



## LEGAL BRIEFING

### *S G South Ltd v Swan Yard (Cirencester) Ltd* [2010] EWHC 376 (TCC), Mr Justice Coulson

#### *The Facts*

Swan Yard employed South to construct and fit out a retail shopping arcade and hotel at two sites. The project had already been subject to a previous adjudication enforcement decision (see *S G South Ltd v King's Head (Cirencester) LLP & Another* [2009] EWHC 2645 (TCC) <http://www.bailii.org/ew/cases/EWHC/TCC/2009/2645.html>). No written contract was concluded between the parties. A dispute arose between the parties which South referred to adjudication.

During the adjudication Swan Yard raised no jurisdictional challenge with regard to the lack of a written contract. In fact the adjudicator investigated the matter of his own accord but, surprisingly in the Judge's view, found that he still had jurisdiction to continue. The adjudicator awarded South £98,117.37. However, in the enforcement proceedings South conceded that, due to direct payments made by Swan Yard to the works contractors, in fact only £70,450.14 of the decision was owed to them.

In the pleadings for the enforcement proceedings, again, Swan Yard did not allege that the lack of a contract in writing should render the decision unenforceable. South's Particulars of Claim were also careful not to allege a concluded contract in writing; instead they accepted that a contract was never executed and alleged that the parties had proceeded on the basis that the terms of the JCT Management Contract formed the basis of any agreement between the parties. The only substantive defence Swan Yard raised in their pleadings was that, because there were separate final account proceedings ongoing in the Bristol District Registry, the enforcement should be stayed.

#### *The Issues*

- (i) Notwithstanding Swan Yard's failure to raise a jurisdictional objection on the basis of the absence of a written contract, could the adjudicator's decision be enforced?
- (ii) Did the ongoing final account proceedings mean the enforcement could be stayed?

#### *The Decision*

The Judge held that, despite the absence of a contract in writing, the fact that Swan Yard had not raised the issue in the adjudication nor in the pleadings for the enforcement meant that it could not prevent enforcement of the decision. In doing so the Judge considered s107(5) of the Construction Act which provides:

"An exchange of written submissions in adjudication proceedings, or in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged."

The Judge applied this section and concluded that, given the failure of Swan Yard to raise the absence of a written contract in either the adjudication or in its pleadings for enforcement, the Court was not prevented from enforcing the decision.

In relation to issue (ii), the Judge considered that the ongoing final account proceedings had no affect whatsoever on the enforceability of the adjudicator's decision. He emphasised

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that the whole point of adjudication was that it was a temporarily binding decision unless and until the dispute was determined by arbitral or legal proceedings. This was exactly the scenario here.

*Comment*

This was a rare case where the responding party in the adjudication had not raised an obvious jurisdictional dispute that was open to it. It underlines the necessity of raising any jurisdictional point regarding the existence of a written contract as soon as possible. With the impending introduction of the amendments to the Construction Act the necessity of having a contract in writing may soon become a moot point, but, for the time being, if a party wants to ensure they have the option of adjudication available to them, then they should ensure there is a contract in writing in place.

Chris Farrell  
April 2010

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