and Latham LJJ agreed, came to the conclusion that as a matter of construction of the relevant provisions of the contract it was open to the respondents to Set Off against the Adjudicator's decision any other claim which they had against the sub-contractors which had not been determined by the adjudicator.

[30] A notable feature of that case was the concentration of the court on the specific terms of the contract, actually agreed by the parties, which allowed for this very situation and which would not ordinarily arise in claims for the enforcement of an Adjudicator's award. The case therefore should be seen in the context of its own facts. It is also highly relevant that the judge at first instance not only refused summary judgment to enforce the adjudicator's award but also granted summary judgment to the defendant on the

Counterclaim. This seems to me to further outline the special nature of the circumstances of that case.

[31] In the instant case there is a valid adjudicator's award and I am asked to refuse enforcement because the defendants have a claim for a Set Off, indeed one that may be very substantially in excess of the plaintiff's claim. The reality of it is however that the defendants Counterclaim exists at present only in the form of a potential claim detailed in the affidavit of Mr Jamison. He may be correct in his analysis but I can make no judgment on that as the issue is the subject of a reference to arbitration. It is self-evident that it will be some very considerable time before that matter can be brought to a conclusion. I do not consider that I have been given any sufficiently cogent reason for refusing to enforce the award simply on the basis that an asserted Counterclaim has been referred to arbitration. Finally there is no suggestion that if I grant enforcement of the Adjudicator's award there will be a particular problem in recovering the money if it has been paid in circumstances where had the matter proceeded by way of simply litigation or arbitration there would have been a claim and counterclaim and perhaps a greater award made on the counterclaim than on the claim. I do not accept any of the arguments advanced on behalf of the defendants in this regard and therefore must refuse to accede to the application of the defendants that enforcement of the adjudicator's award should be denied in light of their claims formulated in the affidavit of Mr Jamison, the subject of the arbitration reference.

Request for a stay

[32] The defendants' final point is that even if I consider there is an enforceable award, and that I have no grounds for refusing enforcement on the basis of the Set Off/Counterclaim, I should still order a stay of enforcement. The court has power to grant such a stay in equity as I could have done pursuant to Order 14 rule 3(2) which provides:

> "The court may by order, and subject to such conditions, if any, as may be just, stay enforcement of any judgment given against the defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action."

[33] Given that the claim is now no longer for summary judgment under Order 14, but for a Declaration, the provisions of Order 14 are no longer applicable. Nevertheless I am satisfied that as the remedy of Declaration is a discretionary remedy that similar principles ought to apply and may be called in aid by the defendant if appropriate.

[34] In Hillview Industrial Developments (UK) Limited v Botes Building Limited [2006] EWHC 1365 (TCC) His Honour Judge Toulmin QC stated:

> "[33] … I am satisfied that [the plaintiff] is entitled to judgment but I am also satisfied that the purpose of 1996 Act is provide a statutory framework which would enable justice to be done between parties to a dispute. It was not intended to cause injustice. This can, in appropriate cases, be dealt with by the grant of a stay. I am satisfied that the jurisdiction in adjudication enforcement cases to grant a stay under the CPR must be limited to cases where there is a risk of manifest injustice."

I respectfully agree with those sentiments. The learned Judge went on to hold that since it was not suggested there was any risk the applicant could or would not repay the sum sought, if required to do so, then no stay should be granted.

[35] I am satisfied that the starting point for a court dealing with a request for enforcement of the award of an Adjudicator is that it should work on the assumption that the award ought to be enforced, on a summary basis if necessary. The purpose of the legislation is to ensure speedy payment by dint of a summary process and, even where there is an error, to require the money to be paid and for the matter to be sorted out later when the contract disputes are settled finally by way of agreement, arbitration or litigation. I do not need to review at this stage the history of the legislation and the valiant attempts made to improve cash flow and payment practices in the construction industry. In this context it is worthy of note that the 1997 Order, and the 1996 Act, both outlaw the practice of "pay when paid" clauses which were frequently operated by main contractors to withhold payments from sub-contractors where they had not themselves been paid. The essential ground upon which the defendants object to paying the award of the adjudicator, once the jurisdictional issues are set to the side, is that they have a large Counterclaim. That Counterclaim remains subject to proof. It may be accurately stated in the affidavits, or it may be under or overstated. The purpose of the arbitration is to find out what sum, if any, is due by way of restitution to the defendants. I am satisfied that process should take its own course and that there are no cogent reasons put before me which justified the court in refusing to follow the normal practice of enforcing the award of the adjudicator pending authoritative determination of all remaining disputes between the contracting parties. I shall therefore refuse the stay sought.

[36] In light of the amendment of the pleadings and the agreement of the parties to convert the application for summary judgment into a final trial of an action for a Declaration, I propose to make the Declaration in the terms

sought in the amended pleadings and to order accordingly. The defendants shall therefore pay the sum claimed in the writ together with accumulated interest within 14 days. Interest shall be payable from the date of the adjudicator's award until the date of this order and hereafter at the judgment rate. The defendants shall also pay the plaintiffs' costs to be taxed in default of agreement.