JUDGMENT : JUDGE WILCOX: Case No: HT-08-0-58. TCC. 21st April 2008

1. This is yet another application under Part 24 to enforce an adjudicator's award made to T & T Fabrications (a firm). T & T Fabrications, the firm, also have a relationship with another part of their business, a limited company with a completely separate legal personality called T & T Fabrications Limited. Doubtless that incorporation of those parts of the businesses that were suitable to confer the benefits of the protection of corporate law, and discuss advantages fiscally important to both the firm and the company, and which were well known and demarcated between there. It is clear from the demarcation agreement before and during their relationship.

2. The chronology of events is important. It is clear that there was a contract between the second Claimant, the firm, and Hubbard Architectural Metalwork Limited, the Defendant. That related to the receipt and installation of a number of atrium bridges, staircases and other metalwork at the Victoria Docks development in London. The contract arose out of negotiations in the period October 2002 to July 2003. The dispute that gave rise to these proceedings, and to the reference to adjudication, relates to three invoices issued by the second Claimant which were disputed by the Defendant.

3. The contract was concluded as long ago as 2003. The notice of adjudication was on 12th November 2007. It was in the name of the firm. One year and a month previous to this, in September 2006, the assets and liabilities of the second Claimant were assigned to the first Claimant, including any rights to sue. On 12th November 2007 the firm could not be the beneficiary of any award made by the adjudicator. The right to pursue any remedy or enforce any remedy under the contract had been assigned to the first Claimant a considerable time before.

4. This is a small family company. It is a small family firm. It is argued by Counsel for the Defendant that at the time of the purported reference, there was no basis upon which the firm could pursue an adjudication, assuming of course that there was an adjudication scheme that was in force and giving rise to a reference.

5. It seems to me, having read the statement of Mrs Felgate, a director of the company and partner in the firm that nobody was in any doubt as to the reality as to who was to pursue the reference. The firm on any basis, but particularly the documentary evidence emanating from the Defendant, was the relevant party to the contract, and the relation between the firm and the company in these circumstances were a matter essentially for the firm and the company. Had the company formally given leave to the proceedings to be pursued, then I have no doubt that this argument would not arise. For them formally to give permission in a situation such as this is not necessary, because it is clear to me beyond doubt that the company had given the necessary authority for the proceedings to be brought, and would be the recipients of any benefit and liability that flowed from such a reference.

6. The real issue in this case is whether there was, in the contract between the firm, that is the second Claimant, and the Defendant, an adjudication scheme statutorily implied under the Housing Grants Act. If there was not, then the adjudicator had no jurisdiction. It *[was] sic* unlike for instance JCT(?) contracts where there is a contractual right to adjudication. The claimant must establish that there is to be implied, if appropriate, the statutory right to adjudication and scheme.

7. In order for there to be such a statutorily implied scheme, the contract must be Section 107 compliant. The authority in relation to what constitutes such compliance is clear. It is to be found in the Court of Appeal decision ***RJT Consulting Engineers Limited v DM Engineering (Northern Ireland) Limited*** [2002] 1 WLR 2344. The majority decision *[is] sic* to be found in the judgment of Lord Justice Ward. It is that all of the terms of the agreement should be reduced into writing and not merely the material terms.

8. The Defendants case here is that there were two terms that were not reduced into writing. They in fact related to the provision of drawings, and the duty in relation to such drawings, and secondly, as to the timing of the works and how they fitted into the main scheme under the principal contract. As to those terms Miss McCafferty submits that they rely in this Court upon parole assertions by the witnesses, that were not recorded in writing. They are denied by the Claimant in sworn written evidence. Can *[they] sic* be characterised as fanciful and obstructive, matters brought into being in order to frustrate firstly the adjudication proceedings and secondly this enforcement attempt?

9. In an application such as this, the Court is not in a position to adjudicate upon the weight of evidence and the credit of witnesses, save where on the papers matters may appear so manifestly absurd or wholly unlikely, such as when contradicted by agreed contemporaneous documentation. That is not the position in this case. The evidence, on which the terms contended for go to scope, quality and essential programming. The evidence is that of the sworn evidence of the Defendant's contracts director. They are consistent with the account of affairs that he put forward at a very early stage, and are corroborated by an independent witness who speaks as to the meeting when it is said that these essential terms were agreed.

10. The contrary evidence is that of Mrs Felgate, who I am sure honestly believed the position to be true, that there was no such agreement. She was not party to one of the meetings and therefore was not in the best position to express herself.

11. In short, what appears before me is a real dispute as to the agreement of those terms that are alleged by the Defendant. This *[these] sic* are matters which I cannot determine, and should not attempt to do so, having regard to the evidence that is before me on the papers.

12. If such evidence is credible, then clearly there are two material terms that were agreed that were not reduced to writing, and are not evidenced in writing for the purposes of Section 107, whichever section or sub section is relied upon within that section.

13. I am therefore constrained to find that there is an arguable case as to the question of jurisdiction because it is arguable that the contract was not Section 107 compliant, and therefore that there was no adjudication scheme implied into the contract between the firm, second Claimant that is, and the Defendant.

14. I make this comment about the case before I part with it. The work took place such a long time ago, and yet in 2007 the Claimant still pursues a remedy which is provisional, albeit final through its limited purposes. It is brought in the High Court rather than in the County Court, where the regime of costs tends to be less, where there are Judges experienced in the TCC list in dealing with these matters. I ask myself, what on earth is this doing here so late in the day, and when I look to the sums in dispute which are modest, and consists *[consider] sic* the time taken to pursue this matter, and the costs, it seem to me to be out of all proportion. Essentially these were final dispute matters that could have been dealt with as such, years ago, when recollections were fresh, and before claims consultants got involved,

MISS LYNNE McCAFFERTY (instructed by Messrs Davies Arnold Cooper) appeared on behalf of the Claimants
MR THOMAS LAZUR (instructed by Messrs Nicholsons) appeared on behalf of the Defendant