[2003–04 Gib LR 492]

HOPEFIELD PROPERTIES LIMITED v. MOWLEM C.C.S. LIMITED and BURTON

SUPREME COURT (Dudley, A.J.): October 12th, 2004

Construction Industry—standard form building contract—incorporation of terms—clause added by Architecture and Surveying Institute to later, revised edition of standard form contract not included in parties' contract based on earlier edition

The claimant sought a declaration that its building contract with the first defendant did not include an adjudication clause.

The claimant, a developer of residential premises, engaged the first defendant in 2001 to undertake certain building works. Their contract was based on the March 1986 edition of the standard form building contract published by the Architecture and Surveying Institute. When a dispute arose concerning the works, the first defendant sought to refer it to adjudication, in accordance with a purported adjudication clause in the contract, and appointed the second defendant as adjudicator.

The adjudication clause was referred to in a later, revised edition of the Institute's standard form building contract as an additional clause to be inserted in compliance with an English Act of 1996. An unsigned copy of the clause was contained in the first defendant's completion bundle. It did not, however, appear in the parties' contract, based on the 1986 edition, nor was it found in the tender documentation or the claimant's completion bundle. It was provided in the contract that any document to be included should be signed by the parties.

The claimant submitted that as there was no signed copy of the adjudication clause it could not have been incorporated in the contract.

The first defendant submitted in reply that, as the parties had used a standard form contract, it should be presumed that when they contracted in 2001 they did so on the terms of the latest version, which incorporated the adjudication clause.

Held, granting the declaration:

(1) The claimant had proved on the balance of probabilities that its building contract with the first defendant did not include an adjudication clause and the declaration sought would therefore be granted. In so finding, inferences were drawn from the fact that the copy of the adjudication clause provided by the first defendant had not been signed. A lack of signature could have significant evidential value but it would not be

determinative of the issue and all the extrinsic evidence had been examined to determine the parties' agreement (para. 12; para. 35).

(2) The adjudication clause had not been incorporated into the contract merely because it had been included by the Architecture and Surveying Institute as an additional clause to be inserted in a later, revised edition of the standard form building contract upon which the claimant and the first defendant had in fact contracted. Parties using a third party's standard form contract could not be contractually bound by amendments made to it by that third party at a later date of which they were unaware at the time of contract. This could be contrasted with the situation where parties agreed to contract on one of the parties' standard terms which, in the absence of agreement to the contrary, could be taken to be a reference to the most recent version (paras. 15–16).

Case cited:

(1) *Smith* v. *South Wales Switchgear Co. Ltd.*, [1978] 1 W.L.R. 165; [1978] 1 All E.R. 18; (1977), 8 BLR 1; 122 Sol. Jo. 61, distinguished.

J.E. Triay and *C. Simpson* for the claimant;
D. Phillips, Q.C., and *K. Azopardi* for the first defendant;
The second defendant was not represented and did not appear.

1 **DUDLEY, A.J.:** The claimant ("Hopefield") is the developer of residential premises at the Old Naval Hospital. The first defendant ("Mowlem") was the main contractor engaged to undertake the works. On May 30th, 2001, the parties entered into a standard form building contract, published by the Faculty of Architecture and Surveying ("F.A.S."), in its March 1986 edition form ("the contract").

2 There is an underlying dispute between the parties concerning the works undertaken on site. In consequence thereof, Mowlem sought to refer the matter to adjudication in accordance with a purported cl. 11 of the contract. Clause 11, however, is not to be found in the main body of the contract booklet but is described by the Architecture and Surveying Institute ("A.S.I.") as "Additional Clauses to be inserted (in compliance with the provisions of the Housing Grants, Construction and Regeneration Act 1996, Part II (Adjudication))." In essence, adjudication is a mechanism established by the said Act, providing for a swift interim dispute resolution process in respect of construction disputes in England.

3 The second defendant is the adjudicator appointed upon Mowlem's application in reliance on cl. 11. The second defendant has not entered an appearance in these proceedings and the parties before me are agreed that there is no need for him to appear.

4 On June 15th, 2004, Hopefield issued the present claim, seeking a declaration that the contract does not include an adjudication clause and

ancillary relief. That, in essence, is the sole issue to be determined in these proceedings.

5 On July 23rd, 2004, Schofield, C.J. directed that the trial of the action should be expedited and that the action be tried on written evidence unless I determined live evidence was necessary. There are elements in the affidavit and witness statement evidence which may have merited some cross-examination, which would undoubtedly have assisted in the assessment of the weight and credibility to be given to the evidence of the witnesses. However, aware of the parties' desire for a swift resolution of this dispute and counsel being in agreement, the hearing of this action proceeded without the benefit of *viva voce* evidence.

6 Before embarking upon a consideration of the evidence, there are three preliminary issues which with I should deal.

Applicable law

7 The contract is, by virtue of cl. A6 (but without consideration of extrinsic evidence), governed by English law. It is contended by Hopefield that this arises through an erroneous omission to delete "English" and insert "Gibraltar." The parties are, however, agreed that for the purposes of the issue to be determined by this court the matter is unaffected by whether English or Gibraltar law applies.

Determination by virtue of lack of signature

8 Mr. Triay submits that, absent signature or initials in the cl. 11 document, there can be no incorporation. The relevant provisions upon which he relies are Recital 3, which provides that—

> "the said specification/bills of quantities/drawings *as drawing schedules separately attached and signed* (the 'contract drawings') and any other necessary documents, which, together with this contract have all been signed by or on behalf of both parties, are the 'contract documents.'" [Emphasis supplied.]

(The emphasis in Recital 3 reflects the handwritten endorsement in the contract, done by Mr. Stirling for Mowlem prior to signature.)

9 Appendix 2.2 defines "contract" as "this printed form, duly completed as to entries and signed by both parties . . ." It also defines the "contract documents" as—

> ". . . the batch of documents defined in recital R3 (contract second page), which may include other documents necessary to the contract and to the particular project, all signed at the same time as the contract form as acceptable by both parties to the contract."

10 Appendix 2.3, under the heading "Signing," provides:

> "The signing can be done and witnessed at a joint meeting, or separately—if separately, then preferably the contractor first (to clear any possible queries)—all alterations, deletions, and additions must also be initialled by each party. Each contract document and counterpart . . . must equally be signed, but the contract should only be dated at the time all are fully signed and initialled by both parties."

11 Mr. Triay argues that cl. 11 is not part of the contract as defined in Appendix 2.2 because it is not to be found in the printed form, and that whilst it could be a "necessary document" or an "addition," then by virtue of Recital 3 and the definition of "contract documents" in Appendix 2.2 and the provisions dealing with "signing" in Appendix 2.3, the cl. 11 document should have been signed or initialled for it to be incorporated into the contract.

12 I am not persuaded by Mr. Triay's submissions. What he urges me to do is, in effect, to apply the parol evidence rule in too strict a manner. It seems to me that I must look at all the extrinsic evidence so as to determine what in fact was agreed by the parties and what therefore amounts to a complete record of the contract. The absence of signature, however, may have significant evidential value and inferences may of course be drawn.

Incorporation of cl. 11 by virtue of revision of the standard contract by the Architecture and Surveying Institute

13 Mr. Phillips argues that where a standard form of contract is used, the parties are to be deemed to have contracted upon the terms of the latest version of such a standard form of contract. Mr. Phillips relies upon the *dicta* in *Smith* v. *South Wales Switchgear Co. Ltd.* (1) and, in particular, the passage in the speech of Lord Keith of Kinkel, who says ([1978] 1 W.L.R. at 177): "Any reference to conditions can only be understood, in the mind of an ordinary reasonable man, as a reference to the conditions currently in force."

14 To my mind, the present facts are very different from those in *Smith* v. *South Wales Switchgear*. In that case, the issue was whether an agreement entered into subject to one party's general conditions of contract, which conditions were obtainable on request and which were not so requested, made the contract between the parties subject to the most recent conditions or to conditions which had governed earlier transactions between the parties.

15 On the facts before me, it is fanciful to think that cl. 11 could be incorporated into the contract merely by virtue of the review of the standard form of contract by the A.S.I. Such a proposition could result in

the bizarre scenario of parties not being able to use standard forms of contracts without ascertaining whether these had been the subject of amendment, otherwise they could unknowingly be bound by terms wholly different from those in print before them.

16 Ultimately, a contract is a meeting of minds. It is one thing for parties to contract on one party's standard terms and that, absent other agreement, for that to mean a reference to the latest version. It is a wholly different matter that parties be contractually bound by amendments which may be made to a standard form of contract by an unrelated drafting third party, when all that the parties to the contract have done is to use the third party's standard form as the basis for their contract.

The substantive issue

17 Determination of the substantive issue—as to whether or not the parties agreed and intended that cl. 11 form part of the contract—therefore requires examination of the extrinsic evidence.

18 On June 30th, 2000, Hopefield issued an "invitation to tender." That invitation in effect consisted of an F.A.S. building contract in its March 1986 edition, an explanatory memorandum, and C.D.M. (construction, design and management) regulations. It did not contain a copy of cl. 11. The first two paragraphs of the explanatory memorandum are, I think, worthy of note:

> "It is intended that the attached form of building contract issued by the Architecture and Surveying Institute, *as the same may be amended*, is to form the basis of the contractual relationship between Hopefield Properties Ltd. and the successful tenderer.
>
> Subject to any further amendments which may be agreed by Hopefield Properties Ltd. (in its absolute discretion) with the successful tenderer, the standard form of building contract shall be amended as follows . . ." [Emphasis supplied.]

The phrase highlighted by me is, to my mind, capable of two possible interpretations. Either it refers to the building contract as it may be amended by the Institute or, alternatively, as amended by the parties. Read in conjunction with the second paragraph, it seems to me that the second interpretation is the more likely.

19 By letter dated August 10th, 2000, Mowlem tendered for the project on certain conditions. The question of the applicability or otherwise of cl. 11 was not raised.

20 At some point between August 10th, 2000 and May 2001, Austin Ruiz, Hopefield's quantity surveyor, asked David Stirling of Mowlem to obtain two copies of the F.A.S. building contract. Mr. Stirling obtained

two copies of the standard form contract and supplementary documentation, which consisted of "clause 11," an amendment sheet in respect of the C.D.M. regulations, and a booklet entitled "A guide to A.S.I. contract documents: Architecture and Surveying Institute."

21 By letter dated January 24th, 2001 from Hopefield to Mowlem and countersigned by Mowlem on the same date, the parties agreed to enter into the F.A.S. building contract 1986, as amended by the explanatory memorandum dated June 30th, 2000, by the tender and by certain correspondence. None of these documents made reference to cl. 11. By virtue of this letter and prior to signature of the contract, Mowlem took possession of the site and commenced works.

22 It is only in the context of the completion meeting that there is any direct evidence as to the incorporation of cl. 11. Colin White, a director of Mowlem, in his witness statement of September 6th, 2004, recalls that the contract physically made available for signature included "clause 11," the "C.D.M." regulations amendment sheet and a guide entitled "A guide to A.S.I. contract documents: Architecture and Surveying Institute."

23 Mr. Stirling's recollection, as regards cl. 11 and the A.S.I. guide to contract documentation, is the same as Mr. White's. Mr. Stirling, however, also recalls that there was both an original C.D.M. regulations amendment sheet (by which, presumably, he means the signed copy) and a copy of the C.D.M. regulations amendment sheet, that is, an unsigned copy. Mr. Stirling also recalls his stapling what he says were the contract documents to the back of the contract booklet after the meeting. His evidence does not, however, shed light as to how soon after the meeting this was done. The implication would appear to be that this happened either immediately or shortly after the completion meeting.

24 That, however, is not a conclusion that need necessarily be drawn. In the selfsame affidavit, Mr. Stirling deals with the request by Mr. Ruiz for him to obtain the contract conditions from the F.A.S., the implication which could be drawn is that this happened shortly after August 10th. Yet, in the next paragraph of his affidavit, Mr. Stirling deals with his request for the contract documentation from the F.A.S. as having taken place in May 2001, therefore making it impossible to determine when during that nine-month period Mr. Ruiz made his request. Given the foregoing, it is unsafe for me to draw any inferences from Mr. Stirling's affidavit as to when after the completion meeting he stapled the contract documents together.

25 It is, I think, useful if at this juncture I detail the contents of the completion bundles produced in court by the parties and the extent to which they differ. The common material in the bundles is the following:

1. A4 Booklet—Architecture and building contract (March 1986 edition), dated May 30th, 2001.

2. Main summary (21/05/2001).
3. Amendment sheet in respect of C.D.M. regulations.
4. Schedule of qualifications to the tender summary for Admirals Place, Old Naval Hospital.
5. Schedule 5, Provisional and firm sums.
6. Schedule 5, Qualifications.
7. Appendix 2, p.2.
8. Explanatory memorandum.
9. Confirmation of verbal agreement/post-tender submission.
10. M.E. Belilo & Partners drawing register and issue sheet.
11. D.M. Orfila Associates drawing register.

26 Worthy of note is that all these documents are signed on behalf of both parties. In the first defendant's completion bundle there is also to be found the following:

1. A copy of the A.S.I. additional cl. 11.
2. A further copy of the C.D.M. regulations.
3. A booklet entitled "A guide to A.S.I. contract documents."

None of these three documents has been signed by the parties.

27 James Ramagge, a director of Hopefield, and the person signing the contract for the claimant, does not have specific recollection as to whether or not cl. 11 was to be found in the completion bundle. Rather, his evidence in effect relates to his examination of the original contract bundle and copies thereof post completion. His lack of specific recollection is further evidenced by his having sought confirmation from Mr. Ruiz that there was no adjudication clause a year or so after signature of the contract. For his part, Mr. Ruiz does not recall this conversation. From perusal of an unsigned witness statement sent by Mowlem's solicitors to Hopefield's solicitors, it is apparent that Mr. Ruiz does not deny this conversation took place, he simply does not recall it.

28 Hopefield seeks to support its contention as to the non-incorporation of cl. 11 by relying upon the retention of the original contract by Natwest, the bank financing the project. A letter from the bank to Hopefield's solicitors, dated June 9th, 2004, shows that the bank held Hopefield's original documentation from January 30th, 2002 (nine months after signature, but before any dispute between the parties arose), until it was passed on to Hopefield's solicitors on June 9th, 2004. The contract bundle received by Hopefield's solicitors did not have cl. 11 attached to it.

29 Other post-completion evidence is, I think, of little assistance. Thus the architect's copy, not having a cl. 11, does not take matters further, in that this is in any event an unsigned copy. Similarly, Roy Bradley's copy (Mowlem's quantity surveyor), not having a cl. 11, does not take matters further. Albeit the copy of the contract he exhibits is a signed copy, it is only a copy of the contract booklet and he does not exhibit any of the other contract documents. On any view, his is only a partial copy of Mowlem's completion bundle.

30 I remind myself that the onus of proof is on Hopefield to establish on a balance of probabilities that cl. 11 was not a condition of the contract. The factors that militate in Hopefield's favour are the absence of a cl. 11 in the tender documentation, the bank holding their copy of the contract before the question of cl. 11 became an issue, and the absence of signature in the cl. 11 document to be found in Mowlem's bundle. As regards Mowlem, its case is almost exclusively premised upon the evidence of Mr. Stirling and Mr. White and their recollection of what the completion bundle consisted.

31 As regards the retention of Hopefield's original contract documentation by Natwest, it is fair to say that it was some nine months post completion that the contract was delivered to Natwest and that therefore during that period the integrity of the completion bundle could have been affected. At that stage, however, there was no dispute between the parties and no one was aware of the significance of cl. 11. Moreover, I think that the accidental loss presumably not only of cl. 11 but also of the extra unsigned copy of the C.D.M. regulations and the guide to A.S.I. contract documents—on the basis that the bundles of both parties would presumably be identical—is highly unlikely.

32 Mr. Stirling and Mr. White appear on the face of their witness statements to have a clear recollection of the presence of the cl. 11 document at completion. Mr. Phillips suggests that this may be so because of the significance that they, being in the construction industry, would attach to the clause. It is, however, surprising that they do not appear to have been aware of its absence at tender stage or when Mowlem took possession of the site prior to signature of the contract.

33 None of the witness statements filed for Mowlem affords an explanation as to why cl. 11 was not signed. All the other contract documents were signed, and indeed it is worthy of note that, albeit referring to contract drawings, Mr. Stirling endorsed Recital 3 by hand so as to require the drawing schedules to be signed by the parties. One may infer from this that the parties were aware of the importance of having all the contract documentation properly identified.

34 That the cl. 11 found its way into Mowlem's bundle cannot of itself incorporate the condition. The A.S.I. guide and an unsigned copy of the

C.D.M. regulations also found their way into that bundle. The guide cannot be seen as a contract document, indeed, no one has suggested in argument that it has any contractual significance. Similarly, the unsigned C.D.M. regulations can have no contractual significance when there is included a signed copy of the same document.

35 Considering the evidence in its totality and drawing an inference from the lack of signature in cl. 11, I find on balance and by a clear margin that cl. 11 is not a condition of the contract. I therefore grant the declaration sought by the claimant.

Declaration granted.