ADJUDICATION CASE SUMMARIES Y

LAST UPDATED 30th APRIL 2006

Yarm Road Ltd v Costain Ltd [2001] EWHC HT 01/288 (TCC)

Road widening works to Junctions 18 to 19 of the M5 motorway were undertaken by the Costain as main contractor to the Secretary of State for Transport pursuant to a main contract, concluded in about June 1995, on ICE fifth edition standard terms. Costain sub-contracted part of the works to Cleveland Structural Engineering Limited. The sub-contract was dated 7th August 1995 and incorporated the FCEC form of sub-contract 1984, the blue form, with amendments. In November 1996 Cleveland changed its name to Redpath Dorman Long Ltd. By a novation agreement dated 14th August 1998, the sub-contract was novated in favour of Yarm Road. In contemplation of the novation agreement, Costain and Redpath concluded a supplemental agreement on 10th August 1998, the effect of which was to vary the provisions for valuation and for reimbursement of the sub-contractor.

A dispute arose between the parties. Yarm Road wished to refer the dispute to adjudication and asks in this action for a declaration that the contract is a construction contract subject to the HGCRA. The defendants assert that the contract predates the HGCRA or that otherwise, it would result in a nonsense for to apply the withholding provisions of the HGCRA to events that occurred before the Act came into being and hence the HGCRA should not apply. However, Costain conceded that this was more of a technical defence than a practical reality in the circumstances of the case.

Havery J referred to the decision of Thornton J in ***Atlas Ceiling v Crowngate*** *2000 CILL 1639*, which acknowledged that some anomalies might occur by applying the HGCRA in similar circumstances but nonetheless went on to do so. ***Alexander v Mercouris*** *[1979] 1 WLR 1270* referred to. The court concluded that the contract was concluded post HGCRA and that the adjudication procedure applied to the contract.

His Honour Judge Richard Havery. TCC. 30th July 2001.

Yorkshire Water Services Ltd v Taylor Woodrow Construction Northern Ltd [2002] EWHC 2140 (TCC)

Contrary to the titles in the citation, the parties to this Part 11 application were in fact Elga and Biwater, both being Part 20 defendants and sub-sub-contractors and sub-contractors respectively to Taylor Woodrow. The Biwater/Elga sub-sub contract required Elga to indemnify Biwater against potential liabilities to Taylor Woodrow and costs flowing from breaches of contract by Elga.

The main contract between Yorkshire Water and Taylor Woodrow on standard ICE form limited Yorkshire's liability to "*charges, damages and reimbursements provided in the contract*." Quantum was subject initially to expert determination as is usual in construction contracts. The contract also contained a good faith negotiation clause followed by adjudication provisions. The main parties had in fact engaged in extensive negotiations and a trial had been set down for the following April. Elga had been brought into the action late in the day and had taken part in a Case Management session before the judge.

As an end of chain Part 20 defendant Elga here attempts pre-emptive action to protect itself from any eventual liability flowing from the main action asserting 1) that any claim against Elga would not be in relation to any damages and reimbursements provided in the main contract (*this head was deferred to a subsequent hearing*) 2) the court had no jurisdiction, the main and the sub-sub contract jurisdiction vested with adjudication, not the court and 3) jurisdiction in relation to quantum by virtue of the contract vests with expert determination, not with the court.

The court had to decide first whether to go ahead with this hearing and if so, to then determine whether the sub-sub-contract litigation provisions prevailed or whether the dispute resolution provisions of the main contract applied equally to the sub-sub contract and overrode the litigation provision.

The court first examined whether or not it was appropriate to use the Part 11 procedure in such a situation. Elga's problem was that since it was not the main party it could not use s9 Arbitration Act to apply for a stay to adjudication and needed some other mechanism to attack the process. (Elga's central remit, that liability be limited to that specified in the contract would also no doubt be the central defence of Yorkshire – but

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Yorkshire would not be worried about protecting itself from any liability that would ultimately be covered by Elga, who therefore felt it wise to take self protective measures.)

Relying on dicta from ***Bernhards Rugby Landscapes v Stockley Park Consortium*** *[1997] 82 BLR 39;* ***Halifax Financial Services v Intuitive Systems*** *[1999] 1 All ER 303;* ***Guaranty Trust Company of New York v Hannay*** ***[****1915] 2 K.B. 536;* ***The Siskina*** *[1979] AC 210;* ***The Veracruz I*** *[1992] 1 Lloyd's Rep. 353 C.A;* ***The P*** *[1992] 1 Lloyd's Rep. 470 and* ***County & District Properties Ltd v Jenner*** *[1976] 2 Lloyd's Rep. 728,* Elga sought to establish that where litigation had no chance of succeeding the court had no jurisdiction.

Against this Biwater relied upon ***Hayter v Nelson*** *[1990] 2 Lloyd's Rep. 265;* ***Halki Shipping v Sopex*** *[1998] 2 All E.R. 23;* ***Scott v Avery*** *and* ***Letang v. Cooper*** *[1965] 1 Q.B. 243* to establish that in a variety of ways the court would have jurisdiction over many issues even where a case was to be heard elsewhere or had little or no prospect of success. Here the court found that since there were prospects of success in the main litigation, the court had jurisdiction and thus the Part 11 application was not the correct mechanism to use in the present circumstances. Nonetheless, in the event that he was wrong on this, Humphrey Lloyd then went on to deal with issues 2 & 3.

The court then decided that the main contract dispute resolution procedures were not incorporated into the sub-contract, applying ***Giffen (Electrical Contractors) Ltd v Drake & Scull Engineering Ltd*** (1993) 11 Con LJ 122. which sets out a useful collection of authorities on incorporation of clauses including ***Thomas v Portsea*** *[1912] A.C.1;* ***The Merck*** *[1965] P.223, C.A.;* ***The Annefield*** *[1971] P. 168; C.A.;* ***The Rena K*** *[1979] Q.B. 377;* ***The Varienna*** *[1983] 2 Lloyd's Rep. 592; [1984] 1 Q.B. 599;* ***Pine Top v Unione Italiana Anglo-Saxon Reinsurance*** *[1987] 1 Lloyd's Rep. 476;* ***The Federal Bulker*** *[1989] 1 Lloyd's Rep. 103; and* ***Aughton v Kent*** *(1991) 57 B.L.R. 6*

Humphrey Lloyd then held that whilst under the main contract questions as to quantum may well have to be determined by an expert, the jurisdiction in this court relates to whether or not Elga was in breach of contract. That remained an issue for the court. Accordingly, all of Elga's applications failed.

His Honour Judge Humphrey Lloyd QC. TCC. 18th October 2002.

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