Vision Homes Ltd v Lancsville Construction Ltd

Positive/Neutral Judicial Consideration

Court
Queen's Bench Division (Technology & Construction Court)

Judgment Date
4 August 2009

Case No: HT-09-278

High Court of Justice Queen's Bench Division Technology and Construction Court

[2009] EWHC 2042 (TCC), 2009 WL 2392213

Before: Mr Justice Christopher Clarke

Date: 04/08/2009

Hearing dates: 20th July 2009

Representation

Peter Fraser QC & Simon Crawshaw (instructed by Maxwell Winward LLP) for the Claimant.
Martin Bowdery QC & Stuart V Kennedy (instructed by Merriman White Solicitors) for the Defendant.

Approved Judgment

Mr Justice Christopher Clarke:

1. Vision Homes Limited (“Vision”), the claimant, is a property developer. It contends that a decision of Mr Tony Bingham in respect of an adjudication is null, void and of no effect because it was made without jurisdiction and because it is vague and ambiguous. There is also a separate action in which Lancsville Construction Ltd (“LCL”), the defendant, seeks to recover the amount of Mr Bingham's fees.

2. In October 2007, Vision entered into a contract (“the contract”) in the form of the JCT Design and Build Contract 2005 Edition (with amendments) with LCL. Under the contract LCL was to construct the structural shell and external envelope (cladding, windows, doors and roofing) to five new blocks of residential apartments being developed by Vision at Paradise Dock, 142 Lea Bridge Road, London E5, together with other landscaping and infrastructure work. The contract sum was £ 7,975,000. Clause 9.2. of the Conditions provided for disputes under the contract to be referred to adjudication under the Scheme for Construction Contracts (“the Scheme”).

3. Work under the contract began. By July 2008, LCL realised that they were unable to undertake the external envelope works as required by the Contract, because they were unable to provide adequate funding to their proposed sub-contractor for the cladding works. LCL told Vision of the difficulty. Following discussions, in or around July or August 2008 the parties agreed that the external envelope works would be omitted (“de-scoped”) from the Contract, resulting in a 40% reduction in the value of the works. The agreement was preceded by an e-mail of 10th July in which Mr Freeman of Vision said to Mr Sherry of LCL:

> "…we are not looking for compensation or to get caught in contractual negotiations…"

4. With regard to the remaining works which stayed with LCL, the parties agreed a revised method of working for Block 5 and other fundamental changes to the way the work was to proceed and be handed over. According to the evidence of Mr Wallace of Kingfisher Associates Ltd, LCL's advisor, the works then proceeded on the basis that LCL would complete the remaining sections of the frame to blocks 2 and 3 and hand them over floor by floor. This contrasted with the original arrangement in which it had been envisaged that LCL would complete the whole frame including envelope works and then hand them over to Vision for internal fit out and completion. By 21st July LCL notified Vision that blocks 1 and 4 had reached practical completion, which Vision accepted at the time. Block 5 had fallen substantially behind schedule on account of problems with planning permission. It was agreed that the works would be carried out but again on an entirely different basis. LCL would complete the ground floor slab. Vision's employees would then carry out the brick and block work on the slab and then LCL would return and cast the next floor on the metal sheeting provided and installed by Vision and so on.

5. The effect of the changes (according to LCL) is summarised at pages 5 and 6 of Mr Bingham's decision as follows:-

> "LCL says: This Agreement substantially altered and drastically reduced the scope of Works. It altered the nature of the possession of the site and/or sections or parts thereafter and the issue of Practical Completion, LADS and the issuing of non-completion notices. The 'Notice of Adjudication' then particularises the effects of LCL position and continues: This project has an original contract value of £7.9 million. The contract indicates the amended document JCT 2005 Design and Build set of rules signed under seal and dated 05 October 2007. The subsequent July 2008 Agreement reduced the contract value by approximately £3 million down to £4.9 million. One of the effects of this agreement is an intention not to deduct Liquidated & Ascertained Damages. Further, or alternatively partial possession was taken with the effect of proportionate reduction of LADS. Further, the Agreement fundamentally altered the contractual matrix. Vision became in full control of the site, it was doing the majority of the Works and had CDM implications. Further, various practical completion status arose. The right to insist on performance of the contract in respect of time was lost and became at large. LCL effectively became a Vision subcontractor. Alternatively says LCL the Agreement had the effect of LCL taking partial possession of the whole site. Alternatively the effect of the Agreement is that it provides "yet another series of dates".

6. According to LCL by October 2008, the remaining contract works were substantially complete, although no Certificates of Practical Completion or Sectional Completion were issued. However, on 21st and 28th November 2008, Vision issued Non-Completion Certificates for the works. On 28th November LCL submitted to Vision a draft final account. On 26th March 2009, Vision purported to determine LCL's employment under the Contract.

Adjudications Nos 1 and 2

7. In April 2009, LCL commenced an Adjudication ("Adjudication No. 1").in relation to whether the determination of the contract was unlawful, but this was withdrawn before a decision was made and the adjudicator, Mr Lorne Alway of Always Associates, who had been appointed by the RICS, stood down. LCL commenced a second adjudication ("Adjudication No.

2"), with Mr Alway as adjudicator, relating to the non-payment of part of an interim valuation. Vision paid the sum in question and Mr Alway stood down.

8. By a letter dated 1st May 2009 Vision claimed against LCL £509,254 in Liquidated Damages for alleged late completion in accordance with clause 2.29 of the contract. LCL denied liability on the grounds that the contract dates for completion had been superseded by the agreement reached between the parties in July and August 2008 when the cladding was omitted. There was, therefore, a dispute over whether Vision was entitled to payment under the contract of Liquidated and Ascertained Damages ("LADs") and what contractual Completion Dates (if any) still applied.

8. *14th May 2009*

Adjudication No 3: LCL's first Notice of Intention to Refer

9. At 0622 on 14th May Mr Wallace on behalf of LCL faxed to Maxwell Winward on behalf of Vision a letter inviting them to agree one of three candidates to act as Adjudicator and enclosing a Notice of Intention to Refer a Dispute. The Notice included the following:

> "6. It is Lancsville's intention to try to agree a nomination for adjudicator and if not apply to the President of the RICS in accordance with the provisions of the Contract for the appointment of an adjudicator for the resolution of the dispute or difference, the terms of which are set out below.
>
> …
>
> **The Dispute**
>
> 8. The dispute or difference between the parties arises out of or in connection with the aforesaid written construction contract in respect of the Works at Paradise Dock, Lea Bridge Rd, London.
>
> 9. The Employer has in breach of contract decided to levy LADs in respect of purported late completion. The Adjudicator is requested to investigate all the issue of the agreement and/or the change to the Employer's Requirements and the Change instruction issued by Vision Homes whereby LCL's scope of work was substantially altered and drastically reduced. This agreement then altered the nature of the possession of the site and/or sections or parts thereafter and the whole issue of practical completion, LADs, time and the issuing of non-completion notices. However the Adjudicator is not given jurisdiction to investigate and make any decision as to Lancsville's application for an extension of time."

LCL included in this notice a " *Statement of Relief* " sought which read as follows:

> "Declarations that:
>
> A: In respect of blocks 1 to 5 Vision Homes amended the Employer's Requirements, by agreement with LCL, and removed from their scope of works the obligations to complete the external envelope including cladding, windows and doors or such other elements as the Adjudicator in his discretion shall decide.
> B: The Employer's Requirements were fundamentally changed in respect of Block 5 whereby Vision Homes and LCL carried out the construction Work jointly.

C: Vision Homes issued a Change instruction under clause 3.9 of the Contract to alter the Employer's Requirements.
D: Due to Vision Homes changing the Employer's Requirements and then undertaking either by themselves or through sub contractors all the External envelope work then, for the purposes of possession and/or Practical completion the situation was:

> Practical completion of blocks 1 and 4 took place on a date not later than the 21st July 2008.
> Phased partial possession by Vision Homes took place under clause 2.30 of the Contract of blocks 2, 3 and 5 in accordance with Mr Naude's letter of the 4th August 2008 reference AD/cc/2410/2 save for the stairwells of blocks 2 and 3.
> Practical completion of block 2 took place on a date not later than 27th February 2009 and block 3 on a date not later than 6th March 2009. Block 5 was practically complete on a date not later than 27th March 2009.
> Partial possession of section 6, save for the basement car park took place on or about the 21st July when Vision Homes commenced work on the external envelope of blocks 1 and 4 and practical completion as at 26th March still had not been achieved.
> Or such other arrangement or arrangements and date or dates as to practical completion and/or part possession of the various parts or parts, section or sections as the Adjudicator in his discretion shall decide.

E: When the Employer's Requirements were amended by Vision Homes their failure to thereafter amend the Sectional Completion dates as set out in the Particulars to the Contract thereby caused time to become at large.
F: When the Employer's Requirements were amended by Vision Homes their failure to amend the amounts entered into the Sectional Completion Supplement in respect of LADS had the effect that in respect of blocks 1 to 5 they became a penalty because they were no longer a genuine pre estimate of their loss if there was late completion as the amounts entered therein failed to recognize the revised scope of works.
G: The e-mail of Mr D, Freeman of Vision Homes on the 10th of July at 0810hrs to Mr Sherry is such that Vision Homes thereafter agreed not to seek financial compensation in respect of delays for completion of the Works or the reduction in LCL's scope.
H: The notice of non compliance of the 21st November is invalid as it refers to a scope of works for which LCL was not responsible.
I: The notice of non completion of the 28th November is invalid as it refers to a scope of works for which the LCL was not responsible".

Adjudication No 4: Vision's Notice of Intention to Refer

10. At 1635 on 14th May Vision's solicitors, Maxwell Winward, served on LCL a Notice of Intention to Refer a Dispute regarding Vision's entitlement to LADs of £509,254. That notice included the following:

> **"The Dispute**
>
> 4
>
> a. The dispute referred to Adjudication concerns the Referring Party's [i.e. Vision's] entitlement to Liquidated and Ascertained Damages in accordance with clause 2.29 of the Contract…
> h. On 1 May 2009 [Vision] wrote to [LCL] requesting payment of FIVE HUNDRED AND NINE THOUSAND POUNDS STERLING (£509,254.00) in respect of LADs within 7 days…
> i. On 8 May 2009 [LCL] wrote to [Vision] requesting an extension of the payment deadline until Wednesday 13 May 2009…

> j. On 14 May 2009 [LCL's] legal representative stated that the Respondent did not intend to pay LADs…
> k. A dispute accordingly exists which is capable of reference to Adjudication.

Redress sought

5

> a. [Vision] will request that the Adjudicator orders [LCL] to pay [Vision] the sum of FIVE HUNDRED AND NINE THOUSAND POUNDS STERLING (£509,254.00), or such other sum as the Adjudicator considers appropriate, within 7 days of the date of the Adjudicator's decision being delivered to the parties, or within such other period as the Adjudicator shall deem appropriate."

11. The dispute referred to in the Vision notice was referred for determination by Mr Alway by a Referral Notice dated 21st May 2009. I refer to this adjudication as "the Alway Adjudication".

12. At 1636 Mr Wallace, LCL's claims consultant, requested the RICS to appoint Mr Bingham as adjudicator. At 1450 on the same date Maxwell Winward applied to the RICS to nominate an adjudicator.

LCL's modified Notice of Intention to Refer

13. At 1654 on the same day Mr Wallace e-mailed to Vision a slightly modified Notice of Intention to refer. The only change consisted of the addition of a claim for a declaration that Vision should pay the adjudicator' costs, fees and expense.

14. On 19th May Mr Tony Bingham accepted nomination in respect of LCL's Notice and proceeded to conduct what I will call "the Bingham adjudication".

15. Both the Alway and the Bingham adjudications proceeded.

16. On 20th May LCL served a Referral Notice. It also served a Final Account Statement which was expressed to be in accordance with clause 4.12.2 of the Contract. On 21st May Vision served a Referral Notice.

LCL's Referral Notice

17. The LCL Referral Notice set out and relied upon a series of provisions under the contract relating to practical completion, partial possession by the employer (which Vision was alleged to have taken), liquidated damages, defects and changes. The Notice claimed that there had been what amounted to a change instruction to omit the external envelope, an agreement that block 1 and 4 had reached practical completion and that blocks 2 and 3 were to be the subject of a series of phased partial possessions. The Notice gave four possible analyses of what had happened under the contract. It claimed that, because of the omission of the works, the LADs in respect of blocks 1 and 5 had become penal, that Vision had elected not to rely on

them, and that time was now at large because of the omission of works and Vision's partial possession of the site. The Notice did not suggest that the contract had been abandoned.

18. Vision then challenged the jurisdiction of Mr Bingham to act. On 21st May Vision's solicitors invited Mr Bingham to resign as Adjudicator on the basis of lack of jurisdiction because there was no dispute. This contention has not been pursued. Mr Bingham initially took this to be Vision's response document. At 1845 Vision's solicitors responded:

> "Thank you for the email. Just to clarify, our letter amounted to a jurisdictional challenge on the basis that the Referring Party's Adjudication Notice did not set out a dispute. We should be grateful if you could give an indication as to when you will make a determination on the jurisdictional point. In order to avoid unnecessary legal costs, it would be helpful if you gave such a ruling prior to the deadline for submission of our Response Document".

19. On 22nd May LCL submitted their response to Vision's jurisdictional challenge to Mr Bingham and asked Mr Bingham to determine the jurisdictional challenge. Mr Wallace on behalf of LCL also wrote to Mr Alway to invite him to resign on the basis that the dispute was essentially the same as that which LCL had commenced at 0622 on 14th May.

20. On the same day Maxwell Winward (Mr Sergeant) for Vision e-mailed Mr Bingham asking if it would be possible for Vision to postpone the date for service of its response: until after the jurisdictional challenge had been determined saying:

> "Adjudication was introduced in order to save parties large legal bills. We are concerned that if we are required to produce a Response before a resolution of this very straightforward jurisdictional matter quite the opposite will occur, i.e. this will result in considerable wasted costs for no good reason.
>
> We appreciate that you are very busy. However, if you do not have the available time to consider the jurisdictional point would it be possible for us to postpone the date for service of our Response so that the jurisdictional challenge can be heard first?"

Mr Bingham replied the same day:

> "Thank you for your e-mail earlier today. I immediately looked at this challenge and could not see the force of Vision's position. I will look at it again once your Response is served. Rest assured I will resign (and do resign) from appointments"

21. On 26th May 2009 Mr Bingham produced his decision on the preliminary point on jurisdiction, which was that Vision's claim that he had no jurisdiction failed. He indicated that he would look at the question again once Vision's Response was served because if that admitted the complaint there would be no dispute.

22. In their letter to him of the same day Maxwell Winward told Mr Bingham that further submission would be made in Vision's response to the Referral. They also wrote to Mr Alway asserting that the dispute referred to him was not essentially the same as that which was the subject of any other proceedings and asking him to continue to act.

23. On 28th May Vision served their response to LCL's referral. This included the following

> "The Respondent reserves its position in relation to the Adjudicator's jurisdiction. Nothing in this Response should be taken as an acceptance of the Adjudicator's jurisdiction. Further submissions are made in this regard at paragraph 5 and in Appendix 1. "

24. In their conclusions they stated the following:

> "87. It is the Respondent's position that the following agreement was reached:
>
> a. The metsec and external insulated render would be removed from the Referring Party's scope of Works;
> b. £564,561.98 and £275,451.00 would be deducted from the Contract Sum in respect of these omissions; and
> c. It was later agreed that the external envelope would be omitted from the Referring Party's scope of Works. As no agreement was reached in relation to the valuation of the external envelope Works, the Change would be valued in accordance with clauses 5.4 to 5.7 of the Contract.
>
> It is denied that the above omissions from the Employer's Requirements meant that the existing provisions regarding completion could [not] still apply. It is denied that the Change amended any provisions of the Contract."

25. On 1st June Mr Bingham, having received the response, suggested a meeting and circulated an Agenda as follows:

> "For TB meeting assistance please:
>
> The Agreement(s)
> Whether the Agreements of July/August 08:
> Reduced/omitted £3 million of work (para. 41 Referral)
> Para. 82 Response
> Para. 19 Response 1st para.
> Dean Freeman's letter "lost weeks/compensation"

Removed EOT machinery
Removed LAD
Put time at large
Left contract behind
Completed/partial possession
Whether
PC/deemed pc for 1 & 4 21st July 08
Partial possession block 6 21st July 08
PC Block 2 27th Feb 09
PC Block 3 6th March 09
PC Block 5 ??
Determination
Para.32 Response
Whether correct
Repudiatory
Effect either way
TB”

The 2nd June meeting

26. On 2nd June 2009 a meeting took place between Mr Bingham and representatives of the parties - Mr Sergeant and Ms Doran of Maxwell Winward, Mr Wallace of Kingfisher, Mr M Henry, LCL's managing director, and Mr Jonathan Wicke, LCL's managing surveyor. At this meeting (see para 37 of Mr Sergeant's witness statement) LCL was saying that the omission of the works agreed to be omitted in July/August (a) resulted in sectional practical completion being achieved earlier on certain blocks; (b) in the absence of any change to the sectional completion dates the level of the LADs in the contract for each of the blocks became at large and the LADs became a penalty; and (c) that in the process of agreeing the omission it had been agreed that Vision would waive any future claims for LADs.

27. What exactly was said at this meeting is in dispute.

Vision's evidence - Mr Sergeant

28. According to Mr Sergeant Mr Bingham raised the question of whether the omission of the work from the contract amounted to a variation of the contact itself rather than a variation issued under the contract. Mr Sergeant said that it had never been suggested that there was a variation under the contract and that it had always been treated as a variation under the contract. Mr Wallace agreed with his analysis.

Ms Doran's notes

29. A note taken at the time by Ms Doran of Maxwell Winward records Mr Bingham asking whether it was a varied contract. There is then a submission by Mr Sergeant that the reference to not seeking compensation in the e-mail of 10th July related to the cost of an alternative sub contractor and not to LADs for delay. Mr Bingham is recorded as saying at one point that the parties were “ *asking tribunal to construct the contract* ”. He also expresses the view that the e-mail is crucial and that it suggests some deal about time and asks how that affects the extension of time machinery. Mr Sergeant then refers to the fact that “ *we are looking at variations under the contract and that there was a mechanism under the contract to vary completion dates* ”. The e-mail of 10th July is open to two interpretations - that it is covering (i) the cost of an alternative subcontractor; or (ii) the delay being caused by swapping sub contractor. He says that he cannot see how that causes the contract to break

down because the omission of works amounts to a variation and it would have been open for LCL to apply to amend the completion date.

30. Mr Wallace is then recorded as submitting that the final paragraph of the 10th July e-mail related only to time. He is recorded as explaining what happened in relation to the various sections, the fact that LCL could not do the external envelope and that in relation to section 5 the parties worked on a collaborative basis and it should be removed from the contractual machinery. Toward the end of the note Mr Wallace is recorded as saying:

> "I don't think the contract is unworkable."

It is not clear from the note whether this was a general remark or related to some specific aspect.

31. On 3rd June Ms Doran of Maxwell Winward sent a note of the meeting of 2nd June to Vision which included the following:

> **"1. The Agreement(s) to Omit Works**
>
> The Adjudicator was concerned primarily about whether the EOT mechanism in the contract can be said to have "broken down". (This can be said to happen if the parties start to treat delay on the project in such a way that the EOT mechanism can no longer work). He raised the possibility that Dean Freeman's email of 10 July 08 could have led to this (see below). The Adjudicator was therefore interested in understanding the value of the omitted works and how it had been omitted. MW advised that both parties had agreed to omit the works and this was done in accordance with the variations mechanism in the Contract. There is no reason why the variations mechanism cannot operate with relation to omitted works – i.e. it can be used to omit a substantial sum provided that the contractor agrees. The Adjudicator wanted to debate the possible interpretation that the Contract had been varied when the work was omitted rather than the omitted work being deleted via the variations mechanism. (This may seem like a technical legal distinction – The adjudicator may think this is important because he should then be deciding that the variation to the contract meant that the EOT mechanism broke down).
>
> **2. Dean Freeman's email of 10 July 08**
>
> The Adjudicator had not yet looked at Dean Freeman's statement, as he wanted to form an objective view on the meaning of Dean's email. MW advised that the reference to "compensation" related to the additional cost of appointing an alternative sub-contractor, it was not a waiver of LADs. The Adjudicator was not convinced that there was not some agreement relating to time in this email – reference was made to "clawing back the programme", and if so, what did that agreement do to other contractual machinery, such as LAD's? Either way, the Adjudicator thought Dean's email was crucial. MW explained that an alternative interpretation would be LCL would not be responsible for any delay caused by appointing an alternative subcontractor. MW could not see how that caused the contract machinery to break down. KA argued that if the reference was to "compensation" did relate only to the cost of the works, Vision had not conducted themselves in such a manner as to support this – reference to Notional Final Account."

LCL's evidence – Mr Wallace

32. Mr Wallace's account included the following:

> "22. The meeting commenced with Mr Bingham giving each side ample opportunity to state their position and then he moved to the agenda. M s Doran, who had been dealing with the matter, was accompanied by Mr Sergeant who in fact led for Vision Homes. When the issue of the effect of the removal of 40% of the contract value was broached Vision's initial position was that it was not£3m but only £2m and they persisted in that assertion and that whatever it was it did not really make that much difference to the management of the Works. There were then many other matters discussed as to practical completion, partial possession defects and the suchlike.
>
> 23. The meeting moved to a consideration of the arrangements following the de-scope and how that impacted on all the administrative issues under the Contract for example, but not limited to, such matters as practical completion, partial possession extensions of time, the prolongation loss and expense, Principal Contractor and the suchlike. Mr Bingham floated the idea that this change was so fundamental that might it not be that the effect of what the Parties had actually done was to "leave the contract behind" and operate on an ad hoc basis because it was a bit of a mess. Maxwell Winward, being represented by an experienced solicitor Mr Sergeant rather than Ms Doran, raised no objection to this issue on jurisdictional, or any other, grounds but, rather more, enthusiastically entered into the debate albeit arguing that it was not their conclusion that this had happened. His view was that the large omission of work and the substantially altered working arrangements could be dealt within the contract framework, but he failed to acknowledge the substantial problems which this brought about, some of which Mr Bingham highlighted.
>
> 24. When Mr Bingham asked my opinion I accepted that there were substantial difficulties in clinging to the contractual framework because it was clear, on any analysis, the parties had, by their actions, abandoned many if not all of the procedures thereunder such as:-
>
> (a) the giving and taking of notices,
>
> (b) Vision had commenced final account negotiations at the end of November 2008 far earlier than envisaged under the Contract),
>
> (c) Mr Freeman had agreed to abandon the LAD provisions,
>
> (d) there was no agreement about Principal Contractor role and the health and safety implications and also other "contractual" issues which might arise under the contract.
>
> No doubt there were many other examples which were relevant not least of course the arrangements evidenced by Mr Freeman's letter of the 11th of December. All of these factors then made it very difficult to square the conduct of the parties with the continued operation of the JCT contract. My conclusion was that it was certainly an explanation and a logical one at that."

Mr Wicke

33. According to Mr Wicke's evidence the meeting covered all the items on the agenda. Mr Bingham indicated at the start that his initial reaction was to query whether and what (if any) contract survived following the agreement to omit such a significant part of LCL's original work. He said that he would have real trouble trying to reconstruct the contract to deal with

the agreed events (or words to that effect) and was left with the notion that it was a real mess. On at least one occasion he raised the possibility that the JCT contract was "left behind". He invited both parties to argue the point and gave them time and opportunity to do so. Mr Sergeant did not agree with the view that the JCT contract was left behind and argued that it was not but did not question Mr Bingham's jurisdictional right to look at the point. At the end of the meeting Mr Bingham said that he was left with the unenviable task of trying to see if the contract worked in dealing with the events that took place.

34. Mr Wicke's notes taken at the meeting record:

> "Bingham Suggesting the amendments constituted a varied contract as opposed to a change under clause 5.1.
>
> TB looking very carefully at what DF meant by no compensation, and how this impacts on whole EOT mechanism.
>
> TB trying to almost reconstruct contract basically says real mess.
>
> Not looking at Determination/Repudiation etc.
>
> TB trying to see if the contract works."

35. Vision accepts that Mr Bingham raised, once, the possibility that the JCT contract had been left behind. But, as it submits, both sides made submissions about how the contract terms applied and did not suggest that the contract had been left behind or dumped. Mr Sergeant's evidence is that the interpretation that the contract was abandoned was not debated at the meeting.

36. Mr Bingham received further clarification from the parties in e-mail of 3rd, 4th and 5th June. In the last of those e-mails Mr Wallace observed:

> "The removal of 40% of the contract value and changes to plot five, and the failure by both parties to comply with contractual notices and the suchlike leave the contract in tatters. This the wisdom of both parties agreeing the accommodation to get the scheme built and to avoid years of litigation and waste more time getting lawyers in re-drafting the Contract before proceeding."

37. On 16th June Mr Bingham published his Decision. By his award Mr Bingham held, inter alia, as follows:

> "The Adjudicator forms the view that the parties dumped the Rule book last year. Usefully though LCL was kept on to do what it could in its crippled condition. True, the parties are willing to say that this Agreement is some form of Variation under the contract rules, which permit variations. But the obligations between LCL and Vision became completely different. It is making no sense to try to read the JCT Rule book given the major surgery to the original contract. It is the worst of all notions when the tribunal becomes tempted to manipulate clauses to somehow fit a wholly different set of

events. It is also tempting to say the parties gave little or no thought to re-assembling their contract at the time of the new deal. That's wrong. They plainly gave real thought. Dean Freeman [of LCL] did not want to end up in contractual antics. He did a good deal.

The effect of the Agreement is that LCL and Vision dumped the JCT. The remaining Works was to be done 'as & when' using as best they can guidance from rates and prices in the original deal. The events completely left behind the EOT machinery, out went the LAD's . No one really knows what EOT might be due at July 2008, nor how to re-fix completion dates. Gone too is all the sophisticated machinery of partial possession, part LAD's. Vision can't claim LAD's. LCL can't claim loss and expense. Vision is to simply pay LCL a fair rate for the jobs done and LCL can come and go to site as reasonably required by Vision. At a glance it appears a mess. It is not. It is an extremely sensible arrangement given Vision thought LCL was in its death throws. Vision benefited from whatever work LCL did eventually do. So does LCL provided Vision pays up for that work.

The effects of the 'Agreement'

(1) The dates for completion of Sections (per JCT) fall away

(2) LCL is on a 'beck and call' arrangement

(3) Vision is to pay a fair price for the Works done.

(4) The 'Section' sums fall away.

(5) The dates for possession fall away.

(6) The LAD rates, arrangements and EOT are unworkable.

(7) LCL is to work with any other company on the site doing work as required by Vision, as might a subcontractor working alongside other subcontractors.

(8) LCL is to carry out the Works indicated by Vision from time-to-Time as reasonably required and to a reasonable price.

(9) The definition 'Completion Dates' as explained in JCT do not apply.

(10) The following JCT clauses (inter alia) are unworkable: 2.3; 2.4; 2.5; 2.6 as amended; 2.23; 2.24; 2.25; 2.26; 2.27; 2.28; 2.29; 2.30; 2.31; 2.34; 2.35 and 2.36

(11) It is impossible to declare that 'Practical Completion' takes place."

38. The 'Agreement' referred to in Mr Bingham's Award was the agreement reached between LCL and Vision in July/August 2008 for the omission of the external envelope works from LCL's scope of work.

39. Applying his decision to the declarations which had been sought by LCL Mr Bingham held as follows:

(a) He granted declarations A, B, C and G claimed by LCL;
(b) In respect of declaration D, he held that no mechanism for Practical Completion or partial possession existed and/or survived the Agreement. Instead, Mr. Bingham declared that *"LCL is working to the reasonable beck and call of Vision"* ;

(c) He did not grant declaration E in the terms sought. Instead he declared that *"Time became at large for the reasons given"* ;
(d) He did not grant declaration F in the terms sought. Instead he declared that *"The EOT clause and LAD provisions fell away for the reasons given"* ;
(e) He did not grant declarations H and I in the terms sought. Instead he declared that *"Notices of non-completion are ineffective for the reasons given"*.

After the Decision

40. On 17th June Vision wrote to Mr Alway contending that Mr Bingham's Award was not binding on him. On the same day Mr Wallace for LCL wrote to Mr Alway seeking his resignation in the light of Mr Bingham's decision on the ground that he now lacked jurisdiction to give any decision.

41. Mr Alway requested submissions from the parties. Vision stated their position to be (a) that the purported dispute the subject of the Bingham adjudication was not the same as that which was referred to Mr Alway in the Alway adjudication; and (b) Mr Bingham's decision was invalid and not binding on Mr Alway. LCL's position was that Mr Bingham had decided the matter in dispute in the Alway adjudication in that he had decided that Vision could not claim LADs, and LCL could not claim loss and expense; so that any adjudication by Mr Alway would be without jurisdiction…

42. On 18th June Mr Alway informed the parties

> "In acknowledging that I cannot bind the Parties on jurisdiction, either my own or Mr Bingham's, I must confirm my present view based on the information available that given Mr Bingham's decision and my view on the arguments, cases presented etc the decision given by Mr Bingham does appear to relate to the same or substantially the same dispute as the one referred to me.
>
> On the question of Mr Bingham's decision being invalid, I consider it would be inappropriate for me to advise the Parties of my view given the nature of that question and the information available.
>
> I am of the opinion then that if I ultimately conclude that the decision of Mr Bingham concerns a dispute the same or substantially the same as the dispute in this Referral, I should resign."

43. He stated that it would be much more satisfactory for all concerned if the court considered the jurisdictional challenges to Mr Bingham's decision. He asked Vision to agree to a further 13 day extension of time for his decision to allow either party to apply to the court for guidance. Vision agreed to extend the time to 2nd July 2009. LCL did not agree any extension. Mr Alway indicated that he would not issue a decision by the 2nd July 2009 but would wait the outcome of the Part 8 Application.

44. On 2nd July Vision served its Part 8 claim.

Adjudication No 5

45. On 24th June LCL commenced a further adjudication in respect of a claim under the Final Account of £ 1.6 million. The adjudicator is Mr Milloy.

46. On 1st July Mr Alway notified the parties in relation to the call for him to resign that he would await the outcome of the application to the courts.

The adjudicator's decision

Vision's submissions

47. Vision submits that the adjudicator's decision cannot stand because it is not clear what it means. Since it is expressed in idiosyncratic terms, such as the expressions that the parties " *dumped the Rule book* " or" " *dumped the JCT* " and that " *Out went the LADs* ", it is not clear whether the decision is (i) that the parties abandoned the contract so that none of it was left for any purpose, but a new contract agreement or arrangement arose; or (ii) that the parties impliedly agreed to amend the contract so as to omit some work and some of its conditions; or (iii) that the new arrangements agreed to take effect in the summer of 2008 had the inevitable effect that certain contractual provisions were no longer capable of operating in accordance with their terms or could no longer be applicable.

48. Just as an arbitrator's award which is uncertain on its face is unenforceable at common law – River Plate Products NL BV v Etablissement Coargrain [1982] Lloyds LR 628 - and under the Arbitration Act 1996 section 68 (2) (f) so must an adjudication decision be also.

49. I do not accept that the decision is so unclear on its face that no effect can be given to it. Firstly, I do not accept that Mr Bingham has held that the whole of the JCT Contract has been abandoned. According to the decision, little of it may after July 2008 have remained in effect so far as future operations were concerned. But that does not mean that it ceased to exist in any sense at all e.g. for the purpose of governing the rights and obligations of the parties in respect of work carried out before then, including the scope of the works, and to confer rights of adjudication and arbitration. What Mr Bingham did decide was what he found it necessary to decide for the purpose of determining the dispute as to whether LADs were applicable, namely the non applicability, in the light of what was had been agreed in July and August 2008, of the matters specified in paras (1), (4) (5), (6) (9), and (10) under the heading " *The effects of the 'Agreement'* ". That must be on the basis that the provisions are either impossible of application in the light of the agreement or cannot, consistently with the agreement, be treated as still applying as before. In its place so far as the external work is concerned are the arrangements specified at paras (2), (3), (7) and (8).

50. I do not regard the use of the expression " *beck and call* " as too uncertain to have meaning. The work in question is to be carried out when called for by Vision and may be interrupted e.g. where Vision carries out its functions in respect of Block 5. The fact that the adjudicator describes certain clauses as unworkable indicates that he is not holding that all of them are either unworkable or inapplicable. Such a conclusion would have removed the source of his jurisdiction namely the adjudication clause in the Contract. The adjudicator referred to major surgery to the original contract, not that the patient died.

Want of jurisdiction - Timing

51. The Scheme for Construction Contracts provides as follows:

> **"Notice of Intention to seek Adjudication**
>
> 1.-
> (1) Any party to a construction contract (the "referring party") may give written notice (the "notice of adjudication") of his intention to refer any dispute arising under the contract, to adjudication.
>
> (2) The notice of adjudication shall be given to every other party to the contract.

(3) The notice of adjudication shall set out briefly -

(a) the nature and a brief description of the dispute and of the parties involved,

(b) details of where and when the dispute has arisen,

(c) the nature of the redress which is sought, and

(d) the names and addresses of the parties to the contract (including, where appropriate, the addresses which the parties have specified for the giving of notices).

2.-
(1) Following the giving of a notice of adjudication and subject to any agreement between the parties to the dispute as to who shall act as adjudicator -

(a) the referring party shall request the person (if any) specified in the contract to act as adjudicator, or

(b) if no person is named in the contract or the person named has already indicated that he is unwilling or unable to act, and the contract provides for a specified nominating body to select a person, the referring party shall request the nominating body named in the contract to select a person to act as adjudicator…"

(2) A person requested to act as adjudicator in accordance with the provisions of paragraph (1) shall indicate whether or not he is willing to act within two days of receiving the request.

3. The request referred to in paragraphs 2, 5 and 6 shall be accompanied by a copy of the notice of adjudication.

52. The scheme thus contemplates that the request to the nominating body (in the contract the RICS) shall follow the giving of a notice of adjudication. Vision contends that the notice under which Mr Bingham acted was the second notice of 14th May (as is apparent from the fact that he ordered Vision to pay his costs and expenses, which was the last item of redress claimed in the second notice). Accordingly the decision, made in an adjudication where the request *preceded* the notice is invalid.

53. In IDE Contracting Limited -v- R G Carter Cambridge Limited [2004] EWHC 36 (TCC) HHJ Havery QC said (in relation to a contract where an adjudicator was specified):

"9 Mr. Lee submitted that those provisions had been complied with. Mr. Pratt indicated on 12th September that he was unwilling or unable to act. Thus the condition contained in paragraph 2(b) was fulfilled. On a literal reading of the provisions, that submission cannot be gainsaid. But it seems to me not to be in accordance with the general intendment of the provisions. What is intended, in my judgment, is that the notice of adjudication comes first. Then the referring party is to request the person specified in the contract to act as adjudicator, unless he has already indicated to the parties that he is unwilling or unable to act. The request must doubtless be in writing since it must be accompanied by a copy of the notice of adjudication. The person specified must indicate within two days whether or not he is willing to act. If he indicates that he is not, then provided that that

> indication is made to all parties the referring party may proceed under paragraph 6(1) (b) to request the nominating body to select a person to act as adjudicator. What happened here is that no request at all was made under paragraph 2(a). The procedure was bypassed. And it is in my judgment implicit in paragraph 2(b), as it is explicit in paragraph 6, that the unwillingness or inability of the specified person to act should be indicated to all parties.
>
> 10 If Mr. Lee's construction of the scheme were correct, it would be open to an intending claimant who did not want the specified person to act as the adjudicator to ascertain, without the knowledge of the other party, when the specified person would not be available, and to serve the notice of adjudication [Semble the request to act] at that time. By the time the notice of adjudication was served, the adjudicator might have become free to act. Yet he would not be appointed. The other party would suffer prejudice in that he would be deprived of having the adjudication carried out by the person of his (and the other party's) first choice. The same could apply in the absence of any ulterior motive on the part of the claimant.
>
> 11 I conclude that the provisions of the scheme relating to the appointment of the adjudicator were not complied with. Mr. Dennys submitted, and I accept, that non-compliance with those provisions deprives the adjudicator of jurisdiction unless the defendant has submitted to the adjudicator's jurisdiction in the full sense of having agreed not only that the adjudicator should rule on the issue of jurisdiction but also that it would be bound by that ruling (see the words of Simon Brown L.J., as he then was, in *Thomas-Fredric (Construction) Limited v. Keith Wilson [2003] EWCA Civ 1494, 21st October 2003*). However, Mr. Lee submitted that non-compliance with the provisions of the scheme did not affect the validity of the appointment because, on the evidence, Mr. Pratt would in any event have declined to act as adjudicator and a nomination through the Chartered Institute of Arbitrators would have been made. Thus the defendant had suffered no prejudice."

54. Judge Havery went on to decide that he was not satisfied that the defendant had suffered any prejudice. But, as he held, it was " *clearly* " unnecessary for him to have done so. The adjudicator had exceeded his jurisdiction.

55. LCL relied on Palmac Contracting Ltd v Park Lane Estate Ltd [2005] EWHC 919 (TCC) . In that case, however, the court held that the relevant clause did not stipulate that an application for nomination of an adjudicator had to be made after notice of adjudication has been given. The court's decision that it was not fatal that the nomination preceded the application is not, therefore, an authority for the position under the Scheme.

Conclusion

56. Not without some misgiving I accept that the adjudicator had no jurisdiction to act, as he did, under the second notice of 14th May because that notice was not followed but preceded by a request to the nominating body under 2 (1) (b) of the Scheme. It is not possible, in my judgment, to regard the request as continuing so that it may be regarded as made both before and after the second notice. Clauses 2 (1) and 3 of the Scheme refer to a request in writing which accompanies (rather than precedes) the relevant notice of adjudication. Further I am persuaded, as was Judge Havery, that if the provisions which establish the jurisdiction of the adjudicator are not complied with it is irrelevant whether or not the other party has suffered prejudice by that non-compliance.

57. My misgiving arises from the fact that the alteration to the Notice to add a claim for the adjudicator's fees added something which, although not insignificant, was of limited importance compared with the dispute as a whole. In other circumstances, however, the difference between one Notice and a second may be much more significant. Where one Notice is served, a

nomination is sought, a second Notice follows, and the adjudication proceeds pursuant to the second notice, the question of jurisdiction cannot in my judgment be decided by a determination of the degree of importance of the additional claim.

58. I do not regard Vision as precluded from taking this point notwithstanding that it pressed for Mr Bingham to resolve the jurisdictional challenge. Vision did not agree to him having " *jurisdiction in the full sense of having agreed not only that the adjudicator should rule on the issue of jurisdiction but also that it would be bound by that ruling* ".

Want of jurisdiction – departure from what agreed

59. In *Carillion Construction Ltd v Devonport Royal Dockyard [2006] BLR 15* , at paragraph 85, Chadwick LJ said:

> "The objective which underlies the Act and the statutory scheme requires the courts to respect and enforce the adjudicator's decision unless it is plain that the question which he has decided was not the question referred to him or the manner in which he has gone about his task is obviously unfair. It should only be in rare circumstances that the courts will interfere with the decision of an adjudicator…"

60. Vision submits that Mr Bingham has purported to decide something that was not referred to him and has thereby exceeded his jurisdiction. No part of the dispute referred to him included a dispute as to whether or not the contract had been abandoned or left behind (if that is what " *dumped the JCT* " or " *dumped the Rule Book* " is intended to mean). Since that was not part of LCL's case Vision did not have the opportunity of dealing with it such that there has been obvious unfairness.

61. In McAlpine PPS Pipeline Systems v Transco [2004] 352, 367 HHJ Toulmin CMG QC said:

> "145. It seems to me that it is clear from the Act that it is for the party who refers the dispute to adjudication to define the issues which are referred. In the absence of agreement between the parties to vary the terms on which the dispute is referred, the adjudicator has no jurisdiction to vary the basis on which the reference has been made.
>
> 146. …If the existing referral does not enable him to deal with the dispute in the way in which he wishes, he is powerless to alter the terms of the referral in the absence of the agreement of both parties. So long as the dispute remains before him, he must decide only the issues referred to him."

I respectfully agree.

Definition of the issues

62. If, however, one looks at the dispute as defined in the Notice of Intention to Refer it is a dispute as to whether Vision was in breach of contract in deciding to levy LADs in respect of purported late completion. In those circumstances it seems to me that it was open to the adjudicator to consider (subject to the dictates of natural justice) any point which bore upon

the question of Vision's contractual entitlement or the lack of it, and on what were the completion dates, particularly when the Notice requested him:

> "to investigate all the issue of the agreement and/or the change to the Employer's Requirements and the Change instruction issued by Vision Homes whereby LCL's scope of work was substantially altered and drastically reduced. This agreement then altered the nature of the possession of the site and/or sections or parts thereafter and the whole issue of practical completion, LADs, time and the issuing of non-completion notices."

63. Having regard to the context in which this dispute arose I regard it as within the adjudicator's jurisdiction to determine what parts of the original contract remained in operation and with what effect. Whether his decision was right, either in fact or law, is irrelevant.

Inconsistency with the agreement of the parties

64. In *Shimizu Europe Ltd v LBJ Fabrications Ltd [2003] BLR 381* HHJ Kirkham held that an adjudicator had exceeded his jurisdiction because he had reached a decision which was inconsistent with the agreement between the parties as to what was the basis of the contract:

> "43. I conclude that the parties had agreed the position as to the contractual relationship between them, namely that their agreement was based on the LOI. The contractual relationship was not in issue. Accordingly, the adjudicator did not have jurisdiction to decide the matters he dealt with at paragraphs 6.2.2 and 6.2.3 of his decision."

65. Coulson J reached a similar conclusion in Primus Build Ltd v Pompey Centre Ltd [2009] EWHC 1487 (TCC) where the parties had agreed that certain accounts should be ignored.

66. In the present case it does not seem to me that there was such an agreement between the parties as would preclude the adjudicator from reaching the decision that he reached. He did not decide that the contract was abandoned. On the contrary he has decided that there was an omission under clause 3.9 the effect of which was to make a number of other provisions of the contract inoperable. The relief sought had claimed that a number of provisions could, in the light of the agreement of July and August 2008, no longer operate in accordance with their terms. LCL had claimed that time was at large and that LADs were inapplicable. Vision had expressly denied that the omissions meant that the existing provisions regarding completion could not still apply or that the change amended any provisions of the contract. That pleading implicitly recognised that the adjudicator might reach a different decision, as he did.

67. In the recent Scottish case of Barr Ltd v Klin Investment UK Ltd, Outer House, Court of Session, 17th July 2009 , where the complaint was that the adjudicator lacked jurisdiction because the validity of a withholding notice was not something which was in dispute before the referral to adjudication, Lord Glennie made a distinction between a new dispute and a new argument relating to an existing dispute. The adjudicator's arguments, for such they started as, seem to me to be arguments

relevant to the dispute referred to him under the Notice of Referral. If the parties had agreed that the question of recoverability of LADs should be determined on the footing that the contract continued with all its terms in full force, it may be that the adjudicator could not legitimately have reached the decision that he did. But, in my judgment they made no such agreement. His conclusion was a development and exposition of the contention that time was at large, the LAD provision inapplicable and the scope of the work so changed that the notices of non completion were inapposite.

Unfairness

68. Vision submits that in any event the manner in which the adjudicator has gone about his task is obviously unfair. I do not accept that that is so. It is not possible wholly to resolve the dispute about what occurred on 2nd June in the absence of cross examination. But the material about which there can be no credible dispute established:

i. that LCL was submitting that the LADs, if potentially claimable, had, in the light of the de-scoping, become a penalty: see para 26 above;
ii. that LCL was saying that the agreement amounted to a waiver of future LADs: see para 26 and para 2 of Ms Doran's note to Vision at para 31 above;
iii. that the adjudicator had indicated that what had been agreed as the way forward may have had the effect of removing the EOT machinery and the LADs, put time at large and left the contract behind: see the agenda at para 25 above;
iv. that he had also said that the tribunal might have to be engaged in constructing a contract out of what had happened: see para 29 above;
v. that the adjudicator had indicated that he was concerned with whether the EOT mechanism and other contractual machinery such as the LAD provisions could still operate: see Ms Doran's note to Vision, para 1.

69. In those circumstances, as it seems to me, the parties had sufficient notice that the adjudicator might arrive at the sort of conclusion that he in fact reached; and that his decision is not to be set aside on the ground of a failure to act fairly. There was no serious breach of natural justice.

Two adjudications

70. Vision also submitted that there could not be two adjudications on the same dispute at once. Unhappily, as it seems to me, there can be. Paragraph 9 (2) of the Scheme provides:

> "An adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication and a decision has been taken in that adjudication."

The Scheme makes no provision for the resignation of an adjudicator where the dispute that he is to decide has previously been referred to adjudication but no decision has been taken in that adjudication.

71. In those circumstances I decline to hold that Mr Bingham's decision was made without jurisdiction on grounds other than the timing point.

72. The question then arises as to the status of any decision made by Mr Alway in his adjudication. Mr Alway had held his decision back because he took the view that, unless Mr Bingham's decision was declared to be of no effect by the court, he had no jurisdiction to make a decision of his own.

73. Vision submitted that there should be implied into the contract a term that time should not run in the Alway adjudication between the date of issue and the date of resolution of the present proceedings. In their submission the implication of such a term is necessary on the grounds of business efficacy, in particular in order to ensure the efficacy of the adjudication proceedings pending under the contract whilst a court challenge was being ruled on. On the facts of this case that would produce the result that Mr Alway could issue a valid decision provided that he did so on the date upon which I made an order determining that Mr Bingham's award was invalid. This is because the time for Mr Alway to make his award expired on 2nd July which is also the date upon which the Part 8 application was made.

74. It does not seem to me, however, that such a term must necessarily be implied for reasons of business efficacy or because this is what the parties must have meant their contract to provide. The Scheme provides for an extension of time in certain circumstances; but those circumstances do not include where there is a challenge to the decision of another adjudicator. The contract is not unworkable if such a term is not implied even though the absence of such a term may, in certain circumstances, lead to a race to achieving a final decision. If such a term was implied it would be necessary to determine precisely how long the suspension should last and whether, in particular, it should continue pending any appeal, or application for permission to appeal.

75. I also decline to order the payment to LCL of Mr Bingham's fees since, as I understand it, it is accepted that the payment or otherwise of those fees stands or falls according to the outcome of my decision on jurisdiction.