Judgment : His Honour Judge David Wilcox : TCC. 19th January 2007.

1. This is a summary judgment application to enforce an adjudication award for £253,748 plus VAT of £41,255 together with interest of £2,474, a total of £297,477.

2.. The claimant, Bennett (Electrical) Services Ltd is an electrical contractor, and the defendant Inviron Ltd is a mechanical and electrical contractor. A dispute arose between the parties in the course of electrical installation works that the claimant was carrying out for the defendant at Wimbledon.

3. The claimant referred the dispute to adjudication by a referral notice dated the 17th of January of 2005.

4. The defendant asserted that the adjudicator did not have jurisdiction to determine the dispute and reserved its position in relation to jurisdiction, whilst inviting the adjudicator to consider the objection to jurisdiction and give a non-binding ruling.

5. The adjudicator agreed that he did not have jurisdiction on the basis that there was no contract between the parties compliant with section 107 of the Housing Construction and Regeneration Act 1996. It is clear that he never entered upon any adjudication relating to the merits of the referred dispute.

6. The claimant then commenced a second adjudication in relation to the same dispute by a referral notice dated the 19th of September of 2006.

7. Mr Anthony Bingham was appointed adjudicator. There were three challenges to his jurisdiction by the defendant. Firstly, that the letter of intent between the parties was not a construction contract. Second that the quantum meruit claim pursued in the alternative by the claimant was a restitutionary remedy not within section 107 of the Act. Thirdly, that since the first adjudicator ruled that he had no jurisdiction a second application was an abuse of process. The adjudicator ruled that he had jurisdiction, and in his award published on the 20th of November of 2006 he awarded the claimant, £253,748 plus VAT and interest. The defendant has not paid the award and the claimant seeks to enforce payment by way of summary judgment.

8. Mr Quiney on behalf of the defendant opposes the application for two reasons: first, that there was no contract, whether in writing or at all within the meaning of section 107 of the act; and second that the adjudicator had no jurisdiction since the issue of jurisdiction had already been determined in the earlier adjudication.

9. Mr Taylor for the claimant contends that the entire contract is contained in a letter of intent dated the 23rd of April of 2004. The letter is written on behalf of the defendant company by its project manager, Mr Wilson to Mr Flynn of the complainant company. It is headed " *SUBJECT TO CONTRACT*" and the title is " *Subject CIPD Wimbledon Letter of Intent*" the relevant parts of the letter :-

10. *We hereby confirm that, subject to approval of your appointment by YJL it is our intention to enter into a secondary sub contract with yourselves, for the installation and testing of the Electrical Services and Labour Only Installation Package related to works at the above site*

11. *The basis of the Secondary Sub Contract (in no particular order of precedence) is set out below:*

    i. Inviron Ltd contract

    ii. Inviron Form of Secondary sub contract

    iii. Form of Sub contract between YJL and Inviron Ltd

    iv. Inviron Form of Enquiry 8th March 2004

    v. Meeting on 23rd of March 2004

12. *The Secondary Sub Contract sum will be £169,157, which is fixed price for the duration of the contract.*

13. *Sub Contract works to commence on site on the 13th of April 2004.*

    You are to provide the quantified schedule of rates, (not re- measurable) reconciling to the submitted Tender summary within seven days of the date of this letter.

    On the basis of this letter of intent we instruct you to proceed with all works required to progress the proposed Secondary Sub Contract and to meet the programme requirements noted above.

    Our obligations arising from this letter of intent are conditional upon your compliance with the foregoing requirements and the matters set out hereafter.

    If and when the Secondary Sub contract is concluded, (which will not occur until we notify you of approval of your appointment) the terms and conditions of such contract shall govern retrospectively. The work carried out by you, pursuant to this instruction, and any monies paid to you, in respect of the work performed pursuant to this instruction shall be treated as a payment on account of the contract sum under the secondary sub contract once concluded.

    In the event that a Secondary Sub contract is not concluded we shall reimburse only your reasonable and substantiated direct costs of complying with this instruction until it is revoked. We will not reimburse any other expenditure cost or loss whatsoever. This limitation includes without derogating from the generality of the foregoing any claim for breach of contract, loss of profit, loss of contract, loss of expectation or otherwise.

We reserve the right by written notice to revoke this instruction without cause at any time before an unconditional contract is concluded. In such event, you shall vacate the site promptly and with as little disruption as possible, removing all plant and waste materials and leaving the site clean and tidy. It is a condition of this instruction that upon such written notice you shall in addition, deliver to us all designs, plans, programs and other documents prepared by you or on your behalf in relation to the proposed Secondary Sub contract works, which we may use for the purpose of executing the work.

If you withdraw from performance of the work instructed prior to conclusion of the Secondary Sub contract, you shall not be entitled to any payment for work done. In such event you will be liable for all loss and expense incurred by us resulting from your withdrawal.

14. Mr Taylor on behalf of the defendant submits that the fact that the letter of intent was headed " *Subject to Contract*" anticipated the letter later being superseded by a more formal contract. It did not intend to prevent the signed letter from having contractual effect. Mr Quiney contends that the phrase is well-known to the layman and expresses an intention not to be bound contractually until a formal contract is entered into.

15. Save in exceptional circumstances, an arrangement made subject to contract means that exchange of a formal written contract is a condition precedent to legal liability. However, the fact that the parties contemplate the preparation of a formal contract will not necessarily prevent a binding agreement from coming into effect before the formal contract is executed. See ***Rossiter v Miller*** (1878) 3 App. Cas.1124 where Lord Blackburn said: " *I think the decisions settle that it is a question of construction, whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up* "

16. It is a question of construction whether the execution of a formal contract is a condition or term of the arrangements agreed in a letter of intent or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through.

17. The whole content of the letter of intent is expressed to be subject to contract. Whether a contract is to be entered into or not, is subject to the approval of a third-party. The default provisions should a contract not be concluded, provide for reimbursement of reasonable and substantiated direct costs only, and expressly exclude any contractual remedies.

18. It is evident that the parties in default of the contract being concluded, agreed a request and restitutionary basis of remuneration. See the ***BSC v Cleveland Bridge and Engineering Company Limited*** 1984 1 All ER 504 at p510/11.

19. I hold that no contract came into being in this case.

20. Even had the letter of intent arrangement not been subject to contract the claimant would have to show that any such agreement as evidenced in the letter complied with section 107 of the Act which provides that:

    1. *The provisions of this Part 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 Part only if in writing*

       The expressions 'agreement', 'agree' and 'agreed' shall be construed accordingly.

    2. *Where 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 was made in exchange of communications in writing, or*

       c. *If the agreement is evidenced in writing.*

    3. *Where the parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.*

    4. *An agreement is evident 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 arbitrary 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 constitute as between those parties an agreement in writing to the effect alleged.*

    6. *References in this Part to anything being written, or in writing, include its being recorded by any means.*

21. In ***RJT Consulting Engineers Ltd v DM Engineering Ltd*** 2002 WLR 2344 CA it was held that for an agreement in writing to come within section 107(2) (b) the whole contract had to be evidenced in writing, and not merely part of it. It was not sufficient to confer jurisdiction to entertain an adjudication under section 108 that there was evidence in writing, capable of supporting the existence or substance of an agreement.

22. Robert Walker LJ, at paragraph 20 said:-

    I agree that this appeal should be allowed for the reasons set out in the judgment of Ward LJ. It is the terms, and not merely the existence, of a construction contract which must be evidenced in writing. The judge aimed at a purposive approach, but he did not in my view, correctly identify the purpose of section 107.

23. Ward LJ, page 2352, cited with approval the observations of Judge Peter Bowsher QC in ***Grovedeck Ltd v Capital Demolition*** 2000 BLR p 185 para 30

disputes as to the terms, express and implied of oral construction agreements are surprisingly common and are not readily susceptible of resolution by a summary procedure such as adjudication. It is not surprising that Parliament should have intended that such disputes should not be determined by Adjudicators under the Act..... he went on to say that he agreed and " *That is why a record in writing is so essential. The written record of the agreement is the foundation from which the 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.*

24. At paragraph 19. He went on to say:-

On the point of construction of section 107, what has to be evidenced in writing is, literally, the agreement, which means all of it, not part of it. A record of the agreement also suggests a complete agreement, not a partial one. The only exception to the generality of that construction is the instance falling within subsection (5) where the material or relevant parts alleged and not denied in the written submissions in the adjudication proceedings are sufficient. Unfortunately, I do not think subsection (5) can so dominate the interpretation of the section as a whole so as to limit what needs to be evidenced in writing simply to the material terms raised in the arbitration. It must be remembered that by virtue of section 107(1) the need for an agreement in writing, is the precondition for the application of the other provisions of Part II of the Act not just a jurisdictional threshold for a reference to adjudication. I say 'unfortunately', because like Auld LJ whose judgment, I have now read in draft, I would regard it as a pity if too much 'jurisdictional wrangling' were to limit the opportunities for expeditious adjudication having an interim effect only. No doubt adjudicators will be robust in excluding the trivial from the ambit of the agreement and the matter must be entrusted to their commonsense. Here we have a comparatively simple oral agreement about the terms of which there may be very little, if any, dispute. For the consulting engineers to take a point objecting to adjudication in those circumstances may be open to the criticism that they were taking a technical point but as it was one open to them, and it is good, they cannot be faulted in my judgment. They were entitled to the declaration, which they sought, and I would accordingly allow the appeal and grant them that relief

25. Auld LJ at paragraph 22, differs as to the extent of the requirement to record the terms of the contract.

Although clarity of agreement is a necessary adjunct of a statutory scheme for speedy interim adjudication, comprehensiveness for its own sake may not be. What is important is that the terms of the agreement material to the issue giving rise to the reference should be clearly recorded in writing, not that every term, however trivial or unrelated to those issues, should be expressly recorded or incorporated by reference. For example it would be absurd if a prolongation issue arising out of the written contract would be denied a reference to adjudication, for want of sufficient written specification or scheduling matters wholly unrelated to the stage or nature of the work giving rise to the reference.

There may be cases in which there could be disputes as to whether all the terms of the agreement material to the issue in the sought reference are in writing as required by section 107 and it could defeat the purpose of the Act to clog the adjudication process with jurisdictional wrangling on that account. However, there we many cases, where there can be no sensible challenge to the adequacy of the documentation of the contractual terms bearing on the issue for adjudication, or as to the ready implication of terms common in construction contracts.

26. The difference which is apparent in the reasoning of the majority of the Court of Appeal and that of Auld LJ is not a question of emphasis. The reasoning of Auld LJ is attractive because at the subcontractor level and where cash flow difficulties are likely to be encountered in the smaller projects, the paperwork is rarely comprehensive. The extent of the requirement for recording contractual terms for an agreement to qualify under section 107 laid down by majority could have the effect of excluding from the scheme a significant number of those whom the Act was perhaps intended to assist.

27. This court is bound to accept the authority of the majority, namely that it is not sufficient to show that all terms material to the issues under Adjudication have been recorded in writing. An agreement is only evidenced in writing for the purposes of section 107 subsections (2), (3), and (4), if all the express terms of that agreement are recorded in writing.

28. It follows that section 107 will not engage when the written terms are incomplete in that they do not cover key obligations, or where the written terms are incomplete and additional contractual terms have been agreed orally. Similarly, if the written terms are complete, but the works have been subject to significant oral variation.

29. Mr Taylor submits that the letter of intent contained all the terms of the construction contract. It instructed the claimant to proceed with all works required to progress the proposed secondary sub contract and to meet the programme requirements referred to. He contended that all the works required to progress the Secondary Sub Contract were set out in the Form of Enquiry of the eighth of March 2004 and other documents listed in the letter. Thus, work scope was identified and the programming requirements, because the defendant's Form of Tender Enquiry and the detailed specifications and drawings referred to in it, were incorporated by reference.

30. In the letter of intent, the fixed-price for "*the duration of the contract*" was £169,157. A great deal of extra work was instructed by the defendant. The claimant's original valuation of works was £542,827 of which £203,763 had been paid. It is evident that the agreement was subject to additional oral terms and variations. The contractual claim before the second adjudicator for additional monies was not defined by any written contract

terms. The default provisions that I refer to in paragraph 17 make no provision for price and rates, the method of assessing and timing the payment of such costs. There is no payment structure. Of course, such gaps may have been filled by the parties as the work progressed, either tacitly or expressly but they are not recorded as required by section 107.

31. The letter of intent refers to a meeting on the 23rd of March 2004. It is evident that a number of issues were discussed, including working hours, mechanisms of payment, variations, insurance and health and safety. These are key matters and are not subject of recorded agreement. They cannot be characterised as trivial or immaterial.

32. It is clear that essential and key matters which are express and material terms are not specifically recorded in the letter of intent or incorporated by reference in a manner satisfying the requirements of section 107 of the Act as explained in ***RTJ Consulting Engineers Ltd***.

Conclusions

A. The parties did not intend that the letter of intent should have contractual effect.

B. In any event, even had they so intended such agreement could not comply with the requirements of section 107 of The Housing Grants and Reconstruction Act 1996.

C. The adjudicator had no jurisdiction.

D. The claimant is not entitled to summary judgment and the application is dismissed.

Mr Michael Taylor (instructed by Dickinson Dees LLP) for the Claimant
Mr Ben Quiney (instructed by Mayer Brown Rowe & Maw LLP) for the Defendant