

**JUDGMENT : HH Judge Thornton QC:** TCC. 15<sup>th</sup> March 2007

**INTRODUCTION:**

1. The claimant ("Pillar") is a building contractor and, in these proceedings, it is seeking to enforce an adjudicator's award in its favour. The defendant ("Camber") is the party for whom the relevant work was carried out. Camber disputes that it is required to pay the sum that the adjudicator decided was due to it on a number of related grounds. These are, in summary:
  - (1) The parties never entered into a contract at all so that there was no contract under which the adjudication could be started.
  - (2) If there was a contract, although it was a construction contract it was not sufficiently evidenced in writing, as required by section 107 of the Housing, Grants, Construction and Regeneration Act 1996 ("HGCRA") so that Pillar had no basis for requiring or starting an adjudication against Camber.
  - (3) If there was a construction contract which was sufficiently evidenced in writing, it was not a contract made on, or incorporating, the IFC standard form of contract. Since Pillar had applied to the RIBA, as a nominating body, to appoint an adjudicator in reliance on the adjudication clause contained in the IFC form of contract, it is contended that the adjudicator's appointment lacked jurisdiction since that clause was not part of the contract between the parties.
  - (4) The construction contract, if any, that had initially governed the work had been superseded by a fresh contract entered into in March 2004 which replaced the previous contract. It is necessary to determine whether that occurred, and, if it did, what the terms of the new contract were before it is possible to resolve the dispute as to the adjudicator's jurisdiction since he had been allegedly appointed under whatever contract had previously been in force which, according to Camber, had been superseded by the March 2004 contract. There should, therefore, be permission to defend this action so as to allow that issue to be tried out with oral evidence.
  - (5) There was no dispute in existence at the time the adjudicator was appointed.
2. However, it emerged at the outset of the hearing from my own questions to both counsel, that there was an initial issue to be decided that was potentially fatal to all of Camber's defences. This was that the parties had agreed that the adjudicator should have ad hoc jurisdiction to decide both Pillar's claims and Camber's cross-claims and to do so without considering any procedural defence based on an absence of relevant withholding notices. This agreement was reached when Camber served its cross-claim in the adjudication and Pillar then conceded that this cross-claim could be determined in the adjudication without there having been any prior service of appropriate withholding notices by Camber.

**BACKGROUND FACTS:**

3. The adjudication was initiated by a notice of adjudication served by Pillar in October 2003. Camber raised its objections to jurisdiction as soon as the adjudicator had both been appointed and had accepted that appointment and the adjudicator had then given a non-binding indication that he considered that he had jurisdiction.
4. Camber then responded to Pillar's substantive claims in these terms in its response document to the pleading setting out Pillar's claims: *"Camber will only take part in this adjudication on the basis that such action will not prejudice its case [that the adjudicator has no jurisdiction]."*

The response document then set out Camber's detailed defence to each item of monetary claim being advanced by Pillar both in relation to the originally contracted work and as to claims for varied and additional work.
5. Camber then set out under a separate heading in the same document a pleading entitled: "Camber Contra Charges Claim". From paragraphs 111 to 160 of this document, there is set out what is in form classic cross-claims. These consisted, in part, of claims for damages for defective work that went far beyond an abatement or equitable set-off, and, in part, claims for loss and expense caused by Pillar's alleged late completion of the work. The plea, at the end of this contra-charge section of the response document, was that Camber was due over £250,000 for its claims under these heads. The prayer (to adopt the language of civil pleading) then stated:  
*"... Camber also seeks the following: ...*
  - (b) *Camber is entitled to compensation in the sum of £258,965.43",*  
*which is the negative balance claimed after Camber has taken into account payments already made, ...*
  - (e) *All amounts that are found by the adjudicator to be due to Camber are to be paid by Pillar to Camber within seven days."*
6. It follows that Camber was stating its clear and unequivocal intention to make a cross-claim in the adjudication and a monetary decision in its favour, once any sum due to Pillar had been set against Camber's entitlement. Camber was clearly not asserting these cross-claims purely as a defence to Pillar's claim.
7. In response to Camber's cross-claims, Pillar put in a detailed response document which, most significantly, stated that Camber had: *"... never provided any notice for withholding in respect of its claims against Pillar as required by the contract or at all. Pillar intends to take no point about this, electing instead to deal head on with the claims made against it ..."*

The pleading then set out a very detailed reply to Camber's cross-claims, running to many paragraphs and pages. Camber served a response document to this reply. Both Pillar's claims and Camber's cross-claims were pleaded by reference to the IFC form of contract.

8. The adjudicator, with meticulous and commendable thoroughness and speed, decided all the items of claim put forward by both Pillar and Camber including the cross-claims for defective work and delay and arrived at a net sum in favour of Pillar of £46,000. This was arrived at by his first determining what was due to Pillar, taking into account any abatement, and then finding out how much was due to Camber with regard to the cross-claims and contra charges and then netting of one overall sum against the other. In doing so, he was deciding the disputes that the parties had presented for decision in the adjudication.

**AD HOC SUBMISSION TO JURISDICTION:**

9. It is indisputable that, at the point in time when the final pleading was served, being Camber's response to Pillar's response to Camber's response and cross-claim document, the agenda for the adjudication that the parties had set before the adjudicator included both Pillar's claims and Camber's cross-claims. This can be seen by considering how the pleadings developed. When Pillar served its claim document, it was known by both parties that Camber was objecting to the adjudicator's jurisdiction to determine Pillar's claims. This objection was maintained in Camber's defence. However, Camber also served the cross-claim document which made positive claims that went far wider than were necessary to constitute an abatement and set-off defence to Pillar's claims. This cross-claim document contained a positive claim or prayer that the adjudicator should award Camber a sum far in excess of the sum being claimed by Pillar.
10. It follows that Camber's cross-claims document constituted an offer to Pillar to agree to widen the adjudicator's jurisdiction so that, in return for Camber agreeing to the adjudicator having jurisdiction to decide Pillar's claims, Pillar would agree to the adjudicator deciding Camber's cross-claims. In other words, Camber was indicating a waiver of its jurisdiction objections if it was able to obtain from the adjudicator a decision its own cross-claims on their merits.
11. Pillar accepted Camber's offer. It did so by firstly conceding that the adjudicator could determine Camber's cross-claims despite the fact that Camber had not served appropriate withholding notices during the currency of the contract. Ordinarily, even if the adjudicator had had been given, in a formal sense, jurisdiction to determine Camber's cross-claims, any favourable adjudicator's decision on those cross-claims could not have precluded Pillar from obtaining an enforceable decision on its claims without a set-off since Camber had not served appropriate and timeous withholding notices relating to Pillar's claims. However, in its response document to Camber's cross-claims, Pillar clearly and unequivocally waived its entitlement to rely on such non-service as a procedural bar to the merits of Camber's claim.
12. Pillar secondly accepted Pillar's offer by allowing the adjudication to proceed on all issues. In doing so, Pillar served a very detailed reply to Camber's cross-claims with evidence in support of this reply and it then allowed the adjudicator to proceed to determine all claims and cross-claims on their merits and without reference to withholding notices or other procedural defences.
13. I conclude that the adjudicator's jurisdiction was confirmed, or widened, to include all claims and cross-claims. This was achieved by the parties, by their pleadings, consenting to an ad hoc adjudication and to waive any jurisdictional objections each might have had to the other in the adjudication originally started by Pillar. This agreement was made against the background of there being a rule in the adjudication rules that the adjudication was subject to that the adjudicator had the power to add and decide additional disputes between the parties even if one party objected if, in his discretion, the additional disputes were closely related to the dispute originally referred to him. This power provided the background to the agreement by the parties whose effect was to allow the adjudicator to decide all disputes advanced by each party without these disputes being subject to continued jurisdictional objection by either of them.
14. The effect of this ad hoc agreement was that Camber's jurisdictional objection, advanced in its first response document to Pillar's claims, was withdrawn. On analysis, Camber's original objection was a conditional objection which was put forward on the basis that it would not be effective or operative if the offer contained by the service of its cross-claims document was accepted with the effect that all claims on both sides were capable of being adjudicated upon.

**OTHER ISSUES - PRELIMINARY PROCEDURAL ISSUE:**

15. I was asked by the parties to indicate what decision I would have come to in relation to the defences raised by Camber had I not decided that both parties had acceded to the adjudicator's ad hoc jurisdiction to determine the disputes raised by both parties without reference to jurisdiction or to the absence of any relevant withholding notices. Since the parties fully argued these defences, indeed they only argued the ad hoc submission issue at my invitation and with some initial reluctance, I am prepared to determine these defences, albeit that my findings and conclusions are obiter or non-binding.

**NO CONTRACT IN WRITING OR EVIDENCED IN WRITING:**

16. This first ground of defence was to the effect that there was no contract or no contract sufficiently evidenced in writing. The initial contractual relationship between Pillar and Camber was initiated by Camber's letter of intent dated 11 September 2003. It was contended that this letter did not sufficiently identify the core terms of the contract to enable the contract to have contractual effect or to be sufficiently evidence in writing.
17. The letter of intent identified the contract sum of £1,327,476. This is a precise sum which was derived from an earlier document sent by Pillar to Camber dated 28 August 2003 which summarised the work in summary form and identified a lump sum for which that work would be carried out. The work identified was stated to be the

construction of twelve new houses. There were to be three different house types as well as garages, boundary fences, ancillary works and ground works. Each element was given a separate lump sum and each lump sum must have been prepared using further documents that must have contained considerable detail about the proposed works, albeit that that additional detail was not identified in the earlier document dated 28 August 2003.

18. It is clear that the lump sum reference in the letter of intent was a reference back to, and an incorporation of, the figures and work items set out in Pillar's letter of 28 August 2003. Although there was no schedule of information and no drawings referred to in either document and none were attached, it would have been possible for either party to identify the drawings and other documents that had been used to compile the schedule of information.
19. It follows that the letter of intent sufficiently identified the scope of work and the contract sum to enable a binding contractual relationship to be entered into. This was particularly so since the letter of intent referred to the IFC 1998 standard form of contract payment provisions. It was contended on behalf of Camber that the blanks contained in the appendix of this contract had not been filled in and that, therefore, vital terms remained to be agreed. However, that did not preclude the letter of intent having effect. It clearly incorporated by reference the standard terms of the IFC contract with the blanks therefore remained as blanks. Nonetheless, those blanks did not preclude the terms of the IFC contract taking contractual effect in relation to the scope of work and price identified in the letter of intent and the earlier documentation. Although the contract terms were contained in an unwieldy collection of documents, they were not sufficiently uncertain to preclude them having contractual effect and their written terms were sufficiently wide-ranging to cover all necessary matters that were required by the HGCRA's requirement that the contract be evidenced in writing.
20. The letter of intent was clearly intended to govern the future contract which would supersede the letter of intent but it was clear that the payment provisions which would govern payments to be made under the letter of intent would be calculated by reference to the lump sum and its breakdown in the earlier letter. These sums would be paid using the payment mechanism of the IFC contract which had been incorporated into the letter of intent..
21. I conclude that there was a contract which was sufficiently evidenced in writing for an adjudication to have been permitted had the parties not agreed to an ad hoc adjudication. Although the letter of intent contract was intended to have a short shelf life and to be superseded soon after it took effect by a formal contract incorporating the IFC 1998 form of contract, the letter of intent constituted, whilst effective, a fully operative construction contract capable of giving rise to a statutory adjudication under the HGCRA. That adjudication would arise out of the adjudication clause in the IFC contract which had been incorporated into the letter of intent.

**FURTHER ORAL CONTRACT IN MARCH 2004:**

22. Pillar's further contention was that the letter of intent, which had never been superseded by a formal contract, was itself superseded by an oral contract entered into on 10 March 2004. This agreement was said to have been reached by a meeting attended by two men, respectively a director of each company. This agreement was then said to have been evidenced by, and to have been in part concluded by, an exchange of letters which were not placed in evidence. In those circumstances, Pillar contended that there should be a trial of the issue as to what, if any, further contract was entered into by the parties relating to the work, whether that contract superseded the letter of intent in whole or in part and, if it did, whether it was sufficiently evidenced in writing to found an adjudication.
23. I would not have been able to accede to the submission that there should be permission to defend and a trial of these additional issues. The evidence before the court was insufficient to point to there being a triable issue as to the formation or existence of any contract entered into at, or following, a meeting on 10 March 2004. It would therefore now be a purely speculative exercise for me to consider whether any such contract came into being, what its terms were, what its possible effect on the letter of intent contract might have been, whether any of the disputes that had been referred to adjudication would have arisen out of this putative contract and whether any resulting contractual relationship was capable of founding a statutory adjudication in relation to any dispute arising out of it.
24. I therefore decline to reach any conclusions about the suggestion that a contract was entered into in March 2004 or as to the possible consequences of such a contract had it been made.

**NO DISPUTE:**

25. Even if the parties had not waived their entitlement to raise the procedural plea that there was no dispute in existence at the time the adjudication started, it is clear that there was a well-developed dispute as to both the claims and the cross-claims at the time of the adjudicator's appointment which would have precluded this defence being maintained.

**CONCLUSION:**

26. Pillar is entitled to summary judgment in the sum claimed, being the sum decided as being due to Pillar by the adjudicator.