

Case No: HT-07-307

Neutral Citation Number: [2010] EWHC 3415 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22nd December 2010

Before :

MR JUSTICE AKENHEAD

Between :

(1) WALTER LLEWELLYN & SONS LIMITED	<u>Claimants</u>
(2) ROK BUILDING LIMITED	
- and -	
EXCEL BRICKWORK LIMITED	<u>Defendant</u>

Andrew Bartlett QC (instructed by **Berrymans Lace Mawer LLP**) for the **Claimant**
Ben Patten QC (instructed by **Beachcroft LLP**) for the **Defendant**

Hearing date: 20 December 2010

JUDGMENT

Mr Justice Akenhead:

1. The Defendant applies for a stay of these proceedings under Section 9 of the Arbitration Act 1996 on the grounds that there is an arbitration agreement between the parties. The Claimant resists that application on the basis that there was no such agreement. Essentially, the issue between the parties involves the interpretation of the written contractual documentation which it is accepted was incorporated into the Sub-Contract between the parties.

The Background

2. Walter Llewellyn & Sons Ltd (“WLAS”), the First Claimant, was a main contractor employed by Tower Hexagon ASRA Housing Associations to design and build 121 timber framed dwellings at a site known as Crossways, Thamesmead, London SE28.
3. By a Sub-Contract made in about May 2002, WLAS employed Excel Brickwork Ltd (“Excel”), formerly RJ Prentice Brickwork Ltd, to carry out brickwork and blockwork (the “Sub-Contract Works”) at the site. It is accepted that the Sub-Contract was contained in or evidenced by the following documents:
 - (a) WLAS Sub-Contract Order Ref No 8117/D12/014/11.08 dated 29 May 2002.
 - (b) WLAS Sub-Contract Works Analysis Schedule 1 dated 29 May 2002.
 - (c) The Standard NEC Engineering & Contract Conditions November 1995, Second Edition, Incorporating Option A and Clauses G, L, P, R, T, U, Y (UK2 & UK3) and X12.
 - (d) WLAS standard terms and conditions dated 1 June 2001.
 - (e) WLAS Brickwork Package Ref. WLS 8117.
 - (f) Various Drawings.
4. The Sub-Contract Works are said to have been carried out between about mid-2002 and about December 2003.
5. It is said that, by a Sale and Purchase Agreement dated 16 December 2003 between WLAS and Rokbuild Ltd (“Rok”), the Second Claimant Rok agreed to buy the business and assets of WLAS and that the benefit of the Sub-Contract was assigned to Rok. In 2010 WLAS went into liquidation.
6. The Claimants’ case is that in or about August 2004 damage was discovered in a number of the properties which had been built and this was the contractual or tortious responsibility of Excel.
7. Proceedings were issued by the Claimants as long ago as 31 October 2008. As no Pre-Action Protocol process had been followed, the Court ordered, initially, that there should be a stay of the proceedings to enable the process to be

operated. Thereafter further stays were granted. Ultimately the proceedings were served in October 2010.

8. On 12 November 2010, Excel issued its application for the proceedings to be stayed to arbitration pursuant to Section 9 of the Arbitration Act 1996 or under the Court's inherent jurisdiction.

The Law

9. Section 9 of the Arbitration Act 1996, materially, states:

(1) "A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

10. No point is taken on this application by the Claimant that the Defendant is in some way estopped from making this application by reason of its active participation in the Pre-Action Protocol process.
11. The real issue between the parties is simply a matter of contractual interpretation. The principles of contractual construction are well known and do not need to be repeated.

The Sub-Contract

12. The Sub-Contract Order is clearly a pro forma type document, with elements filled in for the purpose of the particular order and other elements in a standard form. Material parts are:

"This order is placed with you for the execution of the Sub-Contract Works hereinafter mentioned, upon the terms and conditions of

The NEC Document* Form of Sub-Contract issued by the Inst. Of Civ Eng. 2nd Edition 1995 and subject to the listed and/or attached documents, additions and amendments.

DETAILS OF THE SUB-CONTRACT WORKS, SPECIFICATION AND PROGRAMME

*NEC Option A incorporating clauses G, L, P, R, T, U, Y (UK2 & UK3), X12 and Schedule of Amendments.

Please provide all necessary Labour, Plant and Mortar to execute the BRICK and BLOCKWORK at the above contract in accordance with the attached documentation listed here under [various immaterial documents are then listed]

FOR THE SUM OF £135,897.00”

13. Forming part of the Order were two sheets which provided various pieces of information, including a partial repetition that the Form of Subcontract included

“The NEC Option A issued by the ICE 2nd Edition November 1995 incorporating clauses G, L, P, R, T, U, Y (UK3 & UK3), X12 and Schedule of Amendments and Llewellyn Standard Additions and Rules dated 1st June 2001.”

There was nothing in the order which identified expressly or directly what the dispute resolution processes were to be.

14. Before considering the NEC Conditions, it is necessary to consider the Llewellyn Standard Conditions and Rules dated 1 June 2001 (the "Additions") as it is clear that these were drafted because there were fears that the NEC conditions even as expressly selected might not comply with the Housing Grants Construction and Regeneration Act 1996 (“HGCRA”). It is, rightly, common ground that the Additions related to the NEC Standard Form as selected by the parties; for instance the title is "Additions to the Form of Sub-Contract & Standard Rules of the Contractor (for use with NEC)". It is clear from the opening paragraphs that the Additions were to have some priority:

“Notwithstanding the provisions of the Standard form of Sub- Contract the following Additions and rules shall override and modify the application or interpretation of its terms and conditions where any discrepancy in or divergence between them would otherwise exist.”

15. Many of the provisions of the Additions involve alterations to the payment regime to bring them in line with Sections 110 and 111 of the HGCRA. The following however is directly germane to the issues between the parties in this case:

“Additions to Sub Contract Conditions in respect of Adjudication

Clauses within the Sub-Contract, if any, dealing with the appointment and actions of an Adjudicator...are deleted and replaced with the adjudication provisions in the Schedule Part One of The Scheme the Construction Contract (England and Wales) Regulations 1998.

The parties to this Sub-Contract may agree to accept the decision of the Adjudicator as finally determining any dispute.

If an adjudicator or adjudicator nominating body is not specifically named in the Sub-Contract then an adjudicator will be appointed through the

nominating bodies of the [RIBA or the RICS] at the sole discretion of the Contractor.

Addition to Sub-Contract in respect of Arbitration

If the standard Sub-Contract form makes provision for settlement of disputes by arbitration then it is hereby agreed by the parties to this Sub-Contract that any dispute which arises for which of those provisions have been made shall be referred to arbitration in accordance with them."

16. The relevant NEC Conditions, so far as they remained un-amended, are as follows:

(a) Clause 10.1

"The Contractor and the Subcontractor shall act as stated in this subcontract and in a spirit of mutual trust and cooperation..."

(b) Clause 17

"The Contractor or the Subcontractor notifies the other as soon as either becomes aware of an ambiguity or inconsistency in or between the documents which are part of this subcontract. The Contractor gives an instruction resolving the ambiguity or inconsistency"

(c) Clause 29.1

"The Subcontractor obeys an instruction which is in accordance with this subcontract and is given to him by the Contractor"

(d) Clause 93

"93.1 If after the Adjudicator

- notifies his decision or
- fails to do so

within the time provided by this subcontract a Party is dissatisfied, that Party notifies the other party of his intention to refer the matter which he disputes to the *tribunal*. It is not referable to the *tribunal* unless the dissatisfied Party notifies his intention within three weeks of

- notification of the Adjudicator's decision or
- the time provided by this subcontract for this notification if the Adjudicator fails to notify his decision within that time,

which ever is the earlier. The tribunal proceedings are not started before Completion of the whole of the subcontract works or earlier termination...

93.3 The *tribunal* settles the dispute referred to it. Its powers include the power to review and revise any decision of the Adjudicator and any action or inaction of the Contractor related to the dispute. A Party is not limited in the *tribunal* proceedings to the information, evidence or arguments put to the Adjudicator.”

17. Part of the standard NEC Sub-Contract form is the Sub-Contract Data, Part one of which is "Data provided by the Contractor". No part of this was filled in and indeed the NEC Contract was not actually signed. The relevant blank parts of Part one are:

“9 Disputes and termination.....

The *tribunal* is.....

Optional statements If the tribunal...is arbitration

- The arbitration procedure is.....”

18. The NEC issued in April 1998 an Addendum to take into account the HGCR Act because, presumably, it recognised that its adjudication provisions arguably offended against the Act. That Addendum, Y(UK)2, was incorporated into the Sub-Contract. Clause 90 was deleted and replaced by provisions which dealt with referral to adjudication and sets out duties imposed on the adjudicator, such as impartiality and the need to produce a decision within 28 days with reasons. Clause 90.11 stated that the "decision of the Adjudicator is binding until the dispute is finally determined by the *tribunal* or by agreement". At least part of this clause probably offends against the HGCR Act because, by Clauses 90.2 to 90.4, it sets out a timetable which prevents a dispute being referred to adjudication "at any time" as required by Section 108 of the Act. The amended Clause 92, amongst other things, requires the Adjudicator to decide the dispute as an independent adjudicator and not as an arbitrator with his decision being enforceable as a matter of contractual obligation. It also provides for a new adjudicator to be appointed if the current adjudicator resigns or is unable to act. Clause 93 (as set out above) is not amended.

The Issues

19. Mr Patten QC for Excel argues that the Sub-Contract form does provide for arbitration, albeit that the form was not filled in, in that in broad terms it makes arrangements for or prepares for arbitration as a means of dispute resolution. Therefore, by virtue of the "Addition...in respect of Arbitration" in the Additions, the parties were specifically agreeing that arbitration should be the appropriate forum. The gaps in the Data document can in practice be filled in so that, for instance, if the parties cannot agree upon an unnamed arbitrator, the Court can appoint one.
20. Mr Bartlett QC argues that the form of contract does not as such provide for arbitration. It provides only for arbitration if the parties have specifically and

expressly selected that form of dispute resolution. The relevant part of the Additions is comprehensible, he argues, in circumstances where the Sub-Contract form has been filled in; one must bear in mind that the Additions were a standard form document and would cover situations where the form had been filled in, as well as where it had not been. He also argues that the effect of the Additions is to remove the existing adjudication provisions and replace them with the statutory Scheme with the result that Clause 93.1 falls to the ground. He also argues that if there is an ambiguity the *contra proferentem* principle works in his client's favour; alternatively, he says that any ambiguity has been resolved by an instruction recently issued by his clients. These latter arguments are challenged by Mr Patten QC.

Discussion

21. I have formed the view that the issues between the parties are readily resolvable by way of any proper construction of the Sub-Contract. Simply as a matter of construction of the Sub-Contract documentation, the parties have not agreed on arbitration as the dispute resolution tribunal or forum. My reasoning and analysis are as follows:
 - (a) There is nothing in any of the Sub-Contract documents which shows or demonstrates any express or conscious agreement that arbitration was the ultimate dispute resolution process.
 - (b) The Additions document, leaving aside what it did to the adjudication provisions (to which I will return below), is predicated upon a conditional hypothesis ("if the standard Sub Contract form makes provision for settlement of disputes by arbitration").
 - (c) The standard (NEC) Sub Contract form does not on analysis "make provision for" arbitration. Clause 93 simply identifies "the *tribunal*". There is no standard form definition of "the *tribunal*". The parties make their own definition for the term "the *tribunal*". They do that by filling in Part one of the Sub-Contract Data. They did not fill it in. The rest of the relevant part of that Data is itself predicated upon a condition: "if the *tribunal*...is arbitration". "The *tribunal*" is only arbitration if the parties have selected it. They had not selected it.
 - (d) It follows that, however one construes the words "makes provision for", the Sub-Contract form did not provide for arbitration.
 - (e) It is clear that the Additions document was drafted primarily to overcome problems with the NEC conditions not complying with the HGCRA. It is in the clearly and understandably standard form typed document used by Llewellyn for Sub-Contracts which incorporated the NEC Conditions. It could therefore, logically, cover a variety of different sets of circumstances, including where the parties had expressly agreed upon arbitration and where they had not or had not applied their minds to the issue.

(f) Making the assumption that the draftsman of the Additions document had some awareness of the NEC Conditions, he or she would be aware that the un-amended standard NEC Conditions did not as such provide for arbitration but only provided for arbitration if the parties had expressly agreed it. The draftsman must be taken to have known that the Arbitration Addition clause would therefore be meaningless unless it was expected to cover the different sets of circumstances on different Sub-Contracts.

22. It follows that I do not consider that there is any ambiguity and therefore the alternative arguments on ambiguity put forward by Mr Bartlett QC do not fall to be considered. I will however say shortly that, if there had been an ambiguity, I do not consider that it would have been resolvable by application of the *contra proferentem* principle because the party proffering the Sub-Contract was Llewellyn; his argument is that it could be applied in his favour was clever but ultimately unrealistic for that reason. The suggestion that the ambiguity could have been resolved by an instruction issued by the Contractor pursuant to Clause 17.1 of the NEC Conditions, seven years after the works are said to have been completed, is not commercially or contractually realistic. The instruction by which the ambiguity is resolved is itself reviewable and revisable by the ultimate dispute resolution tribunal and therefore the point is entirely circular.

23. The remaining point put forward by Mr Bartlett QC was, as broken down:

(a) The Additions clause (“Clauses within the Sub-Contract, if any, dealing with the appointment and actions of and Adjudicator...are deleted and replaced with the adjudication provisions in the Schedule Part One of The Scheme...”) required the deletion of Clauses 90, 91, 92 and (at least) 93.1 of the Y(UK)2 document or the NEC clauses.

(b) The “adjudication provisions in...Part One of the Scheme” are Paragraphs 1 to 26. Paragraph 23(2) states:

"The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

(c) This is contrary to Clause 93.1 which leads to an adjudicator’s decision becoming final and binding if the relevant dispute is not then referred to “the *tribunal*” within three weeks.

(d) If Clause 93.1 is effectively deleted, there is no provision by which disputes are referable to arbitration or indeed to any other tribunal.

24. Ultimately, although I do not have to decide the point, I incline to the view that that this argument is a sound one for the following reasons:

(a) It is only "clauses within the Sub-Contract...dealing with the appointment and actions of an adjudicator” which are to be deleted.

(b) Clauses 90, 91 and 92 obviously do deal with the appointment and actions of an adjudicator.

(c) Clause 93.1 does not deal with the appointment and actions of an adjudicator. It deals with what is to happen after he or she has performed his or her final act in terms of adjudication, the issuing of a decision or the failure to do so. The failure to do so involves the inaction of an adjudicator.

(d) Therefore Clause 93.1 stands and survives.

(e) One must therefore seek to establish by interpretation what is meant by the deleted clauses being replaced "with the adjudication provisions" in the Scheme. It must be with those adjudication provisions which deal with the appointment and actions of an adjudicator. Therefore one ignores Paragraph 23 (2) of the Scheme or at least the final phrase because it deals with the effect or impact of the decision as opposed to the appointment and actions of an adjudicator.

Decision

25. It follows from the above that the Defendant's application to stay these proceedings fails because there is no arbitration agreement in the Sub-Contract between the Parties. I have already made it clear that the Defendant should pay the Claimant's costs of occasioned by the application.