



## LEGAL BRIEFING

### *Glendalough Associated SA v Harris Calnan Construction Co Ltd*

[2013] EWHC 3142 (TCC), Mr Justice Edwards-Stuart

#### *The Facts*

Glendalough Associated SA ("Glendalough") instructed Harris Calnan Construction Co Ltd ("HCL") to build a residential development in north London ("the Works"). Glendalough issued a letter of intent to HCL to proceed with the Works pending agreement of a contract based, according to the letter of intent, on the "JCT 2005 Intermediate Form of Contract With Contractor's Design". In fact, the parties never entered into a formal contract.

The completion date was 10 June 2011. On 1 July 2013 Glendalough issued a Withholding Notice stating that HCL was 64 weeks in delay and was liable for liquidated damages of £250,000. HCL disputed this and on 23 August 2013 referred the dispute to adjudication. It sought a declaration that Glendalough was not entitled to LADs and that Glendalough should pay HCL £245,278 plus interest.

HCL's Referral Notice relied on a contract described simply:

*"By an agreement [Glendalough] employed [HCL] to carry out the construction of a Residential Block and B1 Studios at 121-127 Church Walk, London."*

On receipt of the Referral, Glendalough wrote to the Adjudicator stating that, contrary to paragraph 7(2) of the Scheme, HCL had failed to serve the contract and supporting documents with its Referral. This, Glendalough argued, deprived the Adjudicator of his jurisdiction "and/or" it was a breach of natural justice. Glendalough reserved its rights entirely as to the jurisdiction of the Adjudicator.

At no time did Glendalough argue that HCL was seeking to rely on a contract that was otherwise than in writing. In fact, Glendalough's Response described the contract as being a "JCT Standard Form Revision 2 2009 with Quantities" (rather than the JCT 2005 Intermediate Form as contained in the letter of intent).

In its oral submissions later to the court, Glendalough relied on the fact that it had reserved its rights entirely as to jurisdiction and submitted that those rights had never been waived. Before the Adjudicator had reached his Decision Glendalough applied to the court:

- (i) For a declaration that the Adjudicator had no jurisdiction and must resign;
- (ii) Further or alternatively, for an injunction restraining HCL from continuing with the adjudication; and
- (iii) Further or in the further alternative, for a declaration that any decision reached by the Adjudicator was a nullity and unenforceable.

#### *The Issues*

- (i) Did the parties engage section 107(5) of the HGCRA 1996 so that "an agreement in writing" could be said to have been agreed between the parties?
- (ii) A further point was considered by the court: what part, if any, of the court's declaratory relief should be made known to the Adjudicator prior to his Decision being made?

#### *The Decision*

The Judge found that section 107(5) of the HGCRA 1996 had been engaged. The description of the contract in HCL's Referral notice did not state that the contract was in writing and

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therefore left the question of whether an agreement in writing had been agreed open to question. In order for section 107(5) not to have been engaged Glendalough's response should have stated that no such agreement in writing had been reached by the parties, but it did not. The court found that in the absence of a categorical disagreement by Glendalough as to the contractual position put by HCL the parties had effectively agreed an agreement in writing.

The Judge also reasoned that a referring party would be unlikely to refer to a contract in its referral as being one "otherwise than in writing" since that would be an end to the adjudication unless the responding party was prepared to waive the point and continue.

### ***Commentary***

The Judge sent a clear message to any prospective responding party faced with a referral notice in which the contract on which the referring party relies in the adjudication is either described in vague terms, or not at all. For section 107(5) not to be engaged the responding party's disagreement must be expressed "in his response", i.e. as prescribed by sub-section (5). If a responding party tries to disagree later in the adjudication, such as after close of submissions, that denial may come too late to prevent an agreement in writing from being effectively agreed. Glendalough had not disagreed; it was held that section 107(5) was engaged so that the parties had agreed "an agreement in writing".

Having therefore dismissed Glendalough's applications, the Judge had to decide what part of the court's declaratory relief should be made known to the Adjudicator before he reached his Decision. This depended on what part of the court's declaration bound the Adjudicator. The court's decision as to the meaning and applicability of section 107(5) was ordered to be made known to the Adjudicator since it bound him and the parties who, it was held, had effectively agreed an agreement in writing. However, the Judge's provisional decision as to whether the letter of intent constituted a construction contract was not to be divulged since that formed part of the issues to be decided by the Adjudicator and therefore remained, at the time of the judgment, a matter for the Adjudicator alone.

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December 2013