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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION COURT

No. HT-2018-00042

[2018] EWHC 3969 (TCC)

Royal Courts of Justice

Tuesday, 18 December 2018

Before:

MR JUSTICE WAKSMAN

B E T W E E N :

SITOL LIMITED — Claimant

- and -

R. FINEGOLD
H. FINEGOLD — Defendants

MS J. STEPHENS (instructed by Standish Associates) appeared on behalf of the Claimant.

MR P. CLARKE (instructed by DLA Piper) appeared on behalf of the Defendants.

APPROVED JUDGMENT

MR JUSTICE WAKSMAN:

This is an application by the claimant, Sitol Limited, a specialist tiling and ceramic company, to enforce an adjudication decision against the defendants, Mr and Mrs Finegold, which is dated 18 June 2018. By that decision, the adjudicator awarded to Sitol the claimed outstanding sums for works done of £44,838.38, including VAT and on this claim there are the adjudicator's fees of £41,534.18, including VAT, which have been paid in their entirety by Sitol.

1 The defendants say that there should be no summary judgment on the adjudicator's decision for two reasons. First of all, there is at least a real prospect of successfully contending at trial that the contract with Sitol was not with the Finegolds as the other party, but a company called Proman UK Limited ("Proman"), which is now in voluntary liquidation. Indeed, the defendants go further and invite me, if I consider it appropriate, to decide now that not merely is there a real prospect of arguing that there was no contract between them and the claimant, but there is no argument at all that there was such a contract with the claimant; so they should, in effect, have reverse summary judgment against them. I will refer to this as the contract point. The second point made in the alternative is that, in any event, this dispute was referred to the adjudicator too late by reference to specific notification provisions in the relevant contract with the defendants (if made). I will refer to that as the timing point.

2 The test for summary judgment under part 24 is well known. A claimant can only obtain summary judgment if there is no real prospect of a successful defence on the part of the defendant or no other compelling reason for a trial. The latter is not argued here. A real prospect of a successful defence must be contrasted with a prospect put forward by a defendant which is merely fanciful. The court should not embark on what can clearly be described as a mini-trial, but on the other hand if there is a factual contention being advanced which is clearly hopeless, the court can say so.

3 The claim by Sitol arises in the context of a very large refurbishment and building project which was taking place at the Finegolds' house in Hampstead and the role of Sitol, on any view, was to deal with highly specialised tiling operations. The claim that the adjudicator decided upon was the final part of the monies that were owing to Sitol, it having received interim payments along the way.

4 So far as the evidence before me I have, for the claimants, the witness statement of Mr Tolley of Sitol, but then in addition to that I have a witness statement from Mr Muir, who was the director and principal shareholder in Proman and together with that a witness statement from Mr Lawrence, who was a construction manager for Proman and also a short statement from Mr Eve, who was a quantity surveyor. So far as the defendants are concerned, there is one witness statement from Mr Finegold and there is a second witness statement from Miss Holmes, his solicitor, although she deals largely with matters of chronology, correspondence and argument rather than the substance of the dispute.

5 Let me then turn to the contract point. The defendant's case is that notwithstanding Proman's name, which is obviously an abbreviation for Project Management, and its professional description as a project manager, it was not engaged as such here. It was engaged as a main contracting, acting as principal, although on the basis, as both parties would know, that it would not be rendering the contractual services itself. It was, as has been described to me by Mr

Clarke, although it does not feature in terms in the defendant's evidence, as a costs plus contract, with an incentive to Proman if the project finished early. It is also common ground that there is no contemporaneous document stating that the contract is a costs plus contract or that PM is the main contractor.

6 The claimants say that it was a project management contract and so the only services which were being rendered by Proman were various forms of project management services, albeit as part of those services, the various contractors' bills were to be addressed to and funnelled through Proman as effective contract administrator and then forwarded on to the Finegolds in a form which we will see hereafter. The Finegolds would make a payment not to the contractors, but to Proman, who would distribute the sums onwards.

7 If it is the case, on a proper analysis, that the Finegolds engaged Proman not as main contractor but as project manager, who was responsible, among other things, for obtaining the contractors and managing them and managing the budget, then it would inevitably follow that, so far as Sitol was concerned, any contract made by Sitol through Proman would be made by Proman on behalf of the Finegolds. In other words, there would be actual authority conferred upon it by virtue of its very role inherently, subject, of course, to matters like the approval of budgets and so on. There is no case advanced here on the part of the claimants of ostensible authority in the alternative.

8 So far as contractual or *quasi* contractual documents are concerned in relation to Sitol, first of all, there is from Proman, dated 2 December 2016, addressed to Mr Tolley a letter of intent saying that:

> "Proman have now received approval that the costs quoted by Sitol were accepted and it is our employer's intention (the Finegolds) to enter into an NEC contract with you based on the following:"

And then there is a description of the works, the programme and the total sum and then it is said that:

> "All financial matters must be forwarded to Proman. All approved payments will be sent by Proman by electronic transfer."

One can read into that that whoever the invoices were addressed to, they were going to be sent *inter alia* to Proman for payment, and the document makes that plain.

9 Then there was the NEC contract itself. It is described as a contract between Mr and Mrs Finegold and Sitol Limited for the installation and manufacture of tiling works. On the second page, again, the employer is described as Mr and Mrs Finegold and the site is the Finegolds' house. There are then some provisions in the contract dealing with the timing of notification of any dispute to adjudication, which I will deal with later on.

10 This contract was proffered to Sitol, which signed its acceptance, or at least typed in the name Lee Hutchinson. They gave that copy and did not retain a copy. They gave the original back to Proman, but the Finegolds never signed it. It is not clear whether they were ever provided with a copy. Mr Lawrence thought that he would normally have given them a copy. But it may not have made much difference here because the evidence from Proman is that the Finegolds did not like signing any form of contractual document and so the fact that they did not sign it here, one cannot read too much into it on the contract question.

11 There was some evidence about the standard terms and conditions. Those standard terms and conditions do themselves say that Proman is not responsible for the payment of any fees to the professional team, any works contractor or any person employed by the employer and the standard terms set out its role as a project manager rather than as a main contractor. Mr Muir says that he gave a copy to Mr Finegold at the beginning of their working relationship, although Mr Finegold denies it. All we have is a much later email from December 2017, where Mr Muir is sending him another copy but having noted that he had already sent him one. So, not much can be read into that either.

12 Sitol's own evidence has always been on the basis that it made the contract through Proman but with the Finegolds in accordance with the way in which the documents which were presented to them had shown. Sitol sent their invoices to Proman, but addressed them to the Finegolds but they were paid by Proman. It all changed once Proman went into liquidation at the end of 2017. Sitol was unpaid and so it made demand for the balance of the sums due directly on the Finegolds. But then, as we shall see, they said that there was no contract with them, therefore they were not liable and hence this dispute. It is common ground there is no contractual document or communication between Sitol on the one hand and the Finegolds on the other directly at all.

13 So far as Proman's evidence is concerned, the thrust of it is that it always acts as a project manager. That is its business. It provides a full contract, administration and management service, including the obtaining of tenders, overseeing budgets and payments and looking after the project as a whole, And that is part of its normal business. But that, it says, does not make it into a main contractor which business it did not carry on. That is dealt with in some detail by Mr Muir.

14 Mr Lawrence backs this up. His role as a construction manager was to manage on site the contractors on behalf of the employer and, as far as he was aware, Proman would always contract with the employer to give project management services and then arrange for the underlying contracts. Certainly, that appears to be what has happened in this case so far as a contractor like Sitol is concerned. The thrust of Mr Lawrence's evidence was that, in this particular case, having dealt with the Finegolds, they were perfectly well aware of all of that and there was no question of a main contract. Sitol were, according to Mr Lawrence, the tenderer that was successful so far as the tiling work is concerned.

15 Then, finally, there is the statement of Mr Eve, who was employed as a quantity surveyor from October 2016 to May 2017 to "administer the engagement of specialist contractors on behalf of our employers". He found a number of contracts had been drawn up. He was only stationed at this property for about a month, but has shown a number of different documents and letters of intent to other contractors which are all consistent with the way in which Mr Muir says Proman conducted its *modus operandi*.

16 On that basis, that is how Proman worked and how it purported to work so far as Sitol is concerned. It is at least unlikely that Proman would completely alter its business here just in the case of the Finegolds, especially as the evidence is that they had shown the Finegolds some other properties they had dealt with *qua* project manager. Obviously, it is not a conclusive point, particularly on a summary judgment application. But it is of some importance, in my view.

17 One then turns to the evidence of Mr Finegold. He said that they had no experience of construction projects, it was essential the contractor would organise, procure, manage and complete all of the design and construction works to complete the project, including appointing

specialist contractors. That may well be. But that, of course, would be just as consistent with appointing a project manager who would take care as a conduit as it would with one person as main contractor. But getting down to the detail of the matter, para.3.6 he says this:

> "Following a number of conversations and emails with David Muir, we agreed that Proman would carry out all of the works which were required to complete the project, appointing specialist contractors to undertake those works," which would have to read subcontractors. "In exchange, I paid Proman a fixed lump sum in respect of its overhead and profit, referred to as a "fee", as well as the cost of the work carried out on site."

That is it, so far as the detail of Mr Finegold's evidence is concerned, apart from his reference to particular emails. That, I have to say, and in contrast to the evidence from Proman, is thin.

18 But what Mr Finegold does to back up his case here is, first of all, to refer to an email dated 21 March 2015. I refer to the email itself because Mr Finegold does not. The email is from Mr Muir to Mr Finegold and Mrs Finegold and says:

> "Please find the revised budgets following our discussions. I have kept the wow factor to the ground floor pool area and master bedroom, simplified all the other areas. I will issue you with a schedule of all savings."

Then he says this, and I quote:

> "The work will be undertaken by Proman UK, acting as your project managers, and for this I have reduced all previous budgets by 10 per cent and then shown our fee of 10 per cent for this service."

The only service that the fee of 10 per cent can possibly relate to is acting as project managers. That email is powerful, contemporaneous evidence as to what the true relationship between Proman, on the one hand, and the Finegolds on the other, really was. Indeed, if the true position was that Proman was the main contractor, even acting on a costs plus basis, it is inconceivable that he would be writing in terms of project management and the 10 per cent fee because that would not exist - it would all be wrapped up in the main contract.

19 Two points to note about that email before looking at the attachments. First of all, there was nothing that came back from the Finegolds to say that was a complete misdescription of his role. Secondly, as I have indicated, Mr Finegold has positively relied on that email and referred to it in his witness statement. However, what is referred to by Mr Finegold in para.3.7 of his witness statement is a section of the attached budgets which I take from p.1095 by way of example. There are two relevant sentences. One says the works will be competitively tendered; the second says the works will be carried out as one concurrent contract. Mr Finegold refers only to one line there, the one concurrent contract. I can quite understand that if that had said there was only contract overall and it is a contract with Proman, then that would obviously be supportive of the defendant's case, but it does not say that. I do not actually know, and neither counsel are able to help me, as to what the expression "carried out as on concurrent contract" actually means. It could mean, for example, that all the different skills at the property would be working with each other, in other words concurrently, rather than one after another, in terms of project management. But I certainly cannot read from that sentence, especially in the light of the covering email, that that is indicating that Proman were going to be acting as main contractor. That view is, of course, supported by the previous sentence, which says that the works will be competitively tendered. It is, of course, possible on a costs plus contract that

there may be some tendering, but in my judgment, in the context of the covering email, this is much more naturally to be read as another facet of the project management services which are to be rendered. So, far from helping the defendants, I am afraid this email, and its attachment as a whole, go against their case.

20 The next document I refer to is at 20 April. Here is, first of all, an email from Mr Muir of 17 April, saying they would take possession of the site, they would "engage the design team and other consultants on your behalf for the construction work with immediate effect and begin to discharge all of your pre-start legal obligations". Mr Clarke emphasised that there was a reference there to "design team and other consultants" and perhaps that was to be distinguished from those who were carrying out the construction work. But on the other hand, if this was a main contract then it is not clear why the design team and consultants would be hired on behalf of the defendants in any event. So, I do not think that that is particularly helpful so far as the defendants are concerned. But what we then have, on 20 April, is Mr Finegold writing to Dave, saying:

> "We are very excited to work with you. We have agreed a maximum budget of £3.1 million. Anything less than that we will split. Also, you and your team's fees are fixed so that if the budget is completed in less time you will still get all of it, and if it overruns we do not pay any more."

Well, the emphasis there is on "your team's fees". That, again, would suggest the role of project manager who is earning fees. And Mr Muir writes back to say:

> "Yes. That is the basis of our agreement. Many thanks. We can speak later."

An incentive on the fee if the project comes in under budget and if it ends early the fee remains the same is quite consistent with project management services.

21 However, one then has to go to 21 April, and here Mr Muir is writing saying: "Here are the insurance cover documents for employer's and public liability and professional indemnity which cover all our fee work." I do not agree that has got anything to do with main contracting services. Professional indemnity cover is not apposite to describe contractor's liability as opposed to architects or project managers and so the document attached there does not assist. However, he goes on to say:

> "Our contractors all risk policy is currently being updated with specific details of your project. I have had to complete a further risk profile with them last Friday because of the intended basement works."

It is not clear to me whether that is "its contractors all risk policy" or "the all risks policies of the various contractors". I accept that if this is to be read as a policy actually taken out by Proman then that would be consistent with it acting as a main contractor, although it would also be consistent with it obtaining on behalf of the contractors, of whom there were many, a global policy.

22 We then turn to some of the valuation documents as submitted to Mr and Mrs Finegold. Valuation 1 was dated 29 May 2015. It says: "Preparation work, site establishment, preliminaries and project management as per the attached valuation." I accept that, on the face of it, there are works there which are not exclusively project management, although they are in the nature of preliminary works. At that stage, the payments which are set out later on in the attachment are all to go to one particular bank account. They are broken down into, effectively,

construction works on the one hand and fee works on the other and that is how they are both described.

23 We then go to valuation number 2. Here, there are two invoices. One is for the fee works, the other is for the site works. Each invoice has a separate bank account for insurance cover purposes, because the site work, which is deemed high risk, needs to be kept separate. Then there are valuations setting out all of the works there. There are still preparation works and site establishment works within the consultancy fee, but there is a separate invoice for the site works. By then, they had established a system of having two different bank accounts. On one view, since site works are being billed by Proman, it could be said that that is an indication that Proman is acting as main contractor. On the other hand, if that is the case, it is very difficult to see why it should be billing separately for its own project management fees. There is no basis for that. It is also consistent, in my view, with the way in which Proman said itself that it works, which is to route payments through itself and to take invoices and then make the payment demands on the client for the discharge of the contractors' invoices. So, I do not think there is anything in those valuations which puts out of the picture the notion that this can be a project management contract.

24 We then go to 18 November 2016. What is said here from Finegold is they are over budget.

> "I know we are going over budget. I need to understand how people can be waiting for money when there is still so much to do."

That, it seems to me, is more consistent with project management services because Mr Finegold seems to have got involved with subcontractors/contractors who are making demands where Mr Finegold thought that there was still a lot to be done, in other words before they should earn their money. He then said that he had a look and spotted extra for management and management fees, et cetera. "Clearly, given that we agreed a set fee for you and your team," and I emphasise those words, "is that a mistake?" That seems to me to be more consistent with a project management role.

25 Then we come to 2017. First of all, correspondence from January 2017. Mr Muir refers to a schedule being

> "… a forecast of your liabilities as we see it at this moment in time. You need to pay the contractors for December 2016. Please can you pay PM UK London invoice tomorrow, just to keep the ball rolling, and I can get all the contractors paid."

Well, that seems to me to be wholly consistent with the project management role, which would include a conduit for the receipt of monies to go on to the contractors. The letter, in fact, followed a letter from Mr Finegold, complaining that they were going over budget, that the project was out of control and also that he was annoyed that bills were being sent "for you and your team". Again, that is a reference to the project management team.

26 On 17 February, there is then a further valuation where it is said: "Please make the payment to PM UK so we can them paid." In this particular case, the contractors are all identified. Now, in his witness statement Mr Finegold had said, at para.4.6:

> "Although I do not deny that Sitol appears to have been provided with a contractual document, I did not agree to it, never entered into it, not aware of it until Sitol provided a copy. I had not hear of Sitol until long after the alleged contract had been gone into."

In fairness to him, this document may not be strictly inconsistent with what he said there, depending on what one means by "long into the contract". But what is important here is that this is a document which expressly shows Sitol among a number of contractors. It is on a valuation schedule which Mr Finegold himself produced as part of his evidence, so he obviously had it. It is actually headed "Employer address Mr R Finegold". That is inconsistent if Proman was to be the main contractor and Finegold had no separate liability for any of the underlying contractors, but no point was taken on this. When I asked Mr Clarke about it, he felt it may be that, in relation to this particular document, although Mr Finegold had it, he did not read it. But then a little later on, when I asked, "Well, why was it that these contractors were identified?" He said, "Well, it was because Mr Finegold by that stage was getting concerned about the budget and wanted to look carefully through who the contractors were and what they were charging." I am afraid Mr Finegold cannot have it both ways. The reality is there is actually no evidence from Mr Finegold about that document at all.

27 We then go to 17 February. There is a series of documents of that date, but I am going to p.825. It really begins at p.826, where Mr Muir is writing, saying:

> "Regardless of understanding of our agreement, the contractor still required payment for work done, which does not include any of our fees which I sent you this morning."

It goes on to say:

> "Your current liabilities for contractors and supplies are in the region of £925,000, leaving us with £75,000 in fees, which is a massive shortfall." The response comes: "I am not agreed. I originally agreed £3.1 million. Last week I reluctantly agreed £4 million (inaudible). I was very clear. Why would I agree more? It is not acceptable. You surely cannot have agreed to pay out £1.4 to £1.7 million without my prior approval?"

Again, that is far from necessarily indicating a main contract. It seems to me to be indicating here that here was a project manager who is budgeting and appointment of contractors was subject to the approval of the employer, that is to say the Finegolds. Another document of 17 February is at p.827, and that is Mr Muir "currently negotiating with all the contractors and suppliers on your behalf to establish the budget", which again is consistent with acting with them but on behalf of the Finegolds.

28 There are a set of invoices starting on 2 March which are headed "Site works as per the agreed cashflow" and they clearly are encompassing the construction works. There is not very much evidence explaining what this is all about really from either party, but it is not inconsistent, again, with the existence of Proman as project manager and feeding through the bills from the contractors.

29 We then go to 7 March, some further correspondence. Mr Finegold wants to pay the contractors directly and asks why this cannot be done. "Send me their invoices and I will pay direct." That is not agreed by Proman and Proman says, "You have not paid us, PM UK, since October, which I find disrespectful, despite us taking on all of your changes and instructions. We have continued to do our work diligently and we have also made allowances with the contractors," I think it is meant to be allowances, "and suppliers on your behalf." Again, that is all consistent with PM UK itself being paid for its project management services. Clearly, construction costs

were being paid, but Proman do not regard that as money which is coming to it and it refers to acting on behalf of the Finegolds.

30 We then come to 26 April. Mr Muir says to Mr Finegold:

> "As per our gentleman's agreement, find our VAT invoice for the next set of progress payments which need to be paid to the contractors."

Then Mr Finegold comes back:

> "As discussed, the last payment needs to be roughly 200k, so that will leave you with 100k to call on between now, so please manage your deals and cashflow accordingly."

As we will see in a moment, it is quite unclear to me whether the VAT invoice that is coming through is a VAT invoice representing the VAT charged by the contractors or something else. The documents do not make that clear, in my view. There is otherwise indicators going both ways, perhaps, on these documents, because Mr Muir says, "Our VAT invoice for the next set of progress payments which need to be paid to the contractors," so that suggests that they are not the main contractor. A point has been made by Mr Clarke that the email that comes back says: "Please manage your deals and cashflow accordingly," as if that is only consistent with being a main contractor. Well, I do not accept that, because if you are managing the budget and managing the contractors, and we have seen from the Proman evidence that they have people to do that, it could equally be for project management services. Then there are chasers as far as that is concerned.

31 By the time one gets to August, Mr Finegold is saying that they have been paid everything for electricians but have not been paid them. He is, by now, being chased by some of the contractors. He said that "he asked a while ago to pay them direct and told me you wanted everything to go via you, which I reluctantly agreed to". Well, of course, if Proman was the main contractor, one would not be having a discussion like that, because all the payments would be going to Proman in any event. There would be no question of Mr Finegold paying anybody else. So then he says, "You need to make sure that everyone gets paid. How can we be in a situation where you are not paying out the money I have given you and people are threatening to delay the job." And he wants all of that sorted out. He then says he "wants to see who you have paid and how much, who you owe money to and how much and how much retention you hold for each contractor" and then he needs to know exactly who has been paid, who was owed what and "what retention you have held back". All of that is very consistent with the role of Mr Finegold as an employer but getting very cross with his contract administrator. I think that the document at p.682 is powerful evidence in support of the claimant's case rather than the defendant's case.

32 That really concludes my review of looking through all the documents. I have made some observations about them as I went through them, but let me now state my conclusion. In my judgment, it is clear that this contract was between Sitol Limited, on the one hand, and the Finegolds on the other, through Proman as agent because, in summary, there is the all important email of 21 March 2015, plus there is the clear evidence of Proman as to A, its normal practice and, B, what it did here. There is no real basis for thinking why they would act any differently on this particular occasion. As against all of that, there is really very little detail from the Finegolds on what the contractual relations were and, indeed, the Finegolds themselves have relied on 21 March email. There is not a single document saying that Proman is not acting as project manager, but rather as main contractor, whether on a costs plus basis or anything else.

33 There are later emails which are also supportive of the contract being between Sitol on the one hand and the Finegolds on the other, as I have indicated. There are, it has to be said, some emails which contain features which could go either way, for example, insurance or the payment arrangements, or possibly VAT charges, but they are not determinative in their own right and they are far from sufficient to dislodge the strong points I have referred to above which point clearly, in my judgment, to a contractual relationship between Sitol and the Finegolds. This is not one of those summary judgment cases where it can be said that other things are going to emerge at trial. One imagines that we have the Finegolds' evidence now put at its highest and so it is very difficult to see how that is going to improve at trial. In other words, there is no reasonable basis to suppose that if this is tried out there is going to be any different result.

34 So, for those reasons, so far as the first defendant is concerned, I hold that there is no real prospect of a successful defence.

35 That, then, brings me to the second point, which is the timing point. Now I must read out the provision of the contract. At 93.3 it says: "A party may refer a dispute to the adjudicator if the party notified the other party of the dispute within four weeks of becoming aware of it." In this case, the relevant notification was not earlier than 25 April, and it may have been 30 April. Those are the dates respectively of the notice of adjudication and the referral. However, the defendants say that a dispute had arisen by 19 February and Sitol was aware of the dispute by 19 February, so the clock started ticking then. If that is the case, the latest date for notification was 19 March and they missed that. Therefore, they are out of time. For its part, Sitol says that the clock did not start running until 4 April because it was only by then that there was a dispute of which it is aware. There is no argument here about the law. It has been well summarised in a decision of Jackson J in *Amec Civil Engineering Ltd. v Secretary of State for Transport* [2004] EWHC 2339. His seven propositions have been frequently cited in other cases included in the Court of Appeal. This is not a case where there is silence, or where there is a deadline for reacting to a claim or where the arguments are nebulous and therefore I need to go only to the first four propositions.

> "1) The word "dispute" is to be given its normal meaning.
> 2) Despite the simple meaning of "dispute", there is no hard-edged legal rule as to what was or was not a dispute, but the accumulating judicial decisions have produced helpful guidance.
> 3) The mere fact that one party notifies the other party of a claim does not automatically and immediately give rise to a dispute. It is clear, both as a matter of language and from judicial decisions, that a dispute does not arise unless and until it emerges that the claim is not admitted."

And I emphasise those words.

> "4) The circumstances from which it may emerge that a claim is not admitted are Protean. For example, there may be an express rejection of the claim. There may be discussions between the parties from which objectively it is to be inferred that the claim is not admitted… The respondent may simply remain silent for a period of time, thus giving rise to the same inference."

36 Against that background, I consider the correspondence here. On 17 January, Sitol render the invoice for their unpaid fees to Mr and Mrs Finegold. That is under a covering letter with payment details and then the invoice is attached, which at that stage was put at just over £47,000, including VAT. It was delivered on 23 January. By 6 February they had not been paid, so they

wrote a chaser. There was then an email directly to Mr Finegold of 20 February, but by that stage solicitors, DLA, had been instructed by the Finegolds. On 19 February, they wrote this letter, that the act on behalf of Mr Finegold. They set out, by way of background, the contract was with Proman. A fundamental aspect was Proman would act as main works contractor.

> "As a result, Proman was responsible for undertaking all elements of the work, including procuring the design and the construction. That meant they were responsible for appointing and managing specialist contractors. You were directly appointed as a subcontractor on this basis. Given the contractual relationships between Proman and the subcontractors, our client was not aware which subcontractors had been appointed to carry out what works on the project. For the avoidance of doubt, the only contractual relationship our client has entered into in respect of the project is with Proman. In accordance with the agreement between Proman and our client, Proman has applied to our client for payment of all the works that have been undertaken. It is within this context that Mr Finegold received your letter. We cannot see how you can maintain that you have any valid claim in law, contractually or otherwise, against our client. Your subcontract is between you and Proman. We therefore suggest you direct all future requests for payment to your employer."

They then say insolvency practitioners were appointed. Then on 9 March, Sitol write back, saying that they have still not been paid.

37 On 16 March comes a second letter from DLA Piper, saying:

> "We do not intend to rehearse our client's position as in 19 February letter. Mr Finegold's position remains that a contractual relationship between you does not exist. The only contractual relationship our client has entered into is with Proman. They are not obliged to make any payment to you. It is a prerequisite of any contract that parties had an intention to create legal relations. In circumstances where Mr Finegold had not heard of Sitol Limited (inaudible) carrying out the works and has not seen or signed a contract with you, we cannot see how you can maintain that you have a valid claim. As set out in our 19 February letter, your contractual relationship in respect of the works is with Proman. Proman is responsible for payment of the outstanding sum. We respectfully repeat our suggestion you direct all requests for payment to the liquidators."

Then there is a heading which is "Evidence". It says:

> "You refer to a contract, but you have not provided copies of the contract. You have failed to provide any evidence to support your assertion that a contractual relationship exists between you and Mr Finegold. The onus on you is to demonstrate your entitlement. If you disagree with our client's position, we invite you to provide evidence or any other legal basis for your claim. In the absence of this, your claim is without merit."

They then take another point. Then they go on to say:

> "To the extent you intend to continue to seek to recover the outstanding sums from Mr Finegold, we respectfully suggest you seek independent legal advice in relation to your position."

That elicits a response from Sitol, which provides the invoices, the remittance statements and the contract and refers to the clause in the contract which says the employer has appointed Proman Limited to act as construction manager. Then it says it would offer to issue adjudication proceedings or alternatively some other form of dispute resolution.

38 The answer comes back from DLA, continue to assert the existence of contractual relationship, have provided a copy of the purported NEC3 contract, but our position remains the same. He had not seen the contract before. It is clear that he did not have any intention to create legal relations.

> "While Proman may have provided you with a copy of the NEC3 contract which provides representations concerning our client's intention, they are not evidence of a binding contract between you and our client. It does not demonstrate entitlement to recover payment. It demonstrates an attempt by Proman to mislead Sitol of the contractual position. Again, to the extent you continue to disagree with our client's position, we repeat our suggestion you seek legal advice in relation to your position. We welcome evidence of your entitlement to recover the sums that you are claiming. In the absence of this, your claim is without merit."

And then it repeats all the points about Proman's role and the contractual relationship.

39 This is not a case of silence. It is not a case where it is suggested the dispute has arisen simply because an invoice has been rendered that has not been paid. This is not even a case of an implied rejection. This is, on any analysis, a case of an express rejection of the claim. So, the difficulties that one finds in some "notification of dispute" cases simply does not arise here. In my judgment, the dispute had crystallised once DLA had written its letter of 19 February. It made plain its contention that whatever Sitol might have said or got, there was no contract between the Finegolds and Sitol. That is made plain in the whole of the body of the letter of 19 February. There is nothing more to be said about that dispute.

40 However, if there was any doubt about it, and I do not think that there is, one can go to 16 March letter, because they reiterate the points made in 19 February letter that the person that they have got to look to is Proman. They repeat the suggestion of taking independent legal advice in respect of their position. They say that they invited them to provide evidence "if you disagree with the contract you seek to rely upon", which had not been provided up to that point. But the fact that in the course of a dispute which has arisen one party says, "Show us what you have," or, "Can you not do any better?" or "We will be interested to see what evidence you have," does not indicate that the dispute has not arisen. It just means that it is possible that the dispute might be resolved, for example, without litigation, depending on what is produced.

41 Ms Stephens wanted to make two points; first of all, that it was the invitation to provide evidence to show that the Finegolds were wrong which meant that you could not say a dispute has arisen. That does not work, not only for the reason I have just given, but if that is the case one could apply that to 4 April letter, which again says, "We welcome evidence of your entitlement to recover the sums that you are claiming," and yet the claimant accepts that 4 April is a trigger.

42 It is simply not the law that a dispute does not arise until the arguments going backwards and forward between the parties have gone down the line to some extent or other or that some avenue for resolving it has to be resolved first. The fact that one party says, "I am interested to see what evidence you have got, although I deny your claim," does not mean there is no dispute.

43 The only difference between the position at 4 April and 16 March is that the unsigned contract has been produced. But I do not think that makes a difference as to whether the dispute has arisen or not and, indeed, in the reply of 4 April DLA say, "Well, it is all very well you have been given those documents by Proman, but it does not affect the fact you have got nothing to show that we actually made a contract with you, you have got no document which actually shows that." So, on any view, in my judgment, for the purposes of this notification clause, a dispute had most clearly arisen by 19 March or, if I am wrong about that, and I do not think I am, 16 March. If one left it there, then the adjudication would be timed out. The words here, however, say that it must be a dispute within four weeks <u>of the party becoming aware of it</u>. It is not form me, on an application like this, to engage in a detailed discourse about how to apply the concept of awareness. It cannot be wholly subjective, because if that is right it would mean that if a letter indicating most clearly that there was a dispute had arrived with one party and that party had simply failed to open the envelope for three months or two months, time had not started to run. It could not possibly be said that because of his or her own subjective activities they were not aware of it. One would have to do it by when objectively it had been brought to their attention. In this case, the dispute had been objectively brought to their attention the moment they got the letters because they happened to be the other party to the letters. There may be circumstances where, for one reason or another, the dispute had crystallised but it has not actually been brought to the attention in any objective way of the party who is sought to be barred and that may be the work which the concept of awareness does. But in this particular case, it adds very little because the claimants here were the other parties to the correspondence.

44 On that basis, then, I have come to the conclusion (with no great enthusiasm, I should add), that this adjudication was started too late. It may be regarded as a technical point, but I have to apply the law, I am afraid. The analysis and the correspondence here I am afraid only points one way. Therefore, the second defence succeeds.

CERTIFICATE

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