OUTER HOUSE, COURT OF SESSION

[2018] CSOH 45

CA120/17

OPINION OF LORD BANNATYNE

In the cause

BN RENDERING LTD

Pursuer

against

EVERWARM LTD

Defender

Pursuer: Massaro; DAC Beachcroft Scotland LLP
Defender: Tariq; Harper Macleod LLP

27 April 2018

Introduction

[1] This matter came before me in the commercial court for debate in terms of the defender's plea of no jurisdiction.

Background

[2] On or around 23 September 2016, the pursuer and defender entered into a contract for the provision by the pursuer to the defender of labour for external wall insulation works at several sites in Kirkcaldy. The subcontract order from the defender to the pursuer bearing

the reference EWI5127/0003 and the defender's subcontract terms and conditions enclosed with the said subcontract order together formed the parties' contract ("the contract").

[3] The pursuer and defender are in dispute about the pursuer's entitlement to further sums purportedly due under the contract. The pursuer accordingly referred the question of whether it was entitled to further payments under the contract and, if so, how much, to adjudication. On 16 November 2017 the adjudicator issued her decision. She determined that the pursuer was entitled to a further payment of £141,598.20 plus VAT. The pursuer seeks to enforce the adjudicator's decision in the present action. The ground of jurisdiction advanced on the pursuer's half is the defender's domicile.

[4] The relevant provisions in respect to the issue of no jurisdiction are contained in the subcontract terms and conditions and are these:

> "Clause 8 (Settlement of Disputes)
>
> 8.1 If any dispute or difference shall arise between the parties at any time in connection with this agreement then either party may refer such dispute or difference to Adjudication and the Scheme for Construction Contracts (England and Wales) Regulations 1998 (as amended) shall apply ...
>
> 8.3 The decision of the Adjudicator shall be binding on the parties until the dispute or difference is finally determined by legal proceedings, Arbitration (if agreed) or by an agreement in writing between the parties made after the decision of the Adjudicator.
>
> 8.4 The parties shall without prejudice to their other rights under this agreement comply with the decision of the Adjudicator and shall ensure that the decision of the Adjudicator is given effect.
>
> 8.5 If either party does not comply with the decision of the Adjudicator or give effect to such decision the other party shall be entitled to take court proceedings to secure such compliance pending any final determination of the dispute or difference.
>
> Clause 14 (Governing Law and Jurisdiction)
>
> 14 Subject to any specific agreement to the contrary contained in the Order, any contract governed by these terms and conditions shall be governed by and construed

> in accordance with the laws of England, and the parties hereby submit to the exclusive jurisdiction of the English courts."

The issue

[5] The issue before the court is this: in light of the terms of clause 14 do the Scottish courts have jurisdiction?

The submissions on behalf of the defender

[6] Mr Tariq turned first to the issue of the proper approach of the courts to the construction of an exclusive jurisdiction clause such as clause 14. He began by submitting: The common law regards jurisdiction clauses as ordinary contractual terms and construes these clauses as such. In *McGowan* v *Summit at Lloyds* [2002] SC 638, the Inner House held, *inter alia*, that (i) the question of the construction of a jurisdiction clause depends on the law governing the agreement; and (ii) the same canons of construction are to be applied in relation to a jurisdiction clause as any other mutual contract provision so that the words used are construed in accordance with their natural meaning in light of the circumstances in which the contract was made. In the present case, the governing law of the contract is English law. As there are no averments of English law, the court can only proceed on the basis that the relevant English law is the same as Scots law.

[7] The modern approach to the construction of exclusive jurisdiction clauses is to interpret them widely, encompassing all of the disputes between the parties; variations in wording between such clauses are regarded as largely unimportant, given that such clauses are typically drafted by businessmen and the presumed intention of the parties is to have a "one-stop shop" rather than fragmentation for the resolution of disputes. Thus, Lord

Bingham in the House of Lords in *Donohue* v *Armco Inc* [2001] UKHL 64 at paragraph 14 explained:

> "The exclusive jurisdiction clause in the sale and purchase agreement, quoted above, was in wide terms. The practice of the English courts is to give such clauses, as between the parties to them, a generous interpretation."

Similarly, Lord Hoffman in the House of Lords in *Fiona Trust & Holding Corp* v *Privalov* [2007] UKHL 40 at paragraph 13 said (in the context of construing an arbitration clause):

> "In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."

When considering jurisdiction clauses, the courts take a realistic view of the amount of thought usually given to these clauses and resist overly close readings. Lord Justice Thomas in the Court of appeal in *Sebastian Holdings Inc* v *Deutsche Bank AG* [2010] EWCA Civ 998 at paragraph 57 noted:

> "Jurisdiction clauses are rarely the subject of detailed negotiation and there is nothing to suggest that in these transactions any detailed attention was paid in the negotiations to the jurisdiction clauses"

Thus, a "broad and purposive construction" of the jurisdiction clause ought to be followed.

[8] For these reasons, in a case where there is a single agreement (such as this), the presumption is in favour of a "one-stop shop". An argument that the parties intended any degree of fragmentation in the forum of dispute resolution is inherently difficult.

[9] Mr Tariq, against the above background, then made three short submissions in support of the defender's contended for construction of clause 14, namely: first, the court proceedings for the enforcement of an adjudicator's decision are subject to the exclusive jurisdiction of the English courts . Clause 8.5 of the defender's sub-contract terms and

conditions covers the present situation. There is reference to the right to take "court proceedings" to enforce compliance with the adjudicator's decision. The "court" is not defined in the contract. However, the contract must be read as a whole. Clause 14 also refers to the "courts". The reference to "courts" here is in the context of the English courts having exclusive jurisdiction in respect of the contract. It follows that it is incorrect to argue that the reference to "court proceedings" in clause 8.5 includes the Scottish courts. This argument would require to read clause 8.5 in isolation from other parts of the same contract.

[10] Secondly, clause 14 is drafted in the widest possible terms. It does not seek to nor can it reasonably be read as restricting its scope to court proceedings relating to some form of disputes but not others. Similarly, there is no basis to construe the contract as prorogating the jurisdiction of the English courts in respect of the final resolution of a dispute but not the enforcement of an adjudicator's award which is a temporary resolution of a dispute. Clause 14 extends to all matters under the contract. This ought to include all court proceedings whether of a final or temporary nature.

[11] Thirdly, the need to have a "one-stop shop" for the parties' disputes (as is contemplated in the Contract) is all the more apparent in light of what issues the court may have to consider if it accepts jurisdiction in this action. A substantive defence to this action is that the defender has a contractual right of set-off against the adjudicator's award. If such a right exists, the court is being asked to determine the sum of any debt due by the pursuer to the defender which the defender is entitled to set-off against the adjudicator's award. The right to set-off derives from various assessments as averred in the answer to Article 7 of condescendence. At the same time, the defender has sued the pursuer for payment in terms of these assessments in the English courts. If this court accepts jurisdiction, it will soon need to determine substantive issues relating to the contract. This scenario was not contemplated

by the parties in clause 14 when agreeing that English law applied to the contract and the English courts had exclusive jurisdiction in matters relating to the contract.

[12] Turning to the pursuer's contended for construction he submitted that the pursuer argues that the enforcement of an adjudicator's decision falls outside of the scope of clause 14. This clause is drafted in the widest possible terms. The pursuer's argument is inherently implausible in circumstances where there is an exclusive jurisdiction clause within the parties' agreement which requires to be construed widely and generously and with the presumption in favour of a "one-stop shop" forum for all disputes. The pursuer cannot point to any clear term in the contract that can be read as demonstrating the parties' presumed intention to fragment court proceedings for the enforcement of an adjudicator's award from other types of court proceedings (which fall within the exclusive jurisdiction clause).

[13] The pursuer's argument is also misconceived as its right to enforce the adjudicator's decision derives from the contract itself (see: clause 8.5). It is not a standalone right that derives from statue which is independent from the other terms of the contract. In *Ballast Plc* v *Burrell Co (Construction Management) Ltd* [2001] SLT 1039. Lord Reed noted:

> "It appears from the cases cited to me that different views have been taken as to the appropriate legal framework within which to address the issues raised by adjudicators' decisions: in particular whether the adjudicator is to be regarded as a decision-maker, albeit one whose statutory powers and duties have been clothed in contractual form (the approach adopted by Lord Macfadyen in *Homer Burgess Ltd* v *Chirex (Annan) Ltd*, as I understand his opinion), or whether adjudication should be regarded as a contractual procedure (as Dysion J appears to have regarded it in, for example, *Macob Civil Engineering Ltd* v *Morrison Construction Ltd* [1999] BLR 93). "

Lord Reed decided to approach the issues raised by adjudication within a contractual framework; noted that his contractual approach differed to that adopted by Lord Macfadyen in *Homer Burgess*; and thus did not treat the adjudicator as a "statutory

decision maker". At paragraph 29 Lord Reed explained that the adjudication process flowed from the parties' contract and was subject to the express and implied terms of the contract:

> "Each party to the contract is therefore to be regarded as having a contractual right to refer a dispute to adjudication; and each party equally has a contractual duty to comply with the adjudicator's decision. These rights and duties only exist, however, within limits which are set by the terms of the contract. The right to refer a dispute, for example, is confined to disputes arising under the contract: paragraph 1(1) of the Scheme. Since adjudication has a contractual basis, the construction and effect of paragraph 23(2), and in particular words – 'The decision of the adjudicator shall be binding on the parties, and they shall comply with it' – depends on the construction of the express and implied terms of the contract."

[14] Mr Tariq then turned to consider a second argument which was to be advanced on behalf of the pursuer in response to his plea of no jurisdiction.

[15] This argument in summary was this: clause 14 does not comply with the provisions of the Civil Jurisdiction and Judgements Act 1982 ("the 1982 Act"). The issue in terms of the 1982 Act was consent to the exclusion of the jurisdiction clause and thus its enforceability.

[16] In regard to the 1982 Act it was not a matter of contention between the parties that the legal position was this: paragraph 6 of schedule 8 to the 1982 Act provides that parties can agree to confer jurisdiction on another court. In terms of paragraph 6(2), in order for that clause to be enforceable, it must satisfy specific rules of formality. In interpreting the meaning of this provision, EU law must be applied (section 20(5)(a) of the 1982 Act) concerning "the regulation" (being defined in section 1 of the 1982 Act as regulation 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, as amended from time to time). Article 23 of the regulation is in the same terms as paragraph 6(2).

[17] In addition it was agreed between parties that: EU law is clear that specific consent must be identified in order for jurisdiction to be prorogated. It is not enough that the clause forms part of the contract. What is necessary is specific consent to the jurisdiction clause, to ensure it is not missed within the terms and conditions, as explained by Lord Rodger of Earlsferry in *Bols Distilleries BV* v *Superior Yacht Services Ltd* [2007] 1 WLR 12 between paragraphs 23 and 28.

[18] Before turning to the case law in respect to this issue Mr Tariq drew the court's attention to the following term in the defender's subcontract order, which document it was a matter of admission formed part of the contract.

"**Applicable Subcontract terms are: Everwarm Standard TC'S Rev.6"**.

He reminded the court that these were enclosed with the subcontract order.

[19] Mr Tariq in respect of this issue drew my attention first to the European Court's position. This was elucidated in *Estasis Salotti Di Colzani Aimo e Gianmario Colzani* v *RÜWA Polstereimaschinen GmbH* [1976] ECR 1831. The Court of Justice was asked two questions by the German courts:

> "1. Does a clause conferring jurisdiction, which is included among general conditions of sale printed on the back of a contract signed by both parties, fulfil the requirements of a writing under the first paragraph of Article 17 of the Convention?
>
> 2. In particular, is the requirement of a writing under the first paragraph of Article 17 of the Convention fulfilled if the parties expressly refer in the contract to a prior offer in writing in which reference was made to general conditions of sale including a clause conferring jurisdiction and to which these conditions of sale were annexed?"

[20] In its judgment at paragraph 7 the general approach to Article 17 of the Convention (the Brussels convention was replaced by the Brussels I Regulation, in which Article 23 is the equivalent of the Article being considered in this Judgment) is set out:

"[7] The way in which that provision is to be applied must be interpreted in the light of the effect of the conferment of jurisdiction by consent, which is to exclude both the jurisdiction determined by the general principle laid down in Article 2 and the special jurisdiction provided for in Articles 5 and 6 of the Convention. In view of the consequences that such an option may have on the position of the parties to the action, the requirements set out in Article 17 governing the validity of clauses conferring jurisdiction must be strictly construed. By making such validity subject to the existence of an 'agreement' between the parties, Article 17 imposes on the court before which the matter is brought the duty of examining, first whether the clause conferring jurisdiction upon it was in fact the subject of a consensus between the parties, which must be clearly and precisely demonstrated. The purpose of the formal requirements imposed by Article 17 is to ensure that the consensus between the parties is in fact established. The questions referred to the court by the Bundesgerichtshof must be examined in the light of these considerations."

[21] The court answered the first question as follows:

"9. Taking into account what has been said above, it should be stated that the mere fact that a clause conferring jurisdiction is printed among the general conditions of one of the parties on the reverse of a contract drawn up on the commercial paper of that party does not of itself satisfy the requirements of article 17, since no guarantee is thereby given that the other party has really consented to the clause waiving the normal rules of jurisdiction. It is otherwise in the case where the text of the contract signed by both parties itself contains an express reference to general conditions including a clause conferring jurisdiction.

10. Thus it should be answered that where a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under the first paragraph of article 17 of the Convention [of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters] is fulfilled only if the contract signed by both parties contains an express reference to those general conditions."

[22] It answered the second question as follows:

"In principle, the requirement of a writing under the first paragraph of Article 17 is fulfilled if the parties have referred in the text of their contract to an offer in which reference was expressly made to general conditions including a clause conferring jurisdiction. This view of the matter, however, is valid only in the case of an express reference, which can be checked by a party exercising reasonable care, and only if it is established that the general conditions including the clause conferring jurisdiction have in fact been communicated to the other contracting party with the offer to which reference is made. But the requirement of a writing in Article 17 would not be fulfilled in the case of indirect or implied references to earlier correspondence, for that would not yield any certainty that the clause conferring jurisdiction was in fact part of the subject-matter of the contract properly so-called."

[23] Mr Tariq took three propositions from this case:

- The necessity for a clear and precise demonstration that the jurisdiction clause has been agreed
- The mere fact that general conditions containing such a clause are on the back of the contract is not a sufficient demonstration and
- An express reference in a contract to terms and conditions including such a clause would be sufficient demonstration.

[24] He then turned to *7E Communications Ltd* v *Vertex Antennentechnik GmbH* [2007] EWCA Civ 140. The facts so far as relevant were these:

> "The defendant, a German company, faxed a quotation to the claimant, an English company, offering to sell certain satellite equipment. The quotation was expressed to be on the defendant's general terms and conditions but no copy of those terms and conditions, which contained a clause conferring exclusive jurisdiction on the German courts, was sent to the claimant. The claimant faxed the defendant a purchase order ordering the equipment specified in the quotation."

[25] The court in considering Article 23 first considered the *Estasis Salotti* case and then the decision in *Credit Suisse Financial Products* v *Societe Generale D' Enterprises* [1997] CLC 168.

[26] Having considered the above, the court then made the following observations at paragraph 32 in respect to comments made by Saville LJ in the *Credit Suisse* case at p172.

> "In that passage Saville LJ thus emphasised two points which are of some importance in the instant case. The first is that what the court in the *Salotti case [1976] ECR 831* had called in the first part of para 9 a guarantee that the relevant party has 'really consented to the clause' exists where there is an express reference to the terms and conditions which include the jurisdiction clause. It is not necessary for there to be a specific reference to the jurisdiction clause itself. The second is that the fact that the relevant party does not have a copy of the terms and conditions or the jurisdiction clause in his possession is not relevant. So, in the Credit Suisse case, although he did not have a copy of the master agreement in his possession or readily available to him, Mr Mossler, by signing the confirmation, was held to have agreed in writing that the terms of the master contract formed part of the contract."

[27] Mr Tariq took the following from this passage:

1. Express reference to terms and conditions is sufficient to meet the test for real consent to the jurisdiction clause and there is no need for an express reference to the jurisdiction clause.

2. It is clear from a proper understanding of paragraph 32 that the issue of the signature on the documents relates to the issue of incorporation and not to the issue with which the court was being addressed in the present case. In the present case there was no question that the defender's subcontract terms and conditions formed part of the contract. This was a matter of agreement. In any event when the matter was referred to adjudication by the pursuer reference was made to the defender's subcontract terms and conditions and condition 8 specifically founded upon.

[28] Mr Tariq concluded by saying this: first he accepted that the party's contract was not signed by both parties; nevertheless the defender's subcontract terms and conditions form part of the contract; the subcontract order refers expressly to the defender's subcontract terms and conditions which includes the jurisdiction exclusion clause and lastly, that express reference meets the test for real consent to the jurisdiction clause.

The pursuer's reply

[29] Mr Massaro first dealt with his argument to the effect that clause 14 did not comply with the 1982 Act.

[30] He began by generally submitting that it was not the law that because terms and conditions are incorporated into a contract that there is consent in terms of the 1982 Act. He accepted in the present case that the terms and conditions contained in the defender's

subcontract terms and conditions were incorporated, however, it was his position having regard to the whole circumstances there was no real consent to clause 14.

[31] Turning to the applicable law he first looked at the case of *Bols Distillery BV* and to the judgment of the court given by Lord Rodger of Earlsferry and in particular directed my attention to paragraph 23 where the following observations are made:

> "The rule is that the court must be satisfied, or as satisfied as it can be having regard to the limitation which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction. In practice, what amounts to a "good arguable case" depends on what requires to be shown in any particular situation in order to establish jurisdiction. In the present case, as the case law of the Court of Justice emphasises, in order to establish that the usual rule in Article 2(1) is ousted by Article 23(1), the claimants must demonstrate 'clearly and precisely' that the clause conferring jurisdiction on the court was in fact the subject of consensus between the parties."

[32] It was his position that looking at the contract as a whole there was nothing which met the test as set out by Lord Rodger. It was his general position that: this is a case where clause 14 might pass unnoticed.

[33] Beyond the above he did not differ from Mr Tariq that there were only two authorities which were of materiality in relation to this issue. These were the *Estasis Salotti* and *7E Communications Ltd* cases.

[34] It was his position that on a proper understanding of *Estasis Salotti* the court decided that the signature on the contract was an essential element in showing that a jurisdiction clause contained in standard terms and conditions to which express reference was made in the contract document had not been overlooked. He asked the question why is the signature important in clearly and precisely demonstrating that the parties have agreed to such a clause? He answered the question by saying that the signature evidences that the signing party has looked at the whole terms of the contract and agreed to them including the

jurisdiction clause. The formality of the signature shows that the jurisdiction clause has not been overlooked.

[35] He accepted that the law had been developed by the *7E Communications Ltd* decision. However, he pointed out that although there was not a single contractual document signed by both parties in the *7E Communications* case, there had been an exchange of documents between the parties, unlike the position in the present case, and each party had signed one document, although not the same document unlike the present case. He submitted that that was a material difference from the present case.

[36] He submitted that what was lacking in the present case to demonstrate clearly and precisely that the clause conferring jurisdiction on the English courts was in fact the subject of consensus between the parties was a signature by the pursuer.

[37] He noted that in the present case the defender's subcontract order at page 6 said this:

> "A signed copy of this order together with our terms and conditions/ form of subcontract duly completed must be returned to this office prior to your first payment being made"

[38] It was not a matter of contention between the parties that no such signed copy had been returned.

[39] He concluded by submitting under this head that in the absence of a signed contract and in the absence of any averments about specific consent, the jurisdiction clause is not enforceable.

[40] Mr Massaro then turned to the issue of the scope of clause 14.

[41] He began his submissions by generally noting that clause 14 was part of the defender's standard form terms and conditions and had not been negotiated between the parties. It flowed from this: it is not a type of clause from which significant objective intention can be inferred, see: *Hoe International Ltd* v *Anderson* [2017] SC 313 at paragraph 23.

Further clauses and standard form terms and conditions ought to be interpreted *contra proferentem*, see: *The Law of Contract in Scotland* 3rd edition 2007, McBryde, paragraphs 8.38 to 8.43.

[42] Looking to the clause itself it was his position that it does not specify which disputes are to be litigated in England. The clause says nothing about its intended scope. The scope of the clause is ambiguous.

[43] Beyond that a jurisdiction clause may not include matters relative to the Housing Grants, Construction and Regeneration Act 1996 (the "1996 Act") within its scope, see: *Comsite Projects Ltd* v *Andritz AG* [2003] EHWHC 958 TCC per Kirkham J at paragraph 17.

[44] Mr Massaro then turned to look at *Scotmotors (Plant Hire) Ltd* v *Dundee Petrosea Ltd* [1980] SC 351 and in particular the opinion of the court at page 354 which explained: that in a contract where both parties were based in Scotland and in which performance was to take place in Scotland the normal forum would be the Scottish courts and that a contrary intention would have to be clearly expressed. The same considerations he submitted apply in this case.

[45] He accepted that *Scotmotors* must be considered in light of the comments of the court in *McGowan* v *Summit at Lloyds* at paragraph 50: it does not lay down any rule of law but rather sets out some factual circumstances that might cause a court to construe a contract in a particular way. As explained by Lord Reed at paragraph 52, the surrounding circumstances will (as in *Scotmotors*) colour the interpretation to be placed on the words used. Lord Reed explained that relevant circumstances include:

(a) that the clause appears in the defender's pre-printed terms and conditions;

(b) that the obligations imposed in practice fall substantially on the party to whom terms and conditions have been issued;

(c) that the clause has a commercial or legal significance.

He submitted that each of the above circumstances applied in the present case.

[46] He submitted that properly interpreted the clause does not prorogate exclusive jurisdiction to the English Courts on matters concerning the enforcement of adjudication awards. Adjudication is a *sui generis* system of dispute resolution created by section 108 of the 1996 Act. Its purpose is to enable contractors, such as the pursuer, to obtain interim payments and to avoid insolvency through cash-flow difficulties (*Carillion Construction Ltd* v *Royal Devonport Dockyard Ltd* [2005] EWCA Civ 1358 per Chadwick LJ (delivering the judgment of the court) at paragraph [86]). It is there in this case predominantly for the benefit of the pursuer. Proceedings to enforce adjudication awards are unique (*South coast Construction Ltd* v *Iverson Ltd* [2017] EWHC 61 (TCC) per Coulson J at paragraph [28]). Whilst this clause (on one interpretation) might be said to seek to prorogate jurisdiction to the English courts, it could equally have been a different jurisdiction nominated which did not have a knowledge of the 1996 Act and did not as readily appreciate the *sui generis* nature of enforcing adjudication awards. The court should therefore be reluctant to readily interpret jurisdiction clauses as ousting the enforcement jurisdiction of the Scottish courts.

[47] He therefore submitted that clear words would be required in order to prevent adjudication enforcement proceedings being taken in the Scottish courts. In any event, the absence of any explanation in the clause about what it was intended to cover (for example a reference to "all disputes", as one might frequently expect in such clauses) means that the ambiguity in the clause ought to be resolved in favour of the pursuer. The pursuer ought to be able to enforce its adjudication award in the usual way. He accordingly submitted that the clause does not prorogate exclusive jurisdiction to resolve this dispute in favour of the English courts.

Discussion

[48] I turn to consider first, whether clear and specific consent can be identified in order for jurisdiction to be prorogated to the English courts.

[49] Given the way that the argument developed before me the questions for the court are these:

1. Is an express reference in the defender's subcontract order (sent to the pursuer) to the defender's subcontract terms and conditions, which contain the jurisdiction clause (which document is unsigned by the pursuer) sufficient to satisfy the test that it is clearly and precisely demonstrated that the parties agreed to the clause conferring jurisdiction on the English courts?
2. Or put another way, in order to satisfy the said test is it not only necessary for there to be an express reference to the defender's subcontract terms and conditions but for the subcontract order to have been signed by the pursuer to demonstrate that the parties agreed to the clause conferring jurisdiction on the English courts?

[50] I consider the answer to the above questions are: question 1, yes and question 2, no.

[51] I believe the law in respect to these questions is well established, clear and unambiguous.

[52] In the *Estasis Salotti* case the first question posed to the Court of Justice asked them to consider a situation where the contract was signed by both parties.

[53] When answering the first question the court says that the requirements of Article 17 are satisfied:

> "Where the text of the contract signed by both parties itself contains an express reference to general conditions including a clause concerning jurisdiction."

[54] The court's answer to the question is thus given in the context of a "contract signed by both parties". However, I do not believe that on a proper analysis of the court's judgement that the issue of the contract being signed by both parties is of significance in respect to the issue of real consent to the clause waiving the normal rules of jurisdiction. The court earlier in paragraph 9 says this:

> "Taking into account what has been said above, it should be stated that the mere fact that a clause conferring jurisdiction is printed among the general conditions of one of the parties on the reverse of a contract drawn up on the commercial paper of that party does not in itself satisfy the requirements of Article 17 ..."

[55] The court makes no reference to the question of signature making any difference in those circumstances to the issue of the satisfaction of the requirements of Article 17. It is clear that what the court is saying is this: what guarantees real consent is the express reference not the signature on the contract.

[56] This is confirmed when the court's answer to the second question is considered. It is clear from the answer to that question that satisfying the test of real consent does not turn on the issue of signature but rather on the issue of express reference. The second question does not refer to a contract signed by both parties. The issue of signature is accordingly absent in this question. The court answers the question entirely by reference to the nature and extent of the express reference. The court says this at paragraph 12:

> "In principle, the requirement of a writing under the first paragraph of Article 17 is fulfilled if the parties have referred in the text of their contract to an offer in which reference was expressly made to general conditions including a clause conferring jurisdiction. This view of the matter, however, is valid only in the case of an express reference, which can be checked by a party exercising reasonable care, and only if it is established that the general conditions including the clause conferring jurisdiction have in fact been communicated to the other contracting party with the offer to which reference is made."

[57] Accordingly for the foregoing reasons on a proper analysis of the above decision I consider it is clear that in respect to the issue of the satisfaction of the test of real consent the relevant consideration is the issue of the express reference in the contract to the terms and conditions. I believe Mr Tariq is correct in arguing that the issue of signature is not of relevance when considering satisfaction of the test.

[58] Turning to the *7E Communications Ltd* case I believe the position as to whether express reference on its own can satisfy the test of real consent is made even clearer. The court at paragraph 31 observes that the law in *Estasis Salotti* was clarified by *Credit Suisse* and refers to the judgement of Saville LJ in *Credit Suisse* at page 172 where he says this about *Estasis Salotti*:

> "It seems to me to be clear from the judgment in *Salotti* that the court considered that 'guarantee' of real consent does exist where there is an express reference in the written contract by way of incorporation of other written terms which include a term conferring jurisdiction".

[59] The court in *7E Communications* then observes at paragraph 32:

> "In that passage Saville LJ thus emphasised two points which are of some importance in the instant case. The first is that what the court in the *Salotti* case ... had called in the first part of para 9 a guarantee that the relevant party has 'really consented to the clause' exists where there is an express reference to their terms and conditions which include the jurisdiction clause."

[60] Again what is emphasised in respect to the issue of whether the relevant party has given real consent to the jurisdiction clause is the express reference and not the issue of signature.

[61] I think it worth referring to one further passage in *7E Communications Ltd* which I believe makes it even clearer that the real consideration regarding the question of a guarantee of real consent is the issue of express reference. This passage is at paragraph 40.

It is again a reference to the judgment of Saville LJ in the *Credit Suisse* case where at 172-173 he says this:

> "In the present case there is an express and direct reference to the master agreement in the written contract itself. To my mind the terms of this reference alone make it certain that the clause conferring jurisdiction was part of the subject matter of the contract properly so called. Where, as in the case discussed by the court in the context of the second question, the reference is to earlier correspondence, which in turn is said to incorporate other terms. I clearly accept that, depending on the circumstances, it may be necessary, in order 'clearly and precisely' to demonstrate that the clause conferring jurisdiction was in fact the subject of a consensus between the parties, to establish that the items in question were supplied to the party concerned." (emphasis added)

[62] For the foregoing reasons I believe that the express reference in the subcontract order to the defender's subcontract terms and conditions is sufficient to satisfy the test of real consent.

[63] I accordingly prefer Mr Tariq's submissions in relation to this issue.

[64] The second question before the court is this: on a true construction what is the scope of the jurisdiction clause?

[65] First Mr Massaro argued that clause 14 was ambiguous in respect to its scope.

[66] The material part of the clause is in very short terms, namely: "Subject to any specific agreement to the contrary contained in the Order ... the parties hereby submit to the exclusive jurisdiction of the English courts."

[67] I am unable to identify any ambiguity in respect to the scope of the clause. Rather, the scope of the clause seems to me absolutely clear. Parties are submitting unless otherwise agreed in the "Order" all disputes to the jurisdiction of the English courts. The word "exclusive" in the context of the provision can I believe on no sensible basis be construed otherwise.

[68] There is nothing in the wording of the clause to suggest that some disputes should be dealt with in one jurisdiction and other disputes in another jurisdiction. As argued by Mr Tariq it cannot be read as restricting its scope to court proceeding relating to some disputes and not to others.

[69] Some support for Mr Tariq's construction can be obtained from the presumed intention of parties in respect to such clauses to have "a one-stop shop" rather than fragmentation of the resolution of disputes. I accept that this must be a weak presumption, given it is contained in the defender's standard terms, nevertheless it is I believe a factor to which I am entitled to have regard and reinforces the view which I have formed on the clear wording of the clause itself that the true construction is that all court proceedings are referred to the English courts.

[70] The clause, as I have said, has to be interpreted in terms of the contract as a whole. However, I am unable to identify any factor in the contract as a whole which tends to support the argument advanced by the pursuer.

[71] However, in construing the contract as a whole Mr Tariq advanced an argument to this effect: in clause 8.5 there is the right to take "court proceedings" to enforce compliance with the adjudication determination. The only other reference to "court" is in clause 14. He then argued to hold that reference to court "proceedings" in clause 8.5 was a reference to the Scottish courts would be to read clause 8.5 in isolation from other parts of the contract and in particular clause 14. I believe there is some force in this argument. It again supports the defender's construction of clause 14.

[72] As regards the *Scotmotors* case it is accepted that it has to be read in light of the comments at paragraph 50 in *McGowan*.

[73] Lord Reed at paragraph 51 observes:

> "The same canons of construction are to be applied in relation to this type of clause (a jurisdiction clause) as any other mutual contractual provision. It is a matter of construing the words used in accordance with their natural meaning and in light of the surrounding circumstances in which the contract was made."

[74] As I have already said the natural meaning of the words in light of the surrounding circumstances appears to me to be entirely clear and to favour the defender's contended for construction. The intention is clearly expressed in clause 14 to have all court disputes unless otherwise provided for in the "Order" prorogated to the exclusive jurisdiction of the English courts.

[75] Lord Reed at paragraph 52 sets out certain factors which may point towards or away from the conferring of an exclusive jurisdiction.

[76] Turning to these factors he notes first that a clause selecting a jurisdiction which has been specifically agreed, may tend to point towards agreement on an exclusive jurisdiction. That does not apply here so there is no such factor favouring exclusive jurisdiction being conferred on the English courts.

[77] Secondly, he points to a clause which appears in the printed form issued by one party to the other, and the considerations that exclusivity will in practice impose an obligation falling substantially on the party to whom such a form has been issued, such will point away from agreement of an exclusive jurisdiction. It was argued by Mr Massaro that in this case the exclusivity clause placed obligations on the pursuer which were not otherwise placed on the defender. I do not accept that this is a sound analysis of the effects of the clause. Both companies are domiciled in Scotland and the effect of the clause is that both companies will have to raise court actions in England (as the defender has presently done). Thus the effect of the clause is equal on both parties. It was argued that in the circumstances of the present case the pursuer is the party who has been successful at the

adjudication and it will now have to raise an action in England. However, I do not see how this imposes any extra obligations on the pursuer. An action to enforce the decision of the adjudicator can be raised as easily in England as in Scotland. It was argued by Mr Massaro that the unfairness of this in the circumstances of enforcement of an adjudication decision was illustrated by a scenario where the country to which jurisdiction had been prorogated did not have a knowledge of the 1996 Act and did not appreciate its nature. This does not assist the pursuer's argument. The English court have a full understanding of adjudication.

[78] The final argument advanced by the pursuer in support of its construction was based on this: adjudication is a *sui generis* system of dispute resolution created by section 108 of the 1996 Act. It is thus statutorily based and is conceived in the benefit of contractors such as the pursuer. Thus it is not covered by the clause.

[79] The above argument is I believe misconceived. The right to go to adjudication is a contractual right in terms of clause 8. In my judgement it cannot be looked upon as being independent and separate from the contract from which it arises. It is not a standalone right. I accept the analysis of the structure of adjudication as set out by Lord Reed in *Ballast Plc* v *Burrell Co*.

[80] It is noteworthy that Lord Macfadyen accepted the view he had expressed in *Homer Burgess* was wrong *in Gillies Ramsay Diamond* v *PJW Enterprises Ltd* [2004] SC 430 to treat an adjudicator as a statutory decision maker.

[81] Thus the right to adjudication is subject to the express and implied terms of the contract. I accordingly do not believe that this argument assists the pursuer.

[82] In conclusion for the above reasons I am satisfied that the scope of the exclusion of jurisdiction clause is as argued by Mr Tariq. Accordingly the present proceedings ought to have been raised in England, this court has no jurisdiction.

Decision

[83] In light of the above I find in favour of the defender in respect to the sole issue raised of jurisdiction.

Disposal

[84] I accordingly sustain the defender's plea in law in respect to jurisdiction, repel the pursuer's pleas-in-law and dismiss the action. I reserve all questions of expenses.