



## LEGAL BRIEFING

### *Cubitt Building and Interiors Ltd v Richardson Roofing (Industrial) Ltd*

[2008] EWHC 1020 (TCC), Mr Justice Akenhead

#### ***The Facts***

The Claimant, as main contractor, engaged the Defendant, as a roofing sub-contractor, at a building site at Hampton Wick Riverside.

The Claimant sought declaratory relief that its terms and conditions were incorporated into the sub-contract between the parties and injunctions that the Defendant should be restrained from continuing with arbitration and that adjudication should proceed before any further proceedings.

The Defendant sought a declaration that the DOM/1 Sub-Contract Conditions were incorporated into the sub-contract and that the Claimant's application that the arbitration should be stayed pending adjudication should itself be stayed under section 9 of the Arbitration Act 1996.

By letter, the Claimant invited the Defendant to quote for the roofing works. By a further letter, the Claimant again invited the Defendant to quote for the roofing sub-contract works. The Defendant submitted its quotation which contained its own standard terms and conditions.

The Claimant held a meeting with the Defendant. At this meeting, it was the Claimant's normal practice in relation to sub-contractors, to hand over for discussion or agreement, a pro-forma form containing contract details. As a matter of fact, substantial agreement on every aspect of the sub-contract was reached.

A letter of intent was then sent to the Defendant. The terms of the letter were to be signed by the Defendant. However this never happened.

A year after the Defendant completed on site, the Claimant indicated that it intended to deduct liquidated damages for an alleged period of culpable delay. This prompted a complaint from the Defendant that the Claimant was being disingenuous and the Defendant claimed for an extension of time.

The Defendant commenced adjudication proceedings. It was held that the sub-contract did incorporate the Claimant's terms and conditions. The Defendant then served a Notice of Arbitration and asserted that the DOM/1 conditions were incorporated in the contract.

#### ***The Issues***

There were three issues before the court:

- (i) whether or not the Claimant's terms and conditions were incorporated into the contract;
- (ii) whether the Defendant should be restrained from continuing with arbitration; and finally
- (iii) whether adjudication should proceed before any further proceedings.

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### *The Decision*

It was held that on the evidence, the parties had agreed that the DOM/1 would apply to the sub-contract. It was also agreed that the Defendant's standard terms and conditions would be waived in favour of the DOM/1.

Given that the DOM/1 conditions and the Claimant's standard terms and conditions were not compatible, it was clear that the DOM/1 conditions prevailed. The fact that the terms and conditions referred to on the order were not attached, must mean that the Claimant's terms and conditions were not incorporated and that there was no objective intention that those standard terms should be incorporated. The court therefore dismissed the Claimant's claims for declaratory relief and its application for injunctive relief.

The adjudication provisions in this sub-contract could not be construed in a way that made adjudication a pre-condition. These provisions permitted a party, if it so wished, to refer a matter to adjudication at any material time.

It was open to any party to apply for relief to the requisite tribunal to exercise its right to adjudicate. It was not accepted that there must be a stay of any legitimately constituted proceedings where there is merely a discretionary right to adjudicate as opposed to a binding pre-conditional adjudication requirement.

### *Comments*

Mr Justice Akenhead was disinclined to stay the proceedings to enable the Claimant to adjudicate because it had had three to four years to pursue any of its claims by way of adjudication and had chosen not to do so. It would be an odd and unfortunate state of affairs if it were able to delay the prosecution of the substantive proceedings to enable it to pursue a course which it had failed to take over a period of time.

A party who has started court or arbitration proceedings is entitled to have those proceedings resolved as reasonably expeditiously as the court can achieve. It should not be forced to have those proceedings delayed or stayed by itself being forced to adjudicate when it does not want to exercise the right to do so.

Birgit Blacklaws  
August 2008

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