

**JUDGMENT : HIS HONOUR JUDGE PETER COULSON QC : TCC. 31<sup>st</sup> May 2007**

1. A.R.T. Consulting Limited ("ART"), are a company which, despite their name, carry out both design works as structural engineers and also engineering construction works on building sites. There is no dispute that they were engaged by Navera Trading Limited, ("Navera") to carry out both design and construction work in respect of a site at 101 Kilburn High Road, London, ("the property"). ART made claims for payment which were not met and commenced adjudication proceedings. By a decision dated 22nd February 2007 the adjudicator, Mr. Linnet, ordered Navera to pay £100,369 to ART together with interest and fees. They failed to do so and ART began these enforcement proceedings.
2. It was an inherent feature of the adjudicator's lengthy and careful decision that:
  - (a) *The design works were carried out by ART pursuant to a separate agreement, the terms of which were not all in writing. He therefore concluded that he had no jurisdiction to deal with any element of the claim pertaining to design and, as we shall see, he expressly rejected some of the individual items of claim in the adjudication on the grounds that they related to design works.*
  - (b) *The construction works at the property carried out by ART were carried out pursuant to a JCT Minor Works Form of Contract. The adjudicator found that there was a contract in writing and that, therefore, he had the necessary jurisdiction to deal with the claims made in respect of construction items under that form of contract.*
3. Navera have raised before me two jurisdictional issues as grounds for refusing to pay the sums ordered by the adjudicator and for resisting enforcement. They are:
  - (a) Contrary to the adjudicator's conclusion, Navera submit that the parties did not agree the JCT Minor Works Form;
  - (b) Even if they did, not all of the terms of the contract between the parties were in writing, with the result, therefore, that the adjudicator did not have the necessary jurisdiction.
4. At the outset of the hearing of ART's application under CPR Part 24, Navera made an application for permission "to cross-examine the claimant and/or his legal representatives" on "serious issues of fact" in the claimant's evidence. This was apparently a reference to Mr. Abdul Tresh of ART. It seemed to me that the application was misconceived, because the supporting statement identified no specific evidence from Mr. Tresh in respect of which cross-examination was sought, and no part of his evidence which was or could possibly be relevant to the issues which I have had to decide. Indeed I make it plain that no part of this Judgment relies in any way on any part of the statement of Mr. Tresh. In those circumstances, I reject the application to cross-examine Mr. Tresh or indeed any other of the claimant's witnesses.

**Issue 1. The JCT Minor Works Form**

5. It is now suggested by Navera that the JCT Minor Works Form did not apply to the construction works. That, as Mr. Nigar accepts, is a difficult proposition to maintain, not least because it is contrary to the case that was run by Navera in the adjudication. However, since questions of contract may go to the adjudicator's jurisdiction, I have had regard to all of the evidence surrounding the completion of the JCT Minor Works Form in this case. Having considered that evidence, I am in no doubt that the construction works were governed by the JCT Minor Works Form. My reasons are set out below.
6. ART were asked to tender for the construction works on site. Amongst the documents sent to them as part of that tender enquiry was a schedule of works prepared by Navera's architect, Michael George Associates and dated 14th August 2002. In that document, at clause 1.4.1 it was made plain that the successful contractor had to enter into a JCT Minor Works Form of building contract. ART prepared their tender on that basis. The tender was accepted. Then, shortly after their commencement on site on about 22nd July 2003, ART were sent a copy of the JCT Agreement for Minor Building Works with all the relevant provisions filled in by Mr. George on behalf of Navera. Thereafter, ART carried out the works in accordance with that contract. It therefore seems to me to be inconceivable that the JCT Agreement for Minor Building Works did not govern the works carried out on site.
7. Indeed, it should be noted that, in one of the many statements prepared on behalf Navera for the purposes of this afternoon's application, Mr. George, their architect, refers to the tender documents which he prepared, and he makes plain that those tender documents were indeed prepared on the basis of a JCT Minor Works Contract. He says, in order to distinguish it from the design element, that the JCT Minor Works Contract "was purely for the works", by which he means the construction/engineering works at the property itself. That seems to me to be the clearest evidence, supplied by Navera themselves, that the JCT contract was indeed intended to govern the construction works on site.
8. Furthermore, as I have already noted, Navera were clear that during the course of the adjudication, the JCT Minor Works Form governed the works on site. Both their 'jurisdiction position statement' and their 'response to the referral notice' make plain that, although on their case there were other terms that the parties agreed as well, they accepted that the JCT Minor Works Form was incorporated.
9. As I have said, the adjudicator found that in respect of the construction works, the governing contract document was the JCT Minor Works Form. It might be thought that that was an unsurprising decision, in view of the documents to which I have referred to in paragraph 6 above and Navera's own stated position in the adjudication referred to in paragraph 8 above. Be that as it may, I have concluded, for the reasons which I have given, that the adjudicator was entirely right to reach that conclusion.

10. As I have said, it was hinted in the adjudication proceedings that, although the JCT Minor Works Form was accepted, there were other terms of the contract which were not within the JCT Form but which were agreed by the parties orally. It was on this basis that it was contended on behalf of Navera that this was not a construction contract in writing and, therefore, was not one in respect of which the adjudicator had the necessary jurisdiction.
11. This argument faced a number of insurmountable hurdles. The first is, of course, that the JCT Minor Works Form is intended to be an all-encompassing contractual package. It is not intended to be used in conjunction with other terms and conditions. If it was, it would have had to have been heavily amended, and it had not been amended here. Secondly, any such case would have had to have been supported or particularised by reference to those things which Navera said were agreed by the parties but which, for whatever reason, had not found their way into the JCT Form of Contract.
12. In his statement in opposition to the application for summary judgment, Mr. Reynolds (Navera's solicitor) said that the adjudicator should have refused to deal with the matter and ought properly to have recused himself because inter alia: *"essential or integral elements of the contract relate to discussions which took place between both parties and these were not recorded in writing."*

I asked Mr. Nigar what these essential or integral elements of the contract were, what discussions were relied on, and where I found evidence of the matters which had been agreed but which were not recorded in writing. He was unable to identify any such particulars, or answer any of those questions. It seems to me, therefore, that it would be quite impossible for me to conclude that an argument, based on the existence of other terms not agreed in writing in respect of the works on site, could possibly get off the ground. For all those reasons, therefore, I reject the suggestion that the JCT Minor Works Form did not apply to the works on site. It seems to me plain that the Form did so apply and, moreover, that there were no other terms of the contract in respect of the construction works which had not have been reduced to writing.

#### Issue 2. Contract Terms/Design

13. The opposition to the enforcement does not end there. Taking up the point that is made in the decision itself, Navera argue that not all the terms of the contract were in writing, because the design obligations were not part of or subject to the JCT Minor Works Form and, therefore, it could not be said that the entirety of the contract had been reduced to writing.
14. As a matter of principle, a construction contract must be in writing for the adjudicator to have the necessary jurisdiction. The majority in the Court of Appeal in *RJT Consulting Engineers Ltd. V. DM Engineering (NI) Ltd.* [2002] BLR 217 made plain that all of the terms had to be in writing. As Ward LJ put it, the act required "all of it [the contract] to be in writing, not part of it". Although Auld LJ indicated that it was enough if the 'material' terms of the contract had been reduced to writing, that was not the view of the majority. In *Trustees of Stratfield Saye Estate v AHL Construction Ltd* [2004] EWHC 3286, Jackson J said that it was not possible to regard Auld LJ's words as some kind of gloss upon or amplification of the reasoning of the majority and that his reasoning, attractive though it was, did not form part of the ratio in *RJT*. That was also the approach of His Honour Judge Wilcox in *Bennett (Electrical) Services Limited v Inviron Limited* [2007] EWHC 49 (TCC).
15. In reliance on this principle, Mr. Nigar submits that, because the JCT contract did not include design, that must mean that there were terms of the contract between the parties that were not in writing, and that therefore the adjudicator did not have the necessary jurisdiction. It seems to me that there are a number of fundamental difficulties with that argument.
16. First, the argument seems to me to be based on the assumption that the design element of the agreement between the parties had to be part of the JCT Contract, and that the failure to include the design element or package within that contract took it outside the 1996 Act. However, there is no evidence that the parties intended that the JCT Contract would include the (earlier) design package as well. Indeed, if anything, that is contrary to Mr. George's evidence, who makes plain that he expressly prepared the tender documents solely on the basis of the construction works and that *"no part of it was for structural design or elements of design that ART had carried out on this project in 2002"*. Indeed, Mr. George's evidence demonstrates the problem at the heart of this part of Navera's submissions, because the design work long since preceded the construction works on site. Accordingly, this argument could only succeed if it could be demonstrated that, in some way, it was intended that the JCT Contract would be retrospective in effect, and include the design package as well. As I have said, not only is there no evidence in support of that, but Mr. George's evidence is contrary to it.
17. Secondly, I also consider that the assumption that everything had to be in one package is wrong in principle. It is not what the JCT Minor Works Form of Contract provides: that is a pure construction contract and unlike, say, the JCT Contract Form (With Contractor's Design) 1998 Edition, it is expressly limited to the carrying out of construction works only. Furthermore, there is nothing in *RJT* which says that there must only be one, all-embracing contract between the parties. The position must be that the parties are free to contract however they wish. If they make a series of contracts then that is up to them. Furthermore, if that series of contracts includes some contracts that fall within the 1996 Act and some outside, then that is again a matter for them. An adjudicator would have jurisdiction in respect of the former, and not the latter.
18. I have already referred to the adjudicator's decision on this topic. The adjudicator was clearly aware that the agreement in respect of the design package was nowhere reduced to writing. In any event, he was aware that the design work was not the subject of the contract pursuant to which he had been appointed. He was therefore

scrupulous to strip out of the claim made by ART any element that could be said to relate to design. On at least three separate occasions in his decision he identifies an item of claim and then awards ART nothing on the item because it arose out of or concerned design works. He said, in relation to those items, that he had no jurisdiction to deal with them. He was right to do so.

19. Accordingly, it seems to me that the position is unarguably as follows:
  - (a) The contract in respect of the (earlier) design package was separate from the construction works on site.
  - (b) No claim for design items was allowed or permitted by way of the adjudicator's decision.
  - (c) The adjudicator's decision was based entirely on the construction works in respect of which there was an all-embracing contract in writing.
20. In all those circumstances it seems to me plain that the adjudicator had the jurisdiction to reach the decision that he did, and neither of the grounds relied on by Navera can possibly amount to even an arguable case that the adjudicator did not have the necessary jurisdiction. Accordingly, for those reasons, I enforce the decision of the adjudicator.

#### Stay of execution

21. The defendant, Navera, seeks to stay the execution of the judgment. This court has made it plain that, if there is compelling evidence as to the claimant's financial difficulties, such as to make it likely that the judgment sum would not be repaid, a stay of execution in respect of an adjudicator's decision will be considered: see, by way of example, *Hershel Engineering v Breen Property Ltd* [2000] BLR 272 and *Ashley House PLC v Galliers Southern Ltd* [2002] ADJ.LR 02/15. However, Navera seek a stay on the singular ground that, on the very limited information which they have provided to the court, there is, they say, a mismatch between what the adjudicator found had been paid to ART, and the evidence in the abbreviated balance sheet of ART.
22. The point arises in this way. The adjudicator found as a fact that ART received the sum of about £180,000 in the trading year up to 31st May 2005. However, the abbreviated balance sheet, with which I have been provided, shows a net asset position of £15,816 at the end of that period. It is said that there is a mismatch between the finding by the adjudicator which relates to the turnover of ART and the figures in the abbreviated balance sheet.
23. Ms Slow's response to that is to say that the two figures being compared are entirely different. She points out that the abbreviated balance sheet is just that, a snap-shot of the position as at 31st May 2005. It is not a record of the turnover during the year. She submits that the turnover could have run to hundreds of thousands of pounds, if not millions of pounds, but would not be shown on the abbreviated balance sheet, because that is simply showing the net result at the end of the financial year.
24. As I pointed out to Mr. Nigar, I do not know whether there is other information available to Navera in relation to ART's financial position. If there is, I have not seen it and it does not appear to be relied on. What I can say is that, on the basis of this one sheet of paper, I accept Ms Slow's submission that like is not being compared with like. It is plain that the document relied on is a balance sheet, and not a document recording turnover. Therefore, I reject the submission that there is a mismatch in relation to the decision of the adjudicator and the accounts.
25. On this point I ought to express my surprise that, in the witness statement in which this point is advanced, Mr. Reynolds, Navera's solicitor, records that "*the defendant has grave concerns as to the financial probity of claimant*". It seems to me that such a generalized and potentially damaging assertion is not to be encouraged in documents of this sort, particularly when it is supported by just one, obviously incorrect, particular. I am afraid that the overall impression given to me by such a sweeping and obviously unjustified allegation has been entirely negative.
26. For all those reasons, therefore, I decline to stay the enforcement of the adjudicator's decision.

MS. CAMILLE SLOW (instructed by Trowers & Hamilins) for the Claimant  
MR. SUHAIL NIGAR (of Alexander Boshier, Solicitors) for the Defendant