

Neutral Citation Number: [2006] EWHC 15 TCC

Case number TTC 121/05

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
SALFORD DISTRICT REGISTRY

TECHNOLOGY AND CONSTRUCTION COURT

BIRMINGHAM CIVIL JUSTICE CENTRE
33 BULL STREET
BIRMINGHAM B4 6DS

Date: 10 January 2006

Before Her Honour Judge Frances Kirkham

Between :

ANDREW WALLACE LIMITED

Claimant

and

(1) ARTISAN REGENERATION LIMITED
(2) ARTISAN HOLDINGS LIMITED

Defendant

Mr Sean Brannigan of Counsel (instructed by Pinsent Masons) for the Claimant

Mr Gareth Jessop of Pannone & Partners for the Defendants

Date of hearing: 21 December 2005

Date of draft reasons for judgment: 22 December 2005

JUDGMENT

1. The claimant, Andrew Wallace Ltd is an architectural company. The defendants are in business as developers and in relation to real estate.
2. The claimant issued proceedings in November 2005 to enforce the decision of an adjudicator dated 28 October 2005. On 21 December 2005, the court heard an application by the claimant for summary judgment against the defendants. I am obliged to Mr Brannigan for the claimant and Mr Jessop for the defendants for their assistance with this matter.
3. The court decided that the defendants had no real prospect of succeeding in their defence to the claimant's claim and, there being no other reason why judgment should not be granted, ordered the defendants to pay the claimant the sum of **£128,845.89 (including interest)** and ordered that the defendants pay the claimant's summarily assessed costs. I made that decision for the following reasons.
4. The parties and the adjudicator proceeded on the basis that Andrew Wallace Architects Ltd contracted with the defendants on 11 August 2003. In fact, there is not, nor has there ever been, a company by the name Andrew Wallace Architects Ltd. The only relevant limited company is Andrew Wallace Ltd, namely the claimant. At the hearing of the application for summary judgment, Mr Jessop confirmed that the defendants now take no point with regard to the error in using the name Andrew Wallace Architects Ltd instead of the correct company name, namely Andrew Wallace Ltd.
5. The defendants now defend the claim on the following bases:

There is now an issue as to the material content of the contract.

There is an issue as to the identity of the contracting party: the defendants now contend that they contracted not with a limited company but with Mr Wallace personally.

Lack of credibility on the part of the claimant in relation to alleged illegality on its part, namely breaches of the Value Added Tax Act 1994 and of the Business Names Act 1985 and by fabricating documents. Illegality in relation to the conduct of this claim affects the ability of the claimant to enforce the claim.

6. The defendants' case now is that they contracted with Mr Andrew Wallace as an individual and not with his company. They contend that the terms of the contract

were as set out in the signed agreement SFA/99, save that Clause 5.6 was not amended and that the correct name is Andrew Wallace not Andrew Wallace Limited.

7. The adjudication the subject of these proceedings, and a previous adjudication which took place earlier this year, both proceeded on the assumption that the claimant and defendants had contracted on the RIBA standard form of agreement for the appointment of an architect, namely SFA/99. The adjudication the subject of these proceedings proceeded on the assumption that paragraph 5.6 of the document had been amended in manuscript. The defendants' case, now, is that they did not, at any stage, agree the manuscript amendment to Clause 5.6 or that the words "Architects Limited" be included in the name of the contracting party. They allege that the manuscript amendment and the additional two words have been added to SFA/99 fraudulently, by or on behalf of the claimant and unknown to the defendants until very recently.
8. It is said that SFA/99 was signed at a meeting on 7 November 2003. At the back of the agreement is a page for attestation. The agreement shows the contract to have been signed by Mr B Ormson and by Mr P Patten on behalf of the defendants. It shows that it was signed by Mr Wallace. The following words appear on that page:

"Signing of this SFA/99 was witnessed and in the presence of the following consultants and representatives:

Julian Kavczewski

Stan Fairhurst (defendants)

[unreadable] Fuller (claimant)

Phillip Patten (Shepherd Gilmour Engineers)

C Ainscow (M D, defendant)"

9. On behalf of the defendants, witness statements have been prepared for Ms Ainscow, Mr Fairhurst, Mr Ormson, Mr Knight and Mr Miller. Ms Ainscow describes herself as chairman and formerly managing director of both defendants. It appears that Mr Ball is now managing director. He has not prepared a statement, nor has Mr Patten.
10. In her witness statement Ms Ainscow says that she was not at the meeting on 7 November 2003. She says that she did not witness the signature. Mr Fairhurst in his witness statement says that he was not present at the meeting on 7 November

either, and that he did not witness the signing of the agreement. Mr Ormson was employed by the defendants between February 2003 and June 2004. He confirms that he did sign the agreement at a meeting with Mr Wallace and others on 7 November 2003. He says that, at the time he signed, the manuscript amendment to Clause 5.6 was not written on the agreement nor were the words "Architects Ltd" shown; instead, the name of the contracting party read "Andrew Wallace". He says, that prior to that meeting, Mr Wallace had asked that Clause 5.6 of SFA/99 be amended to provide for an additional percentage fee if the project cost should increase. The suggestion Mr Wallace made was, Mr Ormson said, substantially the same as the words which now appear in manuscript at clause 5.6 in the document. Mr Ormson says that he refused to agree that amendment. He recalls a discussion prior to 7 November 2003 when Mr Wallace produced a form of appointment on which the amendment to Clause 5.6 had been written in pencil. Mr Ormson told him that he could not agree that amendment and erased the pencilled words. The defendants say that they did not have a copy of SFA/99 at the time. They did see a copy in relation to the adjudication. They saw the original for the first time at the hearing on 21 December 2005.

Background

11. The claimant contends that Mr Wallace sent a letter to Mr Ormson dated 21 October 2003 in which he sought to clarify matters concerning company names. In the third paragraph he said "Therefore as agreed today the contract if signed before we are able to bottom out [the issues concerning the company name] will be signed under the company name Andrew Wallace Architects Limited. However, if this cannot be achieved within acceptable timescales as outlined above and we are in contract with you, you have allowed this office the ability to substitute Andrew Wallace Architects Limited with Andrew Wallace Limited accordingly, thus allowing this name to be amended by formal letter to you identifying the agreed change." At the foot of that letter is an indication that it was copied to Ms Ainscow and to Dhd & Company, the claimant's accountants. By letter dated 23 November 2005, Dhd wrote "to whom it may concern" confirming that they had received on 22 October 2003 a copy of the 21 October 2003 letter. Ms Ainscow says that she has no recollection of having received that letter. Mr Ormson says that he has no recollection of having seen the 21 October 2003 letter and denies having agreed the matters set out in that letter.
12. The agreement is said to have been signed on 7 November 2003. It contains at Schedule 1 a Project Description. That schedule contains, amongst other matters, the following information:

"Construction Cost/Client Architect Agreement Re Clause 5.6 Additional Fees.

The estimated construction cost is £2.35 million based on a brief fee of £600 per square metre. ... therefore in accordance with AWA letter/fax dated 4.11.03 Clause 5.6 has been amended accordingly". It also contains the following: "If Andrew Wallace Ltd is required to enter into collateral warranties, Andrew Wallace Architects Ltd reserve the right (sic) to ask for additional fees ..."

13. None of the defendants' witnesses alleges that Schedule 1 was fabricated.
14. The claimant, Andrew Wallace Ltd, was incorporated on 15 December 2003.
15. The claimant contends that it sent a letter to Mr Ormson dated 17 December 2003. By that letter, the claimant confirmed that Andrew Wallace Ltd had been successfully incorporated, and the letter attached a copy of the certificate of incorporation. The letter went on to say:

"As a result of this and as agreed with you and Carol Ainscow previously we will now substitute Andrew Wallace Architects Ltd in our SFA/99 contract with you, with Andrew Wallace Ltd. Therefore for the avoidance of doubt the SFA/99 contract will now be between [the defendants] and Andrew Wallace Ltd ... Further where reference is made to Andrew Wallace Ltd in the contract, as agreed this will now be replaced and superseded in accord with this letter today with the agreed incorporated company name of Andrew Wallace Ltd. We reiterate as per our previous communications outlined above we will amend our stationery in due course, however as agreed today we anticipate this may be some time as a result of graphic input printing and the like. Your patience as further expressed today is much appreciated therefore with this and with your permission we will let our stationery run its course and run out and when appropriate change it accordingly to suit our new company title."

16. Mr Ormson says he has no recollection of ever having received that letter and that he would never have agreed the contents of it.
17. Various invoices were sent to the defendants. Those dated 1 and 21 May 2004, 30 June 2004 and 4 and 27 August 2004 were on paperwork headed "Andrew Wallace". There is no mention of a limited company. The VAT registration number on those invoices is, the defendants contend, the VAT registration number used by Mr Wallace as a sole trader. Invoices dated 3 November 2004, 20 May 2005 and 22 July 2005

were prepared by the claimant company. The same VAT registration number is shown for the claimant's invoices as for those invoices raised in the name of Mr Wallace.

18. The defendants made substantial payments directly to the claimant's bank account, including £25,000 on 30 November 2004, £20,000 on 15 February 2005, £34,575 on 22 February 2005 and £3,061 on 8 April 2005.
19. By fax dated 26 November 2004, the claimant wrote to Mr Stephen Ball (shown on the fax to be managing director of the defendants.) That fax read:

"Re Andrew Wallace Ltd Business Account Details.

Dear Stephen

I fax with regard to our telephone communication and your agreement to free up some of our many outstanding invoices. Therefore as requested by you and for clarity regarding the above please find attached Andrew Wallace Ltd business account details. ..."

20. The defendants do not suggest that that is a forged document.
21. Minutes of a meeting held on 7 November 2003 have been produced. By fax dated 16 November 2003. Mr Wallace sent out what he described as an amended cover page for the minutes of that meeting showing "a true record of attendance" and the correct date of the meeting (namely 7 not 9 November 2003). The amended cover sheet shows that Miss Ainscow, Mr Ormson, Mr Petton and Mr Fairhurst were all in attendance. As I have indicated, that attendance record is now challenged by the defendants.
22. The claimant served notice of adjudication dated 5 July 2005. The adjudicator and parties met on 25 August 2005. At that meeting, the parties agreed to redefine the dispute and expressly agreed the scope of the adjudicator's jurisdiction. The adjudicator made his decision on 28 October 2005.
23. By letter dated 7 November 2005, Knowles Ltd (who were acting on behalf of the defendants in relation to the adjudication and until recently) wrote to the claimant's solicitors. They said that the defendants did not accept that the adjudicator had reached the correct decision. Amongst other matters, the adjudicator had not correctly interpreted Clause 5.6. By that letter, Knowles stated that they were instructed to commence arbitration against the claimant. They went on to refer to

difficulties with the name of the claimant company. (In fact, as I have indicated, the defendants do not now pursue any point concerning differences between the claimant company name and the incorrect company name used in the adjudication.)

24. The claimant's solicitors wrote on 14 November 2005 in reply to Knowles' letter. They dealt with the questions raised as to the name of the company saying:

"As your client is well aware Andrew Wallace was in the process of incorporating a company whilst the contract was being negotiated. The contract was made in the name of Andrew Wallace Architects Ltd as that was the company name which Andrew Wallace anticipated would be used. However in the event, following signature of the contract, the company was incorporated in the name of Andrew Wallace Ltd. Our client wrote to Brian Ormson and copied the letter to Carol Ainscow explaining the situation on 17 December 2003. We enclose a copy of that letter for your information along with the certificate of incorporation dated 15 December 2003. We also enclose for your information a copy of an email received from Brian Ormson to Andrew Wallace dated 19 December 2003 confirming that he had discussed the matter with Carol Ainscow and that they were both satisfied with the contents of the letter."

25. Knowles wrote to the claimant's solicitors by fax dated 18 November 2005. They said that that documentation had never previously been referred to and the defendants denied ever having received it. The defendants considered the letter of 17 December 2003 and the 19 December 2003 email "to be fabricated". They asked that the claimant permit the defendants' IT expert to interrogate the claimant's IT systems.

26. The claimant's solicitors replied to Knowles on 24 November 2005. They drew attention to Mr Wallace's letter to Mr Ormson dated 21 October 2003. They sent to Knowles a copy of the Dhd letter. They rejected the suggestion that the defendants' IT expert should attend and interrogate the claimant's IT systems.

27. By 1 December 2005, the defendants had instructed Pannone & Partners, solicitors. Pannone wrote to the claimant's solicitors by letter dated 1 December 2005, requesting facilities to inspect original documents including the original SFA/99 document. That was the first occasion on which it was suggested that the authenticity of the agreement itself might be in issue. Prior to that point, the only issue between the parties had been the question of the correct name of the company.

28. The claimant's solicitors replied on 5 December to Pannone's letter of 1 December. They pointed out, at no stage (whether in relation to the subject adjudication or in relation to the previous adjudication earlier this year) had any issue of authenticity been raised, save as to the 17 December 2003 letter and email exchange of 19 December 2003.
29. By letter of 6 December 2005, the claimant's solicitors suggested that the appropriate starting point was for the defendants to provide confirmation from an independent IT expert who had interrogated the defendants' system and confirmed that the allegedly fabricated emails were not either sent to or received by the defendants. Until that had taken place, the claimant was not prepared to allow their system to be interrogated.
30. On 9 November 2005, Knowles served on Andrew Wallace Architects Ltd notice to concur in the appointment of an arbitrator. That notice recited that an agreement had been entered into on 11 August 2003 between "Andrew Wallace Architects Ltd" and the defendants. The notice named three possible arbitrators. By letter dated 6 December 2005, the claimant's solicitors informed Knowles that the claimant would agree to accept appointment as arbitrator of one of those named in Knowles letter. However, no progress at all has been made. Mr Jessop explained that this was because of the difficulties which had lately arisen in relation to the identity of the contracting party.
31. Prior to the hearing of the application for summary judgment, the defendants lodged with Pannone a sum equivalent to the principal sum which the adjudicator awarded to the claimant in the adjudication. Mr Jessop confirmed that the principal sum awarded had indeed been paid to his firm before the hearing on 21 December.
32. The claimant brought to the hearing on 21 December the original of SFA/99 and Mr Jessop took the opportunity to examine it.

Identity of contracting parties

33. The defendants' case now is that they contracted with Mr Andrew Wallace, as an individual and not with his company. In her witness statement, Mss Ainscow says that at no time did she agree or authorise anyone else on behalf of the defendants to agree that the defendants "would contract with a company rather than with Andrew Wallace Architects, a firm". Mr Ormson in his statement says that at no time was he informed by Mr Wallace and at no time did he agree with him that his appointment would be in the name of a company.

34. Schedule 1 of SFA/99 contains, on its face, references to both the claimant company and Andrew Wallace Architects Ltd. Those references are not challenged by the defendants.
35. Mr Jessop submits that the question is whether the defendants intended to agree with a limited company or with Mr Wallace as an individual. Mr Jessop has taken me to the invoices, to which I have already referred, which show that, after incorporation of the company, invoices were still being sent out in the name of Mr Wallace personally. That run of invoices potentially supports the defendants' case. However, the claimant's letters explain the position with regard to use of old stationery and the like as Mr Wallace changed from acting in his own right to operating through a limited company. The unchallenged Schedule 1 of SFA/99 supports the claimant's case that the intention was that the company contract with the defendants. That Schedule shows that that was the position by 7 November 2003 at the latest, when the agreement was signed. The unchallenged items of correspondence support the claimant's case on this. The defendants have not raised this issue until very shortly before the hearing of the claimant's application. Indeed, they have throughout proceeded on the basis that they contracted with the company. They paid substantial sums of money into the company's account. It is in my judgment most unlikely that the defendant would not have raised the question of the identity of the contracting party at an earlier stage, had there been any real question on the part of the defendant with respect to that matter.
36. The notice to concur in the appointment of an arbitrator was served on the claimant company, but not on Mr Wallace personally. Mr Jessop submits that the reason for that was that, at that stage, the defendants did not appreciate that there were issues concerning the authenticity of the documents. However, it seems to me that if there had been a real question as to the identity of the contracting party, that would have arisen well before the publication of the adjudicator's decision.
37. There is force in Mr Jessop's submission that invoicing by Mr Wallace in his own name is inconsistent with his case that it was understood that the defendants would be contracting with a company. As Mr Brannigan accepts, on their face, the invoices sent out in the name of Mr Wallace after incorporation of the claimant company suggest an intention that Mr Wallace as an individual be the contracting party. However, the position is explained in the letter dated 17 December 2003, to which I have already referred. The first suggestion that this was a fabricated letter came in witness statements served on 19 December 2005. The letter dated 17 December 2003 had been disclosed by the claimant some weeks before that point arose. At

that stage, there was no challenge on the part of the defendants to the effect that it was Mr Wallace personally who was the contracting party. If Mr Wallace were to fabricate a letter, it is unlikely that he would have included the wording of the paragraph I have quoted when, at the time the letter was disclosed, he could not have known that this particular point would be raised. I also take into account that the position regarding the use of a company is recorded in the claimant's letter of 21 October 2003. If that were a fabrication, Dhd would have to be implicated also. The authenticity of the fax dated 26 November 2004, asking for payment to be made to the claimant company, is not challenged. If there had been any real concern as to the identity of the contracting party, one might expect the defendants to have questioned why payment was to be made to a company and not to Mr Wallace personally. No such question was raised. It is in my judgment significant that the defendants paid the invoices. There is no evidence from the defendants as to why payment of these invoices was authorised. After all, one is looking at the payment of substantial sums of money. It is unlikely that such payments would be made without someone within the defendant companies with appropriate authority considering whether payment should be made.

38. The apparently inconsistent invoices appear to be satisfactorily explained by these matters.
39. Further, there is no explanation from the defendants as to why they raise at this very late stage the suggestion that Mr Wallace personally was the contracting party. There is no explanation as to why they did not pick up this point in either of the two adjudications. It was said on their behalf that no-one appreciated the point until now, and that they are now kicking themselves at not having identified it before. It is said that Miss Ainscow does not have the detailed knowledge (though that does not appear to be the case given the statement she was able to make within the adjudication). There is no statement from Mr Ball. In short there is no explanation from someone who takes responsibility on the part of the defendants for this project. Mr Jessop submitted that the person who really knew about these things was Mr Ormson and he left in 2004. It seems to me highly unlikely that someone within the defendant companies would not have taken over responsibility from Mr Ormson for a project of this size.
40. In my judgment, the defendants have no real prospect of succeeding in their defence that the correct contracting party was Mr Wallace not the company.

"Credibility"

41. Mr Jessop relies on a number of instances where it is alleged the claimant lacks credibility, including the confusion over the identity of the contracting party, the allegedly forged documents and the alleged breaches of VAT and business names legislation. He submits that the claimant's case faces, as he describes it, severe issues of credibility; there is significant lack of credibility on the part of the claimant which is of fundamental importance, because construction of clause 5.6 as amended was the crux of the adjudication.
42. Mr Jessop has taken me to the judgment of His Honour Judge Mackay in **Pro-Design Limited v New Millennium Experience Company Limited** (unreported, September 2001). In that case it was alleged that (presumably unknown to the defendant) the claimant company was owned and operated by an employee of the defendant and that there had been a conspiracy to create such a company to undertake the work. The claimant adduced no evidence to refute the defendant's allegations. The learned judge described the situation as one which needed thorough investigation. In order to do justice, summary judgment was refused. Mr Brannigan accepts that, if the court were reasonably satisfied that to enforce the adjudication decision in this case would be to assist perpetrate a fraud, then the court would be right not to enforce it.

Illegality

43. Mr Jessop submits that the claimant has committed offences by reason of its alleged breaches of Section 67 Value Added Tax Act 1994 and pursuant to Section 4 (6) Business Names Act 1985. Mr Jessop invites me to make a finding that the claimant is guilty of such offences. That is a startling proposition. In this case, I am dealing with a civil dispute between the parties with a different standard of proof from that required in criminal proceedings. It would not in my judgment be appropriate for me to express any view as to any liability on the part of the claimant in respect of these matters. These are matters for the appropriate authorities and, if necessary, a criminal trial. The "credibility" point has relevance only in relation to the allegations of fraud and forgery.

Forgery

44. It is necessary for me to consider whether the defendants have a real prospect of demonstrating that the claimant has fabricated documents, such that it can be said that the defendants have a real prospect of successfully defending the claim. I must do so without falling into the trap of conducting a mini trial (**Swain v Hillman**).

Cogent evidence is needed to support allegations of forgery and fraud. I have referred to the defendants' evidence in support of its allegations.

45. The defendants' case is that there is now an issue as to what is the material content of the agreement. Interpretation of the manuscript amendment at Clause 5.6 was at the crux of the adjudication. The defendants did not realise, at the time of either the subject adjudication or indeed the previous adjudication, and indeed not until after Pannone took over from Knowles, that the manuscript words at Clause 5.6 had not been agreed. An explanation for the defendants' alleged ignorance on this point is the change of personnel within the defendant companies. Mr Ormson, who had been involved with the project, left in 2004.
46. At paragraph 19 of her statement, Ms Ainscow says "I was not personally involved on a day-to-day basis in the adjudication, which was dealt with by Stephen Knight and Stan Fairhurst." At the hearing, Mr Jessop submitted that Ms Ainscow did not have any detailed knowledge of the subject adjudication. Over the short adjournment, the claimant obtained a copy of a witness statement prepared for the adjudication and signed by Ms Ainscow and Ms Talbot. In that statement, Ms Ainscow confirms the truth of detailed comments concerning the total construction costs of the project, including sub-contractor costs, preliminaries, utilities and insurances. A witness statement with a very similar wording was signed as to its truth by Mr Stephen Ball, described as managing director. It is clear that it is not open to the defendants to submit that Ms Ainscow did not have detailed knowledge of the subject adjudication. That of itself gives rise to some concerns as to Ms Ainscow's evidence in relation to these matters.
47. I am not persuaded that the defendants have a real prospect of defending the claim on the basis that clause 5.6 was not amended when they do not challenge the content of Schedule 1 which makes it clear, on its face, that clause 5.6 was indeed to be amended, and in the manner in which it was in fact amended. I have already dealt with the question of the identity of the contracting party, which covers the allegation that the words "Architects Limited" were wrongfully added to SFA/99.
48. Mr Jessop relies on the use by the claimant of the wrong company name in relation to the adjudication. He submits that the position here is different from that in **Total M&E Services Ltd v ABB Building Technologies Limited** [2002] EWHC 248 (TCC). In that case, the court was concerned simply with a misnomer. That is not the position here. Here, Mr Jessop submits, there are associated entities namely Mr Wallace trading as Andrew Wallace Architects and the company. The claimant's

case, as set out in the witness statement of Miss Hill on their behalf, is that Andrew Wallace Architects Ltd was no more than a trading name for the claimant.

49. Mr Jessop relies on the correction cover sheet for the meeting in November 2003 in support of the defendants' case that Mr Wallace's recollection and record of the meeting are wrong.
50. He submits that the passages in Mr Ormson's statement as to the erasure of Mr Wallace's pencil notes is supported by Mr Jessop's scrutiny at the hearing of the original SFA/99 document. Mr Jessop submits that it is possible to see, beneath the ink manuscript amendment, pencil marks which have been erased. When Mr Ormson made his statement, the original SFA/99 document had not been seen. The presence on that document of apparent erased pencil marks supports the defendants' case.
51. I approach the defendants' untested allegations with caution. Any an allegation of fraud is a serious matter. A party alleging fraud has a big hurdle to leap. I am not persuaded that there is a real prospect of the defendants succeeding in their claims that documents were fabricated or that the claimant behaved fraudulently as they now allege. The defendant's "credibility" point does not in my judgment assist the defendants. It cannot be said that the lack of credibility on the part of the claimant affected the adjudicator's jurisdiction to decide as he did. Nor can it be said that to enforce this decision would assist the perpetration of a fraud
52. It cannot be said that the adjudicator did not have jurisdiction to decide the case which both parties expressly agreed he should decide. The defendants contend that SFA/99 did not contain all essential terms because the defendants did not intend to contract on the terms of that document so there is no consensus to found an agreement in writing as the Housing Grants, Construction and Regeneration Act 1996 requires. Accordingly, the adjudicator had no jurisdiction. I reject that submission. The defendants have throughout accepted that there is a contract in writing. They acquiesced in the adjudication. They expressly agreed, after the commencement of the adjudication, that the adjudicator had jurisdiction. The fact that some terms may now, and after the event, be disputed, does not prevent there being a contract in writing. The defendants' case that the adjudicator lacked jurisdiction has no real prospect of success.
53. In all the circumstances, I conclude that there is no real prospect of the defendant's succeeding in defending this claim. This is a case where it is possible for the court to conclude, on the available evidence, and without conducting a mini trial, that the defendants' prospects of success are fanciful not real.

10 January 2006