Neutral Citation Number: [2014] EWHC 4006 (TCC)

Case No: HT-2014-000022
(Formerly HT-14-372)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
London EC4A 1NL

Date: 3 December 2014

Before :

MR. JUSTICE EDWARDS-STUART

- -

Between :

Imtech Inviron Limited	**Claimant**
- and -	
Loppingdale Plant Limited	**Defendant**

- -
- -

Crispin Winser Esq (instructed by **Bracher Rawlins**) for the **Claimant**
Richard Bradley Esq (instructed by **CE Law**) for the **Defendant**

Hearing dates: 19th November 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE EDWARDS-STUART

Mr. Justice Edwards-Stuart:

Introduction

1. This is an application for summary judgment by the Claimant, Imtech Inviron Ltd ("Inviron"), to enforce an adjudicator's decision dated 9 October 2014 by which he directed the Defendant, Loppingdale Plant Limited, ("LPL") to pay Inviron the sum of £643,283.04.

2. The dispute arises out of work carried out at Stansted Airport. LPL had entered into a Framework Agreement with Stansted Airport Ltd ("Stansted") pursuant to which Stansted issued contracts to LPL known as Task Orders. It was contemplated that LPL would in turn sub-contract all or part of the work to Inviron by issuing Purchase Orders.

3. The dispute arose in relation to LPL's failure to pay the sum due to Inviron in respect of an interim payment application known as Application No 6. LPL says, and said from the outset, that the adjudicator had no jurisdiction because he had not been properly appointed.

4. Mr. Crispin Winser appeared for Inviron, instructed by Bracher Rawlins. Mr. Richard Bradley appeared for LPL, instructed by CE Law.

The issues

5. LPL contends that the adjudicator had no jurisdiction because:

   i) by the terms of the contract the adjudicator was to be one of three named persons, which did not include this adjudicator, Mr. Ben Sareen, and in default of any of the named persons being willing and able to act, the adjudicator was to be nominated by the Institution of Civil Engineers; or

   ii) the adjudicator purported to adjudicate different disputes arising under different contracts without the consent of all the parties contrary to paragraph 8(2) of the Scheme for Construction Contracts.

The contractual structure

The Framework Agreement

6. The Framework Agreement was made between Stansted and LPL and was for a defined term. Under the agreement LPL was appointed as one of Stansted's framework suppliers to provide services from time to time in accordance with Stansted's capital projects programme. The Framework Agreement did not commit Stansted to purchasing any particular works and/or services from LPL. Stansted was entitled to issue a Task Order pursuant to which LPL would be obliged to carry out certain works. Each Task Order was to be a separate contract. LPL was entitled to sub-contract the works specified in the Task Order.

7. Clause 45 of the Framework Agreement, entitled "Law and Jurisdiction", provided as follows:

> "... This Agreement and all Task Orders awarded under it shall be deemed to have been made in England in accordance with English Law and shall be construed and interpreted in accordance with English Law and subject to the exclusive jurisdiction of the English Courts."

8. Schedule 4 to the Framework agreement included a document entitled "BAA Service Terms". Clause 100 of these terms was as follows:

> "100.1 (1) A dispute arising under or in connection with this contract is referred to and decided by the *Adjudicator*. A Party may refer the dispute to the *Adjudicator* at any time.
>
> 100.2 (1) The Parties appoint the *Adjudicator* under the NEC Adjudicator's Contract current at the *starting date*.
>
> …
>
> 100.4 (1) A Party does not refer any dispute under or in connection with this contract to the tribunal unless it has first been decided by the Adjudicator in accordance with this contract."

9. Schedule 6 contained definitions. The term "Parties" was defined to mean the parties to the "[Framework] Agreement and each Task Order as the case may be and the context requires". Although the term "Party" was not defined, I consider that it must be taken to have the same meaning, but in the singular, as in the definition of "Parties". The term "Subcontractor" was defined to mean a person or organisation who has a contract with LPL.

10. The Contract Data for use with the BAA Service Terms provided that the Adjudicator was to be one of three named persons agreed between the Employer and the Contractor, failing which the adjudicator was to be appointed by the Institution of Civil Engineers. Mr. Sareen was not one of these.

11. During the period of time relevant to this application LPL issued six Purchase Orders, one of which was E1629. Each Purchase Order contained a provision to the effect that Inviron was to submit valuations of the works to the end of each month and that these were to be submitted on the 16th of each month. There was therefore a possibility that Inviron might submit a composite application on the 16th of a month embracing work covered by more than one Purchase Order.

The Terms and Conditions of the Subcontract (September 2012 version)

12. Each Purchase Order issued by LPL stated that its terms and conditions were to be "as per contract + Stansted Airport September 2012". This referred to what were known as the September Conditions.

13. These provided as follows:

> "1.1 These Terms and Conditions together with the Framework Agreement attached to these Terms and Conditions ('the Framework Agreement') together with the Purchase Order

> to be issued by LPL to the contractor for each sub-contract and the Task Order to be issued to LPL and a copy provided to the Subcontractor for each subcontract ('the Task Order') set out all the rights and obligations of the parties each to the other and no other terms or conditions shall be implied save to the extent that such terms and conditions are implied by statute save as may be agreed by the parties in writing.
>
> …
>
> 1.3 The subcontract Works are executed as part of work to be carried out by LPL for its Customer under the Principal Contract as set out in the Framework Agreement and the Task Order (together 'the Principal Contract'). The Subcontractor shall be deemed to have read the Principal Contract and to be fully aware of the obligations, risks and liabilities assumed by LPL under them. The Subcontractor shall perform and assume, as part of its obligations under this contract, LPL's obligations, liabilities and risks contained within the Principal Contract that relate to the carrying out of the Task Order and/or Purchase Order as if they were expressly referred to in the subcontract as obligations, liabilities and risks of the subcontractor, all things being equal …. Schedule 1 is a list of the relevant clauses under the Principal Contract as a summary but this is provided entirely without prejudice to the Subcontractor's liability under this clause.
>
> 1.4 In the event of conflict between the terms and conditions of the Principal Contract and these Terms and Conditions the former shall take precedence save in relation to payment provisions set out in clause 1.16 of these Terms and Conditions which will always prevail. The order of priority without prejudice to this stated exception is
>
> 1.4.1 The Task Order
>
> 1.4.2 The Framework Agreement
>
> (together "the Principal Contract")
>
> 1.4.3 These Terms and Conditions
>
> 1.4.4 The Purchase Order"

14. Mr. Winser relied also on the following provisions of the September Conditions:

> "1.23 The provisions of the Principal Contract in respect of liability, insurance and Indemnification in respect of death or injury to persons and loss or damage to property shall apply between LPL and the Subcontractor under this contract as though they were respectively the Customer and LPL.
>
> …

> 1.25 The contract shall be governed by English Law and the Subcontractor consents to the exclusive jurisdiction of the English Courts in matters regarding the Subcontract except to the extent that LPL invokes the jurisdiction of the Courts of any other country."

15. In relation to these conditions, Mr. Winser made the following points:

    i) In clause 1.3 Inviron's obligations were to comply with LPL's obligations and liabilities that related

    > "… to the carrying out of the Task Order and/or Purchase Order as if they were expressly referred to in the sub-contract as obligations, liabilities and risks of the Subcontractor, all other things being equal".

    This, submitted Mr. Winser, concerned what he described as primary obligations relating to the work to be carried out and how it was to be done rather than secondary obligations, such as those relating to insurance and indemnities.

    ii) By contrast, clause 1.23 made specific provision for compliance by Inviron with certain secondary obligations, namely liability, insurance and indemnification in respect of death or injury to persons and loss or damage to property. Mr. Winser's point here was that this clause would not have been necessary if these obligations were covered by clause 1.3.

    iii) Although Schedule 1 was said not to be an exhaustive list, Mr. Winser noted that all the obligations identified were what he described as primary obligations, and that this was therefore consistent with his submission in relation to clause 1.3.

    iv) Clause 1.25 was different to the provision relating to jurisdiction in the Framework Agreement, and this cannot have been a mistake. This shows, submitted Mr. Winser, that it cannot have been the intention of the parties that the jurisdiction clause in the Framework Agreement was to be carried over into the September Conditions.

16. As a matter of construction, therefore, submitted Mr. Winser, there was no room for incorporating into the sub-contract the adjudication provisions of the Framework Agreement. Those were secondary, or even tertiary, obligations that did not fall within the ambit of clause 1.3.

17. In the context of the incorporation of terms, Mr. Winser referred me to the decision of Mr. Justice Christopher Clarke (as he then was) in *Habas Sinai v Sometal SAL* [2010] EWHC 29 (Comm), where he said this:

> "46. Where parties are in dispute as to what they have agreed the task of the Court is to determine from the communications that passed between them in the context in which those communications were made what reasonable persons in their position would regard them as having intended to agree. Where those parties agree the essential terms of a

contract and also that their contract shall include the terms of a previous contract or contracts between them the Court may have to determine which provisions of which contract(s) they meant to incorporate. If the Court is able to decide what those provisions were, it should not, in my judgment, be astute to impose any special rules which limit the ability of the parties validly to agree what, on ordinary principles of construction, they would be taken to have agreed.

47. If terms which are said to have been agreed are particularly onerous or restrictive of rights that would otherwise arise, it may be necessary, if they are to be enforceable, for the party seeking to rely upon them to show that notice of their existence appropriate to their content was given to the party potentially affected by them. Where the term in question ('the offending term') was included in a previous contract, but without such notice being given, it may be that general words incorporating terms of the previous contract (including the offending term) in a later contract are insufficient to incorporate the offending term. But an arbitration clause such as the present is not usually some form of onerous term to which special attention must be drawn: see: *Streford v Football Association* [2007] EWCA Civ 238. The fact that such an arbitration clause ousts the jurisdiction of the court does not, in a single contract case, mean that it requires some extraordinary method of incorporation.

48. I accept that, if the terms of an earlier contract or contracts between the parties are said to have been incorporated it is necessary for it to be clear which terms those were. But, like Langley J, I do not regard this to be the position only if the terms said to be incorporated include an arbitration or jurisdiction clause. Whenever some terms other than those set out in the incorporating document are said to be incorporated it is necessary to be clear what those terms are. Since arbitration clauses are not terms which regulate the parties' substantive rights and obligations under the contract but are terms dealing with the resolution of disputes relating to those rights and obligations it is also necessary to be clear that the parties did intend to incorporate such a clause. But, if a contract between A and B incorporates all the terms of a previous contract between them other than the terms newly agreed in the later contract, there should be no lack of clarity in respect of what is to be incorporated.

49. There is a particular need to be clear that the parties intended to incorporate the arbitration clause when the incorporation relied on is the incorporation of the terms of a contract made between different parties, even if one of them is a party to the contract in suit. In such a case it may not be evident that the parties intended not only to incorporate the substantive provisions of the other contract but also provisions as to the resolution of disputes between different

> parties, particularly if a degree of verbal manipulation is needed for the incorporated arbitration clause to work. These considerations do not, however, apply to a single contract case."
>
> (Mr. Winser's emphasis)

18. Mr. Winser submits that in this case it is far from evident that the parties did intend to incorporate into the September Conditions the adjudication provisions in the Framework Agreement. In addition, he submitted, in my view correctly, that those provisions could not be carried over into the September Conditions without a degree of verbal manipulation. The definitions in the Framework Agreement make it clear that it is only a party to that agreement who has the right to refer a dispute to adjudication in accordance with its terms. That is made even clearer by the fact that the term "Subcontractor" includes bodies such as Inviron. These definitions have to be ignored or rewritten if that adjudication provision is to be carried over into the September Conditions.

19. Mr. Winser relies also on the fact that under the terms of the Framework Agreement, adjudication is a condition precedent to the right to litigate in the courts. He submits that that is an onerous, or at least restrictive, provision, which would require clear words if it were to be imposed on a subcontractor.

20. Mr. Bradley's principal point in response to these submissions is that whether or not a term of one contract is to be incorporated into another is a question of fact - in the sense that the construction of a commercial contract takes place against a factual matrix, and the latter obviously needs to be informed by evidence. He submitted that oral evidence might throw light on this and so the point should not be decided on an application for summary judgment.

21. Mr. Bradley submitted also that the incorporation of the adjudication provisions from the Framework Agreement into the September Conditions made good practical sense because then the parties to the two contracts could have related disputes determined by the same adjudicator. This is a perfectly good point, but if this situation were to arise I can see no reason why the parties to the sub-contract could not agree to appoint, or to ask the nominating body to appoint, the same adjudicator as the one appointed in a related dispute under the Framework Agreement. It does not seem to me to be a compelling, or even persuasive, reason in favour of incorporating the adjudication provisions of the Framework Agreement into the September Conditions.

22. In relation to the September Conditions, Mr. Bradley submitted that it was at least arguable that there was an intention that the secondary obligations, including the adjudication provisions, should be the same up the contractual chain.

23. Whilst Mr. Bradley initially submitted that the requirement in the Framework Agreement that a referral to adjudication should be a condition precedent of litigation was not an onerous obligation, he felt compelled to accept that the usual obligation of the successful party in adjudication to bear its own costs was a financial imposition.

24. In relation to Mr. Bradley's point about the potential need for evidence, Mr. Winser submitted that in the context of this dispute it was hard to see how oral evidence

would add anything, particularly since the subjective intentions of the parties were not a relevant consideration. The relevant material as to the surrounding circumstances would usually be derived from the documents and it would be reasonable to assume that LPL would have put any relevant documents before the court on this application.

25. I would add that there was nothing to prevent LPL from putting in a witness statement in response to this application indicating the evidence that it proposed to call at a trial that would be relevant to the nature or scope of the factual matrix. However, not only has no such written statement been produced, but also Mr. Bradley has not given the court any indication, even in general terms, what such a statement might say.

26. Mr. Winser submitted that this was a point of construction of the type that the court can and should determine on an application for summary judgment. In support of this submission he relied upon the decision of the Court of Appeal in *Khatri v Co-operatieve Centrale Raiffeisen-Boerenleenbank BA* [2010] EWCA Civ 397. I was referred to a passage from the judgment of Jacob LJ, with whom Longmore and Rix LJJ agreed, at paragraphs [4] and [5] to the following effect:

> "4. … The factual matrix is key to understanding what the parties must have intended by the words they used. But it far from follows that the need to know what that matrix was requires a full trial with discovery, evidence and cross-examination of witnesses. If there is no actual conflict of evidence on a relevant point of background matrix, it is only when there really are reasonable grounds for supposing that a fuller investigation of the facts as to the background might make a difference to construction that the court should decline to construe the contract on a summary judgment (including strike out) application.
>
> 5. The court should not be over-astute to decline to deal with the construction of a contract summarily merely on the basis that something relevant to the matrix might turn up if there were a full trial. Most disputes as to 'pure' construction of a contract will be suitable for summary determination because the factual matrix necessary for its construction will itself be determinable on that application."

27. Whilst I consider that the court must always exercise great care when approaching the summary disposal of a claim, particularly having regard to the warning given by the Court of Appeal in *Royal Brompton Hospital NHS Trust v Hammond (No. 5)* [2001] EWCA Civ 550, I think that Mr. Winser is right to submit that it is hard to see what sort of evidence might emerge which could assist the court on what is, essentially, a straightforward matter of construction of the documents. To adopt the words of Jacob LJ, no reasonable grounds have been put forward to lead the court to suppose that a further investigation of the facts as to the background might make a difference to the points of construction raised by this application. I therefore reject Mr. Bradley's submission that this is an issue which ought to be disposed of at a trial and not on an application for summary judgment.

28. On the question of construction, I prefer the submissions of Mr. Winser. On a plain reading of the September Conditions it seems to me that they are incorporating those

terms from the Framework Agreement and/or the Task Order (if there is one, which there is not here) with which the sub-contractor must comply in order that not only its obligations but also those of LPL are met. There is, for example, no self-evident reason why Inviron should have to carry the same level of liability insurance as LPL. That, in my view, is the reason why clause 1.23 of the September Conditions is there.

29. In relation to the adjudication clause in particular, I consider that it is far from evident that the parties intended this to be incorporated into the September Conditions or any of the Purchase Orders. In my judgment it is certainly not clear that this was intended and accordingly I conclude that the provisions of the Scheme are to be incorporated into the sub-contract or sub-contracts made between LPL and Inviron.

Did the adjudicator decide more than one dispute?

30. The starting point for this debate must be the Notice of Intention to Refer a Dispute to Adjudication ("the Adjudication Notice"). Section 2 of the Adjudication Notice refers to a contract made on about 14 August 2013 and evidenced by various documents, one of which is LPL's Purchase Order No. E1629/113517 dated 14 August 2013. The description of the works, in paragraph 2.1.2 of the Notice, follows very closely the description in the first paragraph of that Purchase Order.

31. Paragraph 3.1.1 of the Notice is as follows:

> "The dispute that has arisen between the Parties, and which this Notice relates and is confined to, is the failure of LPL to pay the 'notified sum' due to Inviron in respect of Inviron's Application Number 6."

32. This could hardly be clearer. The rest of the Adjudication Notice sets out the terms of the sub-contract, the relevant provisions of the Housing Grants, Construction and Regeneration Act 1996 "(the Act"), as amended by the Local Democracy, Economic Development and Construction Act 2009, and the circumstances in which LPL failed to pay the sum applied for in the application.

33. It is well established that the document that defines the scope of the referral is the Adjudication Notice, and Mr. Bradley, very properly, did not feel able to submit the contrary. The complaint by LPL is that the statement of account which constituted Application No 6 included sums that were attributable to other Purchase Orders.

34. This may be correct, but in my view it is irrelevant. LPL should have dealt with that by issuing an appropriate payment notice, which could have stripped out what LPL contended were the amounts wrongly included. If the adjudicator made an error in not picking this up himself, which I would not necessarily accept, it is nevertheless clear that he answered the question that was referred to him - namely, the amount to be paid by LPL to Inviron under Application No 6. In that event, his decision, right or wrong, cannot be impugned on an application for enforcement.

Conclusion

35. For these reasons I consider that Inviron is entitled to summary judgment in the terms sought.

36. Subject to anything that counsel may say, I would have thought that Inviron is entitled to its costs of the application assessed on the standard basis.

37. If the costs or the basis on which they should be assessed cannot be agreed, I will decide it and assess them on paper. To this end, LPL may make brief submissions on Inviron's costs, limited to two pages of A4 (twelve point font, 1.5 spacing, with one-inch margins). Those submissions are to be served within five days of the handing down of this judgment in draft. Inviron may respond, at no greater length, within two working days.