

JUDGMENT HIS HONOUR JUDGE THORNTON Q.C TCC : 18th February 2000

1. I am asked to enforce the award of an Adjudicator and when this matter first came before the Court, the Claimant was seeking summary judgment on the Adjudicator's award. There was some dispute as to the date on which the relevant contract was entered into and I decided that the application should be transferred into a hearing on jurisdiction. I gave directions as to witness statements and the trial bundle and a trial has taken place 7 days [sic - 9 days] later and 18 days after the Claim Form was issued on 31 January 2000.
2. The issue is whether the contract between the parties, which was strictly a sub-contract was entered before or after 1 May 1998, the date of the coming into force of the Housing Grants, Construction and Regeneration Act 1996, section 104(6) of which reads:
"This Part applies only to construction contracts which -
(a) are entered into after the commencement of this Part.
The date of commencement was 1 May 1998.
3. The background was this. Crowngate, the Defendant, entered into a main contract for the design and construction of a medical centre with the Employer, the Cheltenham Family Healthcare Centre Limited. Following negotiations, Atlas, the Claimant, entered into, at any rate, an arrangement with Crowngate for the construction of the Centre.
4. Work started in January 1998 pursuant to a letter of intent. That letter, dated 18 December 1997, provides that:
"In the event that a contract is entered into between us [that is Crowngate and Atlas] it shall have retrospective effect to include all works carried out under this letter of intent and you will credit us under the contract to the value of any payments made here under."
5. A maximum liability was placed in the letter of just over £1.3m.
6. On 3 April 1998 a DOM/1 [sic DOM/2] form of contract was undoubtedly signed by a representative of both parties. On the Defendant's case this was a contractual act of the two parties, entering into the sub-contract on that day. The Claimant alleges no such contract came into being on that day, although the form was signed by an authorised representative of each party. Mr Fenwick, a director of the Claimant, who signed the form and whose signature was witnessed by Mr Curtis, gave evidence that he had been asked by Mr Beacom, who also signed the form and was a director of the Defendant, to sign the DOM/1 [sic - DOM/2] form because the Defendant was coming under pressure from Pillar Property Investments Plc, the guarantor to Crowngate's obligations.
7. On 3 April 1998 as both Mr Fenwick and Mr Curtis contended, there remained material matters yet to be concluded. The principal matter related to the scope of work. The original tender had been provided by reference to specifications and drawings prepared for the Employer and a document prepared by Crowngate, which was not produced in Court, but which was described as a Bill of Quantities.
8. The purpose and effect of the Bill of Quantities was carefully explained by Mr Fenwick. There were a large number of drawings and without the Bill of Quantities it would have been necessary to take off quantities from those drawings. Time did not allow this and appreciating the difficulty Crowngate had provided its own document which took off the relevant quantities. The Bill of Quantities was used by Atlas for pricing purposes.
9. The Bill of Quantities was not wholly descriptive of the work necessary to fulfil the design intent. By way of example, although not definitive, Mr Fenwick explained that some of the roof had not been included in the Bill of Quantities. The effect was that Atlas priced less work than that depicted on the drawings.
10. The problem of the inaccurate take off exercise was developing and becoming more and more acute. By 3 April 1998, as Mr Fenwick and his colleague, Mr Curtis, saw it, there was no possibility of entering into a contract incorporating the DOM/1 [sic DOM/2] Conditions. Had it been entered into before the quantities problem was resolved, there would have been a significant shortfall in the sum Atlas would be paid for the work it was contracting to carry out.

11. Other reasons for not entering into the contract were also given by these two gentlemen. These included problems with the doors and windows specification and Crowngate's failure to provide appropriate guarantees in an agreed form and to execute them but it is not necessary to go into greater detail. It is sufficient to note these, given the problems with the scope of work, I accept Mr Fenwick's and Mr Curtis' evidence, which is clearly supported by the documentary evidence.
12. On 11 and 12 May 1998, having considered and investigated the discrepancies in the Bill of Quantities, Mr Curtis produced a report. On that day or shortly afterwards his analysis was accepted in principal by Crowngate.
13. The Claimant's case is that in the light of that difficulty and the commercial pressure on Crowngate to provide some comfort to Mr Heath of Pillar, Mr Fenwick was prepared to sign the DOM/2 form but that it was not to take effect until the negotiations were finalised and the Bill of Quantities added to and incorporated as a sub-contract document.
14. Mr Fenwick said that this was agreed to by Mr Beacom. That was supported by Mr Curtis, who was on site on 3 April 1998 for the general purposes of his work to do with the contract. He was invited to enter Mr Fenwick's and Mr Beacom's meeting, to witness the signing. Mr Benyon [sic - Mr Cave] witnessed the signing for Crowngate. This came as some surprise to Mr Curtis and he said that his surprise was self evident, so much so that before Mr Fenwick could explain why he was signing, Mr Beacom explained in the terms I have already set out in explaining the Claimant's case.
15. The DOM/2 form was signed and attested and left undated, Mr Fenwick retained the original but the attestation page was copied to Mr Beacom, who sent a copy to Mr Heath.
16. Mr Beacom does not accept this for a moment. He says that a final contract was concluded. Having considered all the evidence I have little difficulty in rejecting Mr Beacom's evidence without having to carry out the usual analysis of his demeanour and the nuances of his evidence, because there are material aspects in the documents which Mr Beacom's evidence does not accurately account for, to explain what happened on 3 April 1998.
17. By way of example, a further letter of intent was sent, as I find, by Crowngate to Atlas and received on 15 May 1998. This increased the liability figure. This letter was still dated 18 December 1997. It was signed by a director of Crowngate, Edward Benyon. This second letter of intent, clearly amending the first letter of intent, is only consistent with no sub-contract being in existence on 15 May 1998. No commercial or contractual purpose would be served by it if, as Crowngate now assert, a formal sub-contract was already in place.
18. Given that the Bill of Quantities position was yet to be finalised, it is inconceivable that Atlas, through Mr Fenwick or Mr Curtis, would have agreed to enter the sub-contract, without any rectification to account of the inconsistencies. In connection with the Bill of Quantities, Mr Fenwick wrote to Mr Beacom on 8 May 1998. That letter is wholly inconsistent with a contract being in place. There was some suggestion that that letter was not received or if it was that Mr Beacom had not seen it. However the letter was received by the Defendant company and that is all that is important. Another letter was written on 8 May 1998 which was also inconsistent with an already existing formal contract and to which there is no challenge by Crowngate.
19. A year later, Crowngate's quantity surveyors, EP Stevens, were discussing with the Claimant issues connected to the final account. It was agreed at that time that it was necessary to resolve the issues on the DOM/2. Stevens wrote to Atlas on 26 March 1999 in relation to matters discussed on 5 May [sic - March] 1999 stating: "*The DOM/2 contract to be exchanged without delay*"
20. On 12 April 1999 Atlas faxed Crowngate: "*The DOM/2 is in the post - copy thereof*"
21. The copy of the DOM/2 document signed on 3 April 1998 was sent through. It seems to me that that and only that constituted entry into the sub-contract.
22. There is a further document dated 30 March 1999 which may or may not have been sent. Whether signed or not, it contains a clear statement that the sub-contract document had yet to be exchanged. Mr Beacom tried to explain what was meant by "exchange" as not being a step leading to the entry of the sub-contract, but I accept Mr Fenwick's evidence that this is what was intended.

23. The activities, actions, expressions and documents all point away from there being a concluded contract until after 3 April 1999.
24. Although there was some criticism of the statements made by Mr Fenwick to the Adjudicator, such comments on the evidence, although well made, cannot unsettle the conclusion that the contract was entered on 12 April 1999.
25. It follows that the contract took effect for the first time on about 12 April 1999, so that it would appear to have been entered into after 1 May 1998. The parties both lacked the necessary contractual intention to enter into the contract on 3 April 1998. That intention was as much a requirement as completing the necessary form.
26. It was submitted by the Defendant that if the date that the DOM/2 was entered was 12 April 1999, the relationship between the parties was in fact entered into on 18 December 1997 because the letter of intent stated that the DOM/2 would have retrospective effect. Mr Philip Rainey, Counsel for the Defendant, relying on *Fillite (Runcorn) Limited -v- Aqua-Lift (1989) 45 BLR 27*, submitted that the subsequent DOM/2, on a contractual analysis, was a variation of the earlier letter of intent and should be treated as entered into on 18 December 1997, transforming on 12 April 1999 from the mouse of the letter of intent into the mountain of the DOM/2.
27. The *Fillite* case dealt with Heads of Agreement which varied an earlier contract, If the analysis in that case is a correct legal analysis, it may well be that the sub-contract was entered on 18 December 1997, but I find that wholly inconsistent with the parties' actions.
28. The DOM/2 Conditions make no reference to the earlier letter of intent. Applying the four corners approach to construction, the DOM/2 is not to be read with the earlier document. Furthermore the language of the Act is clear, the contract was entered into after 1 May 1998.
29. The contract was entered into after construction of part of the works. Is it permissible to relate back the entry of the contract to when the works began? It is common that a contract entered on day 5 incorporates within the scope, works carried out on days 1, 2, 3 and 4. That does not date the contract as being entered on day 1 The new DOM/2 contract superseded the letters of intent and the contractual arrangements pursuant to those letters of intent.
30. It is clear to me that the parties agreed that the signing on 3 April 1998 was not to have contractual effect and that the contract would only be entered as and when the difficulties were resolved. Those matters were agreed by the exchange on 12 April 1999 on which date, or immediately following, the DOM/2 was entered.
31. The effect was that for the purposes of section 104(6) of the Housing Grants Construction and Regeneration Act 1996, the contract was not entered before the Act came into force. It was only entered nearly 12 months to the day later. The basis for challenging the Adjudicator's jurisdiction fails.
32. The Adjudicator's decision is dated 14 January 2000. It is a decision of Martin Thomas King. The Adjudicator determined that the Defendant, Crowngate shall pay £64,753.19 plus VAT and interest at the daily rate of £19.07. A lump sum for interest was also determined by the Adjudicator of £8,876.53 and that Crowngate shall pay the fee of £200.00 paid by Atlas to the Adjudicator's Nominating Body. Crowngate is also to pay the Adjudicator's fees and expenses of £4,121.43 (including VAT) and a further sum of £528.75 (including VAT) for the Adjudicator's Appointment Fee. All of those sums the Claimant is immediately entitled to and I propose to enter judgment for them.
33. Following submissions on costs the Defendant was also ordered to pay the Claimant's cost of the proceedings, summarily assessed at £12,898.50, being 100% of the total sought by the Claimant.