



## LEGAL BRIEFING

### *Nickleby FM Ltd (“Nickleby”) v Somerfield Stores Ltd (“Somerfield”)*

[2010] EWHC 1976 (TCC), Mr Justice Akenhead

#### *The Facts*

Somerfield engaged Nickleby to provide management services in connection with maintenance at its supermarkets around the country. The contract was entered into in May 2006 and was to run for three years with automatic termination without notice.

The contract, by one means or another, was extended by a year, but on 30 November 2009 Somerfield gave notice, to take effect on 30 May 2010; Nickleby accepted that this notice was validly given. The notice of termination purported to record an arrangement regarding the management fee between 27 January 2010 and 30 May 2010, in which Somerfield made certain deductions; Nickleby, however, denied there had been any such arrangement.

During the ensuing adjudication, Somerfield raised a jurisdictional objection, namely that there was no construction contract in writing. The adjudicator gave a non-binding decision that there was an agreement to extend the contract, with a 14-week notice period, which he decided the parties had accepted by conduct.

#### *The Issue*

In the enforcement proceedings Nickleby disclosed emails evidencing the contract in writing. Somerfield raised its jurisdictional argument again, but additionally argued that Nickleby's case in the present proceedings was different to the case it relied on during the adjudication itself. The Judge had to decide whether, as a result of these emails, Nickleby had ignored the election it had made during the adjudication (i.e. not to rely on those emails) and was now advancing a wholly new case.

#### *The Decision*

The Judge rejected Somerfield's suggestion that Nickleby was advancing a materially different case to that which it had presented during the adjudication. He said that, in quite extraordinary circumstances, before the court both parties agreed there was indeed a contract in writing.

In reaching his decision, Mr Justice Akenhead expressed “some disagreement” with the authority relied on by Somerfield: *Redworth Construction Ltd v Brookdale Healthcare Ltd* - which itself was based on a wide interpretation of the judgment in *Banque des Marchands de Moscou (Koupetschesky) v Kindersley*. HHJ Havery QC had stated it was Redworth's election to make particular submissions during the adjudication in order to obtain the benefit of an adjudicator's decision, on jurisdiction and substantively. Having obtained that benefit Redworth could not resile from those submissions in subsequent court proceedings.

The Judge distinguished the *Banque des Marchands* case and a situation in which a party was seeking to enforce an adjudicator's decision, saying that the former was concerned with two sets of court proceedings; the latter, however, was a temporary non-binding decision that the court could make binding, and the principles of election did not apply in such circumstances.

The Judge also noted that it was also relevant whether the adjudicator would have reached a different decision had he had the full compendium of information available to him. In

---

this instance, both parties accepted that the adjudicator would have arrived at the same decision.

***Comment***

Though Akenhead J said that Somerfield's arguments on jurisdiction involved "much ado about nothing", two important points are highlighted by this case. First, the difficulties that can arise when a construction contract is not in writing or clearly evidenced in writing (at least until such time as the new Construction Act comes into force). Secondly, the dangers of making certain submissions in an adjudication and then submissions in court which could be construed as different, leading to accusations of a party approbating and reprobating on its earlier arguments.

Jourdan Edwards  
November 2010

---