JUDGMENT : HIS HONOUR JUDGE THORNTON : TCC : 20 February 2004:

l. Introduction

1. This judgment is concerned with an application for judgment to enforce a decision of an adjudicator. The background to these enforcement proceedings is that Westminster Building Company: Ltd *("Westminster")* tendered for the refurbishment of a property owned by Mr Beckingham at 40 Wilmington Square, London WC1 based on a specification prepared by Kirsop & Company *("Kirsop"),*- a firm of Chartered Surveyors. Work started on 27 June 2002. There is a continuing dispute as to the form of contract under which the work was carried out but, according to Westminster, the contract incorporated the JCT standard Intermediate form of Building Contract for works of simple content, 1998 Edition incorporating amendments 1, 2 and 3. Mr Beckingham disputes this contention and asserts that the contract incorporated no standard terms and was, instead, concluded on the basis of the specification.

2. Six certificates were issued during the course of the work by Kirsop. The sums certified remained unpaid by Mr Beckingham because, he contends, an agreement was reached between him and Westminster dated 20 February 2003 which capped the total sum payable for the work and the certified sums, if paid, would exceed the sum agreed as the cap of his liability to pay Westminster. Westminster referred their claim for these certified sums to adjudication, relying on the adjudication procedure provided for in the JCT Intermediate Form of contract. The adjudicator issued a decision to the parties dated 29 August 2003 in which he made various findings in favour of Westminster. The crucial findings were that Mr Beckingham should pay Westminster various sums totalling £122,409.16 together with interest under the contract totalling £2,350.18. These sums were not paid and Westminster issued these proceedings on 9 September. The parties agreed that the summary judgment application should be treated as the trial of the issues raised in the enforcement summary judgment application and that the evidence for the trial of those issues would be confined to the witness statements without being subject to cross examination. I agreed to that course and directed that the hearing of the application should be treated as the trial of the three issues arising in the enforcement application.

3. Since the works involved work to a dwelling-house and one of the parties to the contract for those works, Mr Beckingham, is a residential occupier, the adjudication is not subject to the Housing Grants, Regeneration and Construction Act 1996 even if the contract incorporated the JCT Intermediate Form of contract. This is because section 106(1) of the HGCRA excludes such construction contracts from the ambit of the Act. It follows that the jurisdiction of the adjudicator, if he has jurisdiction at all, is derived from the contract and, more specifically, from the terms of the JCT Intermediate Form and that it is crucial for Westminster to satisfy the court that that Form was incorporated into the contract if' it is to enforce successfully the adjudicator's decision in its favour.

4. The enforcement proceedings are resisted on three distinct grounds and each must be separately considered. These are, in summary, that the contract contained no adjudication clause; that the effect of the Unfair Terms in Consumer Contract Regulations 1999 was to make the contractual adjudication clause, if there was one, unenforceable and that the effect of the capping agreement was to preclude the adjudicator from having jurisdiction to determine or decide the dispute as to whether the relevant sums were due and payable notwithstanding their having been certified by Kirsop.

2. The Terms of the Contract

5. **2.1. The Letter of Intent** : Before determining the first issue as to jurisdiction in the full sense, I must set out in greater detail the factual background to the contract. This is derived from the witness statements of Mr Ingmire, Westminster's solicitor; Mr Beckingham and Mr Clark, Westminster's managing director.

6. The work to be carried out at Mr Beckingham's premises involved extensive refurbishment work to a Mid-Town house located in London, WC1. The work was described in a specification and accompanying drawings and this was sent to Westminster who returned it priced in the sum of £256,931.50 on 17 May 2002. The specification included Part 1 entitled *'General Conditions of Contract'* which contained description of the work, definition of the employer; being Mr Beckingham and Mr

Hassan, the contractor administrators and designers and planning supervisor, being Kirsop, and a list of the tender drawings. Part l also contained this provision:

"THE CONTRACT

The form of contract will be the JCT Intermediate Form of Building Contract 1998 incorporating amendments 1:1999, 2:200 including TC/94/IFC.

Allow for the obligations, liabilities and services described therein against the headings below: ..."

The specification also listed various amendments to the JCT Form and the necessary details for insertion in the blanks in the appendix and concluded with these words:

"EXECUTION: The Contract will be executed under hand."

7. Following correspondence between Westminster and Kirsop, a revised tender was submitted by Westminster to Kirsop on 14 June 2002 in the revised sum of £256,931.50. This document consisted of a list of revisions to the original tender and the two documents were intended to be read together. A meeting was then held at Mr Beckingham's then residence on 25 June 2002 and it was minuted that Kirsop was to draft a letter of intent to Mr Beckingham for issue by him to Mr Clark, Westminster's managing director.

8. This letter was prepared and, on 27 June 2002, Mr Beckingham wrote to Westminster a letter which included these words:

"I am confirming instructions for your company to proceed with the alteration and repair of the above premises in accordance with the specification and drawings sent to you by my surveyors Kirsop and Company on 23 April 2002 and your revised tender dated 14 June 2002 in the total sum of £256,931.50 plus VAT.

The works are to be commenced on 15 July 2002 and are to be completed by 18 October 2002.

My Surveyors will be progressing the preparation of the formal contract documents over the next few weeks for signature by both parties, in the interim please proceed to make arrangements for the implementation of the works. In the unlikely event of matters not progressing I would confirm that you will be reimbursed any reasonable expenditure in connection with the project."

9. Work started on site on 15 July 2002. The first question that arises is whether, at that point, the letter of intent created a contract that governed the work and which incorporated the JCT Intermediate Form. The last paragraph of the letter is inconsistent with a full contract being entered into. This provides that the project might not progress, albeit that that is described as "an unlikely event", and that if the project did not progress, Westminster would be reimbursed its reasonable expenditure. If a full contract for the entirety of the refurbishment works was intended to be created by that letter and its acceptance, these provisions would not have been necessary and, indeed they are incompatible with such a contract since a full contract could only be terminated using the contractual provisions for termination contained in the JCT Intermediate Form.

10. The letter does, additionally, provide that the works will proceed in accordance with the specification and drawings and the revised tender in the total sum of E256,931.50. If that paragraph stood on its own, the letter might have sufficed to create an offer addressed to Westminster to undertake the entirety of the refurbishment works pursuant to the JCT Intermediate Form for a lump sum of £256,931.50. The words: "in accordance with the specification and drawings" are ambiguous in that they could constitute an offer to carry out the works on the terms included in the specification, which would incorporate the JCT Intermediate Form, or they could mean that the alteration and repair work was that defined in the specification and drawings so that only the parts of the specification which defined the works to be carried out were referred to. On this basis, Part 1 of the specification was not included in the offer contained in the letter of intent.

11. The narrower meaning of the letter of intent is the meaning intended by the letter when its words are read as a whole. This is because:
    1. The first paragraph and the last paragraph of the letter must be read together and, when this is done, it can be 'seen that the narrower meaning of the first paragraph is intended since that is the only meaning that is consistent with. there being no completed contract created by the letter.
    2. The specification envisaged that a formal contract under hand would be executed. The letter also envisages that that would take place since it states that the formal preparation of the contract documents would be progressed for signature by both parties. In the interim,

Westminster was to proceed to implement the works. These two provisions taken together make it clear that no contract would be entered into until the formal contract had been signed by both parties. In the meantime, there was a simple contract created by the letter of intent which merely provided that such work as was carried out in conformity with the work items of the specification and drawings would be reimbursed on a reasonable expenditure basis.

12. **2.2. The Preparation of Formal Contract Documents** : On the day after work started on site, Kirsop, forwarded to Westminster an IFC Intermediate Form of contract with the appendix filled in. As it happened, the document was slightly different from that envisaged by the specification in that it incorporated amendment 3 concerned with insurance clauses in addition to amendments 1 and 2 whereas the version envisaged by the specification only envisaged that amendments l and 2 would apply. The date for possession was different from the specification and different again from the different date for possession provided for in the letter of intent. The date for completion was different from that provided for in the specification. Finally, the form did not provide for, a named quantity surveyor whereas the specification envisaged that Kirsop would be the named quantity surveyor. These changes were, on any view, minor changes save possibly for the date for completion

13. Westminster signed the form and returned it to Kirsop on about 19 July 2002. The form was never signed by Mr Beckingham, he never informed Westminster that he had any objection to the form or contents of the contract and work proceeded and was completed with interim certificates being issued by Kirsop. These were, in form and appearance, apparently issued under the IFC Intermediate Form and, until interim certificate number 5, honoured by Mr Beckingham.

14. Mr Simon Hughes, on behalf of Mr Beckingham, submits that the words of the letter of intent, supported by the words of the specification already quoted, could not be clearer. They provide that it was a condition precedent to a binding contract being entered into that both parties should sign the contract documents prepared by Kirsop, Mr Beckingham did not sign and, therefore, the works were governed by the letter of intent.

15. Miss Gaynor Chambers, on behalf of Westminster, contended that the words: "will be progressing the preparation of the contract documents ... for signature by both parties" did not mean that formal signature of the documents by both parties was a condition precedent to the contract in the form prepared by Kirsop taking effect. These words were administrative in their meaning. Furthermore, by receiving the signed version from Westminster and then remaining silent whilst allowing the works to proceed to a completion, Mr Beckingham was clearly signifying acceptance to the terms of the contract proffered by Westminster and was waiving any precondition as to signature, if such was the effect of the wording of the letter of intent.

16. Miss Gaynor referred to, and relied on, two decisions of the Court of Appeal, **Stent Foundations** v **Carillion** (2001) 78 Con LR 188 **and Harvey Shopfitters Ltd** v **ADI Ltd,** unreported, [2003] EWCA Civ 1757. In both, the pre-contract documentation provided that a formal contract would be signed following a start of work pursuant to letters of intent and in both the Court of Appeal held that this provision was not a precondition to a formal contract being entered into since all the terms had been agreed and work had then proceeded on the basis of those terms. In the **Harvey Shopfitters** case, Latham LJ stated:

"[counsel for the party contending that no formal contract had been entered into] submits that the words are clear and require no elucidation from their context. The phrase if the contract shall fail to proceed and be formalised' is, he agrees, to be read conjunctively, but so read, he submits, clearly indicates that the parties intended the contract to be `formalised', that is, that a formal contractual document or documents should be signed as being a necessary. part of the procedure if the work was to be carried out under the ICF84 conditions. The fact that they were not formalised triggered, he submits, the entitlement to a quantum meruit pursuant to the terms of the letter, whatever may have been the behaviour of the parties thereafter.

It seems to me, whilst I entirely accept that the behaviour of the parties thereafter was not, for the purposes of this case at any rate, necessary for the purposes of identifying the true meaning of the agreement, this argument fails to recognise that that the letter cannot be read in isolation. It formed the culmination of a process which was accepted by the appellants' own witness below to have resulted in an agreement as to price and to all material terms necessary for the commercial efficacy of the contract under ICF84 conditions. The Recorder [whose judgment was under appeal] was entitled to conclude, as Dyson J had done in ***Stent,*** *that the mere fact that the letter giving instructions to proceed envisages the execution of further*

documentation, does not preclude the court from concluding that a binding contract was nonetheless entered into, provided that all the necessary ingredients of a valid contract are present."

17. In this case, all the necessary ingredients of a valid contract were present. These were incorporated into the signed contract documents submitted to Mr Beckingham. That act of forwarding the signed documentation constituted an offer to carry out the works pursuant to that contract, albeit coupled with an underlying arrangement of an administrative kind that both parties would sign the contract. Mr Beckingham allowed work to proceed, remained silent as to his concerns about the contents of the proffered contract and proceeded throughout the works as if the IFC84 Form was applicable to the works. Thereby, he accepted the proffered form by his conduct in allowing the work to proceed and waived any precondition of its taking effect by not signing and not challenging the contract documents. In any case, the wording of the letter of intent did not create a condition precedent. For all those reasons, the contract that came into being contained a contractual adjudication procedure which was followed in appointing the adjudicator to act pursuant to the adjudication clause in the contract.

3. The Capping Agreement

18. The parties signed a document dated 20 February 2003 which provided:

"It is hereby agreed:

1) A retention will be held by AB of £30,000 including VAT and released to WBC as follows:

- £10,000 within 7 days of AB receiving written confirmation from Islington Building Control or Islington Planning Department that conditional approval is granted for building regulation approval or listed building consent respectively.

- £12,500 within 7 days of AB receiving written approval of the remaining matters outstanding immediately above.

- £7,500 upon satisfactory completion of all snagging and other items at the end of the 6 months defects liability period.

2) The 1500/week damages will not continue to accrue from 21 February 2003.

3) The 6 months defects liability period will commence from 20 February 2003.

4) It is accepted that practical completion is not occurring today.

5) AB shall pay WBL the sum of E105,277 upon account for works unallocated to this sum yet.

6) Total fees shall not exceed £300,000 inch VAT before deductions.

The document was signed by both Mr Paul Clark on behalf of Westminster and Mr Beckingham.

19. Following the signing of this document, Kirson issued the two disputed certificates, no 5 on 17 March 2003 in the net sum of £42,000.59 and no 6 on 9 June 2003 in the net sum of £51,546.29: Prior to the issue of interim certificate no 5, the sum certified and paid had been E284,209.90. Since the sum certified in interim certificate no 5, once retention of (30,000 provided for in the 20 February 2003 agreement had been taken into account, no part of the sums certified in these two interim certificates were due, according to Mr Beckingham, since the maximum sum then due was £270,000 under the capping and retention arrangements provided for in that agreement. On those grounds, he declined to pay any part of either sum certified by these two interim certificates.

20. Westminster referred to the adjudicator a series of disputes, the pertinent ones being:

"1. A declaration that no valid Notice to Withhold had been given by Mr Beckingham in respect of either certificate no 5 or certificate no 6 or both.

2. To the extent that Mr Beckingham intends to rely upon it, a declaration that Clause 6 of the purported Agreement between Westminster and Mr Beckingham is invalid. Alternatively that the whole agreement of 20th February 2003 is invalid as it was entered into in circumstances of economic duress or that it lacked consideration or for such other reasons as the adjudicator shall decide.

21. The adjudicator decided that clause 6 was entered into by the parties, thereby rejecting Westminster's first ground of reply to Mr Beckingham's defence relying on clause 6 that clause 6 had been added after the agreement had been signed by Mr Beckingham so that it had no contractual force. However, he then **decided** that the agreement constituted a variation to the original contract but that it was not effective because it was not supported by consideration because there was *"no clear and practical commercial benefit to Westminster"*, applying the test for consideration in circumstances where the contract appeared to compromise disputes arising out of an earlier contract adumbrated in **Williams v Roffey Brothers & Nicholls (Contractors) Ltd** [1991] 1 QB 1. The arbitrator then decided that no notices to withhold payment were given by Mr Beckingham and that service of valid notices to withhold were conditions precedent to nonpayment of certified sums given the terms of clause

4.2.3(b) of the IFC84 Form. In consequence, the sums certified in interim certificates nos 5 and 6 were both due and payable.

22. Mr Beckingham now takes a number of grounds of objection to the validity of that decision. First and foremost is a jurisdictional objection that the capping agreement amounted to a compromise of underlying disputes arising under the contract and that that agreement put all disputes arising under the agreement to rest. The subsequent claim for sums in excess of the cap did not give rise to a dispute under the contract but was, at best, a dispute arising out of the separate capping agreement which had no adjudication clause incorporated into it. This argument relied heavily on the decision of Judge LLoyd QC in **Shepherd Construction Ltd v Mecright Ltd** [2000] BLR 489, especially at pages 493 - 494.

23. In that case, the parties to subcontract in the DOM/1. Form. were in dispute as to the value of the work that had been performed. This led to a settlement agreement which provided that its terms were: "in full and final settlement of all our claims under the above contract but without prejudice to our outstanding obligations". The contractor subsequently served a notice to adjudicate in relation to disputes which had been settled by the settlement agreement and then claimed in the adjudication that the settlement agreement was not effective since it had been entered into under circumstances of economic duress. Judge LLoyd was then asked to grant a declaration that the adjudicator had no jurisdiction to` decide the dispute referred to him, namely whether the underlying claim settled by the settlement agreement could be pursued and whether the settlement agreement was unenforceable

24. The adjudication in that case, as in this one, had been established pursuant to a provision for adjudication allowing a reference for any dispute arising "under the contract". Judge LLoyd decided that the settlement agreement stood alone, that it compromised all disputes then in existence including the substantive dispute referred to the adjudicator and that the adjudicator had no jurisdiction to decide whether the settlement agreement was unenforceable since it contained no adjudication clause and the dispute as to its enforceability did not arise under the underlying contract. He therefore granted the declaration sought.

25. That case is, however, not relevant to this one. First and foremost, the agreement of 20 February 2003 was not a settlement agreement settling all disputes or a stand alone agreement. It was clearly and clearly intended to be a variation agreement varying the terms of the underlying contract. It is to be read with and as part of that underlying contract. Furthermore, it does not settle all disputes, it merely provides a new contract sum or cap, albeit that that cap is subject to unspecified deductions. Thus, a dispute as to whether it is enforceable is one arising under the contract since its terms form part of, and are to be read with, the underlying contract.

26. It follows that Mr Beckingham's contention that there is no dispute that has arisen under the contract is untenable. There is a dispute as to whether the sums certified in interim certificates 5 and 6 are payable. These certificates are, on the face of them, valid and there validity was not challenged in the adjudication. Instead, Mr Beckingham contended that the sums certified by them were not due because of the capping clause agreed as forming part of the varied contract. To this contention, Westminster contended that the variation agreement was not enforceable because it was not supported by consideration. All these contentions and disputes were clearly referred to, and decided by, the adjudicator.

27. Since the adjudicator decided that the variation agreement was not enforceable, it followed that Mr Beckingham had no surviving grounds for resisting payment since he had not served valid Notices to Withhold payment. It is not contended that the adjudicator's decision was wrong in law or that, this being a contractual adjudication, an. erroneous decision taken within jurisdiction should not be enforced. Indeed, given that the adjudicator applied the correct test to *'determine whether'* the variation agreement was supported by consideration, his decision would not be impeachable for error of law.

28. It follows that the adjudicator's decision was made within his jurisdiction and that Mr Beckingham's challenge on those grounds fails.

4. Unfair Terms in **Consumer Contracts** Regulations

29. Mr Beckingham contended that the adjudication clause in the contract was not binding on him since it was unfair within the meaning of the Unfair Terms in Consumer Contracts Regulations 1999. These are applicable to this contract since Mr Beckingham is a consumer, that is a *"natural person who, in [contracts concluded between a seller or supplier and a consumer] is acting outside his trade, business or profession"*. The Regulations provide that if a term is unfair it is not binding on the consumer. The adjudication term would be unfair and hence not binding on Mr Beckingham if:
    1. It was not individually negotiated; and
    2. It is contrary to the requirement of good faith; and
    3. It causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of Mr Beckingham as a consumer; and
    4. It is unfair taking into account the nature of the goods or services for which the contract was concluded, by referring at the time of the conclusion of the contract, to all the circumstances attending the conclusion of the contract and all the other terms of the contract.

    The Regulations provide an indicative and non-exhaustive list of the terms which may be regarded as unfair. The relevant terms include those which exclude or hinder the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively- to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing a burden of proof which should lie with another party to the contract.

30. In considering these provisions, it is not correct to take account of the provision in the contract requiring the consumer to serve a Withholding Notice in due time if he wishes to set off or counterclaim against certified sums. That provision is one which constitutes a separate exclusion of legal rights but it affects all types of proceedings including legal proceedings n court. It is, therefore a separate and distinct potentially unfair term but, in this case, that term is not relied on as giving grounds for contending that the adjudication clause is not binding on Mr Beckingham.

31. I was referred to a number of authorities of which the most helpful were **Director General of Fair Trading v** First **National Bank** plc [2002] 1 AC 481, HL, particularly the speech of Lord Bingham at. page 494, and **Lovell Projects Ltd** v **Legg and Carver** [2003] BLR 452, Judge Moseley QC, particularly at paragraphs 24 - 31. From these authorities, I derive the following guidance as applicable to the facts of this case:
    1. The terms in this case were not individually negotiated but were couched in plain and intelligible language.
    2. The terms of the contract were decided upon by Mr Beckingham's agent, who are chartered surveyors, and Mr Beckingham had,, or had available to him, competent and objective advice as to the existence and effect of the adjudication clause before he proffered and entered into the contract. Westminster did no more than accept the contract terms offered and had no reasonable need to draw to Mr Beckingham's attention the potential' pitfalls to be found in the adjudication clause and in its operation during the course of the work. The clause did not, therefore contravene the requirement of good faith (see especially the speech of Lord Bingham in the **Director General of Fair Trading** case at page 494).
    3. The clause did not, if considered at the time of making the contract, constitute a significant imbalance as to Mr Beckingham's rights (see especially the judgment of Judge Moseley at paragraphs 28 - 29).
    4. The clause does not significantly exclude or hinder the consumer's right to take legal action or other legal remedy or restrict the evidence available to him (see especially the judgment of Judge Moseley at paragraph 27).

32. For all these reasons, I conclude that the adjudication clause, on the facts of this case, is not unfair and is binding on Mr Beckingham.

5. Conclusion

33. The decision of the adjudicator is binding on Mr Beckingham and there must be judgment for Westminster in the sum claimed.

Miss Gaynor Chambers appeared for the claimant instructed by Nelsons, Sterne House, Lodge Lane, Derby, DE1 3WD
Mr Simon Hughes appeared for the defendant instructed by Humpries Kirk, Ling Road, Poole, BH12 4NZ