



## LEGAL BRIEFING

### *AIR DESIGN (KENT) LTD V DEERGLLEN (JERSEY) LTD*

[2008] EWHC 3047, TCC, Mr Justice Akenhead

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

Deerglen (Jersey) Ltd (“Deerglen”) was the main contractor employed to design and build a 6-storey office building known Liberty Wharf Phase 3 in Jersey. Deerglen engaged Air Design (Kent) Ltd (“Air Design”) as a subcontractor to carry out the mechanical services work for the project. A written agreement for “basebuild” works was signed in April 2007 and the contractual basis was stated to be the “JCT intermediate”. It was accepted that an adjudication clause incorporating the statutory Scheme was included in the contract.

Over the course of the next seven months, several arrangements were made which extended the original scope of works under the “basebuild” contract. First, in May 2007, Deerglen asked Air Design to quote for the mechanical services in connection with the fit-out of three floors of the project for the future tenant CPA. Following a letter of intent and correspondence which confirmed the price and scope of the CPA works, Air Design was instructed to proceed. Then in September 2007, Deerglen wrote to Air Design and further instructed them, “in extension of the existing contract”, to carry out Building Management System (“BMS”) and cooling works to the project. Finally, in November 2007 the parties entered into a “Supplementary Contract” which confirmed the total amount of the contract between Deerglen and Air Design and that it was comprised of the “basebuild”, CPA, and BMS works. It also went on to vary the terms and timings of the payments.

Differences arose between the parties and in July 2008, when Deerglen failed to make further payments, Air Design served a Notice of Intention to refer a dispute to adjudication. It referred to there being one contract dated 16 April 2007, which had been varied by the November 2007 Supplementary Contract. An adjudicator was duly appointed by the RICS.

The parties proceeded to exchange submissions on jurisdictional issues. Deerglen argued that there were four separate contracts between the parties and as such the adjudicator had no jurisdiction over the disputes which arose out of those contracts. Air Design responded, arguing that the CPA and BMS arrangements, along with the Supplementary Contract, were simply variation agreements on the main “basebuild” contract. The adjudicator, agreeing with the submissions of Air Design, gave his “non-binding” view that he did in fact have jurisdiction. He ultimately decided that Deerglen should pay Air Design £139,964 plus interest.

Following Deerglen’s default in payment on this decided amount, Air Design issued proceedings seeking to enforce the decision by way of summary judgment. Deerglen were concerned with Air Design’s financial status and sought a stay of execution if the adjudicator’s decision was enforceable.

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

1. Did the adjudicator have no or insufficient jurisdiction to decide the dispute either under the one, two, three or four contracts which had been referred to him?

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2. If the adjudicator's decision was enforceable, was Deerglen able to obtain a stay of execution on the basis that Air Design may be in a tenuous financial situation and may not be able to repay any sum paid by Deerglen pursuant to the decision of the adjudicator?

### **The Decision**

Mr Justice Akenhead held that the "basebuild" contract was one which incorporated the JCT Intermediate Form of sub-contract which contains provisions for the ordering of variations, and in these circumstances, the BMS, CPA arrangements and the Supplementary Contract were simply variations of the existing "basebuild" contract.

He then went on to identify two further factors which override considerations as to whether or not there was more than one contract between the parties which establish that the adjudicator had jurisdiction. First, as the substantive dispute put before the adjudicator required him to consider whether or not there was more than one contract in order to make a decision, it was thus within his jurisdiction to decide that there was one contract varied by an agreement. The Judge held that:

"there may be cases, and this is clearly one, where substance and jurisdiction overlap so that it is within the Adjudicator's jurisdiction to decide as matters within his or her substantive jurisdiction whether there have been in effect variations to the contract pursuant to which he or she has properly been appointed Adjudicator."

Secondly, on the particular facts, the Supplementary Contract recognised and referred to the parties as being in one "main contract" and treated the "contract sum" as a total of the three sums agreed originally with regard to the "basebuild", CPA and BMS works.

Furthermore, Mr Justice Akenhead also relied on the adjudication clause in the contract which said that "a dispute of difference" under the contract could be referred to the adjudicator. He stated that this wide clause should be construed in the same way that the House of Lords adopted a pragmatic and commercial approach to construing arbitration clauses in the *Fiona Trust* case [2007] UKHL 40.

Summary judgment was granted in favour of Air Design for the sums claimed and a stay of execution was denied. The Judge referred to the 2005 judgment of *Wimbledon Construction Co 2000 v Derek Vago* [2005] BLR 374 and held that Deerglen had failed to prove that Air Design was insolvent.

### **Commentary**

It is quite common in the construction industry for parties to extend their scope of works by agreement through the use of simple letters and/or letters of intent. If parties intend that the extra work is to be carried out under a separate contract with different terms and conditions, then clear and express words are required. Failure to do so, as was the case here, may amount to a single contract between the parties which has been varied by agreement. If a dispute subsequently arises in this situation and it is put to an adjudicator, it is likely that the substance of the dispute will overlap with his or her jurisdiction to decide that dispute. Though this is not the usual position, as adjudicators are now able to decide whether or not there was more than one contract between two parties, they ultimately may now have the power to make a binding ruling on their jurisdiction.