JUDGMENT : HIS HONOUR JUDGE McCAHILL QC (*Sitting as a High Court Judge*), High Court of Justice, QBD, Birmingham T&C Court. Case No: 6BM50020. 25th April 2006.

Introduction

1. This is an application by Westdawn Refurbishments Limited ("WRL") for summary judgment, pursuant to CPR 24, for the sum of £14,480.30, including interest, together with the adjudicator's fees and expenses, awarded by Mr Matthew Baston, a Fellow of the Royal Institute of Chartered Surveyors and a Fellow of the Chartered Institute of Arbitrators, in a decision made on 21 February 2006. He was appointed as an adjudicator under the Housing Grants and Regeneration Act 1996 ("The 1996 Act").

2. The claim, which was the subject of the adjudicator's decision, was for the balance of monies allegedly due under a construction contract made between Westdawn Properties Limited ("WPL") and the defendant Roselodge Limited, on or around 27 January 2004, whereby WPL agreed to carry out refurbishment works at Roselodge's property at Flat 445, Summerwood Road, Isleworth ("the Summerwood contract").

3. Roselodge resists the application on the ground that the adjudicator lacked jurisdiction to entertain the dispute. More particularly the defendant contends that (1) the contract is not a contract in writing, or evidenced in writing, for the purposes of Section 107 of the 1996 Act and/or (2) WRL was not a party to any construction contract, for the purposes of Section 108 of the 1996 Act.

4. Two background matters should, therefore, now be explained. WPL was the original contracting party with Roselodge. It went into creditors' voluntary liquidation on 9 August 2004. It is alleged that, on 25 May 2004, WPL assigned the benefit of its contracts, including this one, to the current claimant, WRL. It is an issue between the parties whether, in the events that transpired, that assignment was merely an assignment of the benefit of the contracts, or whether it constituted novation, whereby WRL was substituted as the contracting party for WPL.

5. The statutory right to adjudication under the 1996 Act provides an important practical right to obtain a quick and enforceable interim decision under the rubric of "***Pay now, argue later***". This is a particularly useful and necessary scheme where a contractor, for example, required to complete a high volume of work to many properties within a relatively short space of time, claims for unpaid monies due under the contract. It is vital to cash flow.

6. However, against that, one of the important restrictions under the 1996 Act is that Part 2 of it, containing the adjudication provisions, applies only when the construction contract is in writing or evidenced in writing. This is because the adjudicator, who is usually required to reach his decision within 28 days of a referral to him of the dispute, has to start with some certainty as to what the terms of the contract are. It is, therefore, necessary to remind myself of some general observations about this scheme. In particular, I remind myself of what Lord Justice May indicated and confirmed in the case of ***Pegram Shopfitters Limited v Tally Weijl (UK) Limited*** [2003] EWCA Civil 1750 [2004 1WLR 2082], para.12. He said that it did not follow from the policy of the 1996 Act of "***Pay now, argue later***", that even in the short term the adjudicator's decision binds the parties, if a respectable case has been made out for disputing the adjudicator's jurisdiction.

The Scheme of The 1996 Act

7. What then are the scheme and the provisions of the Act? The definition of a construction contract is to be found in Section 104. There is no doubt that this was a construction contract. There is an amplification of a construction operation in Section 105 which has no material bearing on the issues in this case. Section 106, with a heading ***"Provisions not applicable to a contract with residential occupier"***, provided that Part 2 of the 1996 Act does not apply to a construction contract with a residential occupier. Then it went on to provide that:

   "*…a construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.*"

8. Again, that has no relevance to the actual case with which I am concerned, but it is an interesting provision in the context of whether an assignee of a party to a contract has the right to invoke the adjudication process under the 1996 Act. The Act, in Section 106, does seem to refer to some personal characteristics of a party to the contract, in this case an occupier, where it refers to "*Operations on a dwelling which one of the parties to the contract occupies or intends to occupy as his residence.*" This is a reference to the present tense and to the future tense, but not a reference to the past tense – "*Has occupied*".

9. Section 107 is the critical provision for the purposes of this case entitled ***"Provisions applicable only to agreements in writing"***. I quote from that section:

   "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) 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 is made by exchange of communications in writing, or
   (c) if the agreement is evidenced in writing.

   Where the parties agree otherwise and in writing by reference to terms which are in writing, they make an agreement in writing."

10. Section 107(4) deals with authority and whether what is said in adjudication proceedings or submissions is or is not capable of amounting to the requisite agreement in writing.

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11. Section 108 of the Act, entitled ***"Right to refer disputes to adjudication"***, sets out the mechanism for the adjudication of a dispute between the parties to a construction contract.

12. For the sake of completeness, Sections 109, 110 and 111 include terms, if they are absent from the contract, dealing with a party's right to stage payments, the dates of payments, and a mechanism for giving notice of intention to withhold payment.

13. Section 114 creates a Scheme for Construction Contracts, and this is set out in Statutory Instrument 1998, number 649. This sets out the scheme and procedures to be followed in the adjudication process and also sets out some implied terms which can be used to fill gaps left by the absence of express agreement between the parties. Those provisions are generally of relevance to this case, but I mention specifically, under paragraph 12 ***"Interpretation"***, the following:

 "In this part of the Scheme for Construction Contracts –
 'claim by the payee' means a written notice given by the party carrying out work under a construction contract to the other party specifying the amount of any payment or payments which he considers to be due and the basis on which it is, or they are calculated."

14. That is quoted by me because it provides some authority or support for the proposition that there is a definitive fixing in time of who the parties to the contract are by referring to the "payee" as meaning the person carrying out the work under a construction contract. If one looks at that definition paragraph for one party to the contract, and, for example, to the exclusion of the residential occupier, one can see some support for the defendant's contention that assignees are outside the ambit of the adjudication process which is confined solely, it is submitted on the defendant's behalf, to the initial parties to the written construction agreement.

The Jurisdictional Issues before the Adjudicator

15. The claimant has referred this matter twice to adjudication. The first adjudicator did not publish his adjudication. It is not necessary to go into reasons why. The second adjudicator, whose adjudication is the subject matter of these proceedings, did, of course, publish his adjudication. The defendant played no active part in the merits of that adjudication, even though they maintained that they had cross-claims of substance relating to delay and defective workmanship, which were not put before the adjudicator for decision.

16. However, they did take the jurisdictional point and sought to argue 2 points in writing before the adjudicator. The first was that the second adjudication was in some respect an abuse of process because of the earlier ineffective adjudication. The adjudicator dismissed that on the basis there had been no earlier adjudication.

17. The second argument was that the adjudicator had no jurisdiction, because there was no agreement in or evidenced by writing, as required by the 1996 Act. The adjudicator took the robust view that he had jurisdiction, and explained why in his adjudication. However, I have no doubt that he was heavily influenced, as he would have to be, by the terms of the reference to him. The reference by the claimant said, effectively, that there had been no substantial oral discussions or agreements between the parties and, therefore, the void which was created by the absence of written agreement in material respects could be filled by applying terms under the Supply of Goods and Services Act 1982, or by implying terms under the 1996 Act, or the Scheme itself, set out in S.I. 1998/649.

Additional Grounds on Jurisdiction

18. Today, the defendant raised before me two additional arguments on jurisdiction, one foreshadowed in the skeleton argument, the other as the clock was about to strike 12. The two additional points were as follows: The argument in the skeleton argument was that the reference to the arbitrator was flawed right from the outset, because the claimant was not an original party or indeed a party to the written construction contract. The claimant, WRL, is an assignee and, submits the defendant, the party to the contract was WPL.

19. The second matter, "the new arrival", relied upon the fact that in the Scheme itself, under S.I.1998/649, paragraph 1(2) in Part 1 of the Schedule provided that:

 "Notice of adjudication shall be given to every other party to the contract."

20. It was submitted on behalf of the defendant that since there was an assignment here and no novation on their case, and looking at the face of the document itself, there were at least two other parties. One was the assignee of the contract or of its benefit, if it was a party to the contract. The other was the original contracting party with whom the non-assignable burden of the contract remained, namely WPL, in creditors voluntary liquidation as at 9 August 2004 and now a company which has been struck off the register of companies and dissolved. That latter point is a very, very recent one, and one which the defendant submits also flaws the reference procedurally from the start by the failure to serve WPL.

The Law

21. The law in this area has undergone considerable judicial scrutiny. It may well be that there has been a divergence between the intentions of the legislation, and the purposes which they sought to achieve by this pragmatic and useful legislation, on the one hand, and the interpretation which it has received on the other. It is not for me to comment, but merely to follow the authorities which bind me.

22. The relevant law under the 1996 Act has been most helpfully submitted by counsel for the claimant in five propositions, which he sets out at paragraph 8 in his skeleton argument. I am very grateful to Mr Pimlott for it. The five propositions which seem to be accepted by both counsel as correct statements of the law are as follows:

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1) An agreement is only evidenced in writing for the purposes of Section 107 (2), (3) and (4) if all the express terms of that agreement are recorded in writing. It is not sufficient to show that all terms material to the issues under adjudication have been recorded in writing.

   Trustees of the Strathfield Saye Estate v AHL Construction Limited. [2004] EWHC 3286

2) Section 107 is not to be construed as excluding from the jurisdiction of the adjudicator an agreement solely because it contains implied terms. ***Connex South Eastern Limited v MJ Building Services*** [2004] BLR 333.

3) Section 107 is not to be construed as excluding [a contract] from the jurisdiction of the adjudicator solely because it fails to record trivial or minor details. An item may be considered trivial or minor in this context if, considered objectively, it is not a material term of the contract and therefore falls within the category of items which an adjudicator should deal with robustly.

   RJT Consulting Engineers Limited v DM Engineering (Northern Ireland) Limited [2002] 1WLR 2344.

4) A written construction contract which fulfils the requirements of Section 107 at the time the contract is made, will be taken outside the ambit of that section if it is subsequently varied, and that variation is fundamental to the contract and is made orally and not evidenced in writing.

   Carrillion Construction Limited v Devonport Royal Dockyard [2003] BLR 79

   Where, however, the subsequent oral variation is trivial (in the sense described in proposition (3) above), the agreement will not be taken outside the ambit of Section 107.

5) There is no requirement in the Construction Act 1996 as to the *time* the agreement in writing needs to be evidenced, nor is there a requirement that the evidence needs to have been *communicated* by one party to the other.

23. There is no direct authority on that last point in proposition 4, but, as indicated in the skeleton argument, His Honour Judge Richard Seymour QC in ***Dean and Dyball Construction Limited v Kenneth Grubb*** [2003] EWHC 2465 indicated it would be a strange result if that proposition were untrue.

24. As far as the test for summary judgment is concerned I remind myself of CPR 24.2:

"The Court may give summary judgment against the claimant or defendant on the whole of a claim or on a particular issue if -
(a) it considers that -
(i) that claimant has no real prospect of succeeding on the claim or issue; or
(ii) that defendant has no real prospect of successfully defending the claim or issue; and
(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

25. In that regard, I also remind myself of the notes from the White Book (2006) at 24.2.3:

"In order to defeat the application for summary judgment, it is sufficient for the respondent to show some prospect, that is some chance of success. That prospect must be real, that is the court will disregard prospects which are false, fanciful or imaginary. The inclusion of the word "Real" means that the respondent has to have a case which is better than merely arguable … the respondent is not required to show that his case will probably succeed at trial. A case may be held to have a real prospect of success, even if it is improbable … The hearing of an application for a summary judgment is not a summary trial. The court at the summary judgment application will consider the merits of the respondent's case to the extent necessary to determine whether it has sufficient merit to proceed to trial."

26. I am helpfully reminded by Mr Pimlott of observations made by Lord Justice Chadwick in the case of ***Carrillion Construction v Devonport Royal Dockyard*** [2005] EWCA Civ 1358 in which he said at paragraph 85:

"The courts should give no encouragement to the approach adopted by DML in the present case; which (contrary to DML's outline submissions, to which we have referred in paragraph 66 of this judgment) may, indeed, aptly be described as "simply scrabbling around to find some argument, however tenuous, to resist payment".

The Factual Background

27. The relationship between the parties began when the parties first met in or around May 2003. In or about June 2003 Roselodge, who carried on the business of, amongst other things, buying properties and redeveloping them before renting them to tenants at a profit, engaged WPL, the insolvent company. WPL's business was that of refurbishing properties. WPL carried out works of refurbishment and repair at numerous properties owned by Roselodge, over the ensuing 12 months, amounting to some £567,434.62, inclusive of VAT. The Summerwood contract, which was one of those properties, accounts for £11,456.25 or thereabouts of that sum.

28. It was important to Roselodge that there should be a consistent finish across all of its properties. That ranged from the colour and type of bathroom and kitchen to other matters to which I shall turn when I come to deal with scope of the works. Certainly, there was a great deal of similarity in the finished product amongst all the properties which were refurbished by WPL for Roselodge.

29. The negotiations for the Summerwood contract started in or about October 2003. The parties had been discussing contracts generally since June 2003. I was referred to a letter dated 5 June 2003, in which the early understanding between the parties on the first three contracts was set out. By October 2003, WPL had been engaged in carrying out refurbishment works to Roselodge's properties for nearly four months. On 12 October

2003, WPL submitted a written quotation which set out the scope of the Summerwood contract at that stage. That is set out page 110 in the bundle before me.

30. The contract price for some 42 separate items was £11,456.25, inclusive of VAT. Roselodge accepted the terms of that quotation by its purchase order set out at page 112 of the bundle, dated 27 January 2004. The work was then done, although precisely when it was carried out is unknown. WPL raised its invoice for payment in respect of the Summerwood contract on 19 May 2004. That is set out at page 114 in the trial bundle.

31. Against that background, it can be seen that the Summerwood contract was a relatively small and straightforward building contract. The terms of that contract were not, as will become apparent, for the most part in dispute. As I have indicated, however, Roselodge have raised jurisdictional challenges to the adjudication award, which these proceedings seek to enforce, on the ground that some of the terms of that contract are not evidenced in writing, even though the defendant has maintained that it has a substantive defence and cross-claim based on delay and defective workmanship.

The Central Issue and its Analysis

32. I, therefore, turn to what is the heart of this case. Was the construction contract sufficiently written to give the adjudicator the necessary jurisdiction to make the award in this case?

33. I have already mentioned that there was a reference prepared on behalf of the claimant, not by its current solicitors, but by its quantity surveyors, Castons. That alleged matters which are significantly at odds with the material before me today. It indicated that there were no, or no substantial, or no material, oral agreements between the parties, so that in certain areas there was a vacuum to be filled by statutorily implied terms. The defendant has forcefully argued, both in the skeleton argument and in the submissions before me today, that this was an erroneous view. As a result, the adjudicator was wrongly encouraged to embark upon, not only his decision, but his own consideration of whether he had jurisdiction. This is because, contrary to what the adjudicator was told, and contrary to the material upon which he based his decision, there were, it is now admitted, orally agreed terms, which have not been evidenced or contained in writing, within the meaning of Section 107 of the 1996 Act.

Areas of alleged non compliance with Section 107

34. The following three matters are matters which, it is now agreed on the basis of the claimant's own witness, Mr Ramage, were orally discussed and were orally agreed. The first of those three matters was: What was the event which determined when a flat was completed and which triggered the right to raise an invoice? It is agreed between the parties that there was an oral agreement that the trigger event which marked completion was the return of the keys to the flat and the issuing of the relevant electrical and gas certificates. When that was done the job, as it were, was completed. The right to raise an invoice was triggered. That trigger point was defined and was agreed orally. It was, in my judgment, a material term of the contract and it was not set out in, nor was it evidenced by any writing.

35. The second matter on which there was an express verbal agreement which was not reduced to or evidenced by writing, was this: what was the time for payment of invoices which were raised by the claimant? Mr Ramage agreed in his witness statement that it would be 30 days following the invoice. The fact that invoices were not always paid within the period is, in my judgment, of secondary importance. That goes to breach. What is important is that there was an express oral agreement that the defendant would pay invoices 30 days following the rendering of the invoice. That agreed term is not contained in the agreement in writing, nor is it evidenced by writing. I find that too to be a material and significant term objectively defined.

36. The third matter relates to, but is separate from, the second matter. In or about December 2003, it was agreed between the parties, orally and expressly, that the payment arrangements would be changed and varied from 30 days after invoice to a 25 per cent pre-payment of the contract sum with the purchase order. That, in my judgment, was also a material and significant term of the contract objectively defined. All three matters were agreed orally and expressly, as Mr Ramage accepts in his witness statement.

37. I regard those as material terms, objectively defined, because they are terms as to payment. They are also material because they provide the certainty as to time for payment and, in particular, when the obligation to pay arose. This is important for the purposes of any statutory demand.

38. Accordingly, I conclude that there were express terms as to payment and to completion which were agreed. In my judgment, the Scheme under the Statutory Instrument and the statutory implied terms, if relevant, do not apply because there was no room for any implied terms to operate. The area which the adjudicator sought to fill with implied terms was already occupied by expressly agreed oral terms which were not recorded in writing or evidenced in writing. They fell foul of the requirements of Section 107.

Triable issue

39. I now turn to how much time was contractually allowed to WPL to fit out each flat. The defendant's case is that it had been expressly agreed that each flat was to be completed within 14 days of work starting and that time was of the essence. The claimant says there was no such agreement and relies upon a letter dated 5 June 2003. This was right at the beginning of the arrangement between the parties, where the first three properties were being discussed, not the contract with which I am concerned. The claimant makes the point forcefully and quite properly that the terms of that letter are really somewhat inconsistent with a 14-day/time being of the essence

term, particularly since the defendant contends that the oral agreement was made very shortly before or after the time of that letter.

40. I remind myself that this is an application for summary judgment and that that conflict really cannot be resolved on paper. I cannot say that the defendant on that issue has no real prospect of success. There is a really arguable case of an express material term as to time for completion, which was neither evidenced nor contained in writing, which would deny jurisdiction to the adjudicator. I make it quite plain that is an issue in respect of which there is a triable issue. It is not one that can be definitively resolved today.

Specification – Robust Approach

41. I then move on to the other remaining issue of specification. Here, too, the question is whether or not all the material terms of the specification for the contract with which I am concerned were in or were evidenced in writing. I have had my attention drawn to the detailed quotation to which I have already referred, and to the very brief acceptance of it by the defendant in its purchase order. I have also heard arguments about the extent to which a number of matters are only briefly referred to with minimum detail in the quotation, which really required greater amplification in terms of colour, style, make of boiler and the particular location of rose pendants.

42. It seems to me this is the sort of area where the robust approach, referred to by judges in the authorities I have mentioned, would or should come into play. Suffice it to say that, having considered the contractual documentation (including the quotation, the acceptance and the invoice) in its factual matrix, I am perfectly satisfied that all material terms relating to specification were sufficiently contained in or evidenced by writing to give jurisdiction. This permitted the adjudicator to take a robust view and to use the powers conferred on him to deal with minor matters.

43. Therefore, I make it plain that, if it were that matter alone, I would reject the defendant's submissions on the specification point and I would accept the claimant's submissions on that matter.

Conclusion on Section 107 of the 1996 Act

44. I have said enough to dispose of the case. My findings on the first three terms about (1) the trigger point for the raising of the invoice, (2) the time for payment, and (3) the variation are themselves fatal to the claim. They justify my acceptance of the submissions made on behalf of the defendant that the adjudicator had no jurisdiction and the claim, therefore, should be struck out. I will wait to hear from counsel for the claimant before embodying that in the order, but provisionally that seems to be the case. That would render it unnecessary to go on and give directions for trial in relation to the matter of time for completion where I have indicated there is a triable issue.

Effect of Assignment

45. It would be tempting, therefore, just to leave it at that and not to express any view on the interesting argument about whether an assignee can rely upon the adjudication provisions of the 1996 Act.

46. There are three aspects to the defendant's submissions on the issue of assignment. The first is whether there was ever an assignment before WPL went into liquidation. I have the evidence of Mr Ramage. He says it was signed on 24 May 2004. I see no reason to doubt that in the light of anything which has been placed before me which, at its highest, is suspicion. There may be many matters about the role of the liquidator of WPL, and whether he knows about the assignment. But it does not seem to me that it is the responsibility of the court at this stage to go looking for issues which are really speculation at the most, and which could have been dealt with by evidence if it was thought to be appropriate to place them before me. Suffice it to say that if it were necessary for me to decide the question whether there was an assignment in May 2004, I would have concluded that the defendant had no real prospect of success, on the evidence before me, of undermining Mr Ramage's evidence that it did take place on 24 May 2004. It was not the strongest of the points raised on behalf of the defendant.

47. I turn to the two other aspects which were not raised on the jurisdiction issue before the adjudicator, but which were raised before me. The first is the bald question: Is an assignee, from an original party to a construction contract, entitled to invoke the adjudication process? This really is too important an issue to be decided unnecessarily and without fuller citation of authority than has been possible in this case. It is not wise for me to say anything which may be a hostage to fortune, particularly since I know in May 2006 there is to be another application between these parties in which this very issue of assignment is, or may be, a core issue.

48. Suffice it for me to say that I fully understand how denying of an assignee access to the adjudication process could undermine this Act. It is said it would drive a coach and horses right through it because assignment is not an uncommon activity in this area.

49. As against that, I can see arguments of substance which, however impracticable the consequence, may have to take precedence. I have already referred to some of them in the course of this now lengthy judgment. They are, for example, the exclusion of a residential occupier's contract from these provisions. It is not the exclusion of that particular contract which is important, but the way in which it is defined which uses the present and future tense, and a personal characteristic, namely the occupier of a dwelling. There is also the definition of the "payee", in paragraph 12 of the Statutory Instrument, to which I have referred.

50. The policy of the Act does require a swift remedy granted by someone who can, with the relevant expertise, look at some documents and make a decision. "Pay now and argue later" is the by-word that is used for these cases. But if an assignee is to be allowed to invoke this procedure one can see how the waters could be well and truly

muddied and how issues could arise which would be far more complicated than the summary procedure may have originally intended. Moreover, there is a possible inequality in the remedies which would be available, were an assignee to be allowed to invoke this procedure. An assignee takes subject, of course, to prior equities. But that would only be sufficient to eliminate the value of a claim. It would not necessarily allow a counterclaim in excess of the monetary claim.

51. These are matters for another day. I am fully alive to the commercial problems to which a decision that an assignee is unable to invoke this procedure would give rise. Nevertheless, it is a matter of statutory interpretation. Section 136 of the Law of Property Act 1925, which gives all the legal remedies to a legal assignee, cannot be definitive in the construction in a statue passed some 70 years later, where the term of art used is "a party to a construction contract". These words themselves seem to refer to the original offer and acceptance. The parties involved at the outset chose to be in a contractual relationship. They were the parties to the construction contract. I say that, not by way of indication of the correct answer, but out of deference to the arguments which have been deployed before me. Suffice it to say that the arguments which would deny an assignee a remedy are not insubstantial.

52. If it were necessary for me to come to a final decision on this issue, I would allow the parties to come back and reargue that particular point.

Service of Notice

53. The last aspect which is raised is that the adjudicator has no jurisdiction because, irrespective of whether or not WRL was, or became, a party to the contract, WPL always was. Since WPL struck off and dissolved, it was not sent a notice relating to this adjudication. It is said therefore that the whole process is flawed and the adjudicator had no jurisdiction. It would be theoretically possible to restore the company to the register and then to serve notice. That has not been done in this case.

54. I do not regard that as fatal in this case. If the matter were to rest on that point alone, it would not have resulted in my dismissing the claim. It simply would have resulted in my saying that one of the issues which has to be tried in this case is whether there was, in fact, a novation, as opposed to an assignment of the benefit. When that question is resolved it will be known who were the parties to the contract and it will then be possible to revisit this procedural point and consider it in the light of the ascertained facts.

Conclusion

55. Accordingly, the adjudicator did not have jurisdiction. Therefore, the claim to enforce his award is fatally flawed and the claim fails.

MR PIMLOTT appeared on behalf of the CLAIMANT
MR STONE appeared on behalf of the DEFENDANT

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