Case No: HT-2016-000244

Neutral Citation Number: [2016] EWHC 3007 (TCC)

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 25/11/2016

Before :

MRS JUSTICE JEFFORD

- -

Between :

DACY BUILDING SERVICES LIMITED **Cla**

- and -

IDM PROPERTIES LLP **Defe**

- -

- -

Mr Maurice Rifat (instructed by **WH Matthews & Co**) for the **Claimant**

Mr Samuel Townend (instructed by **Stepien Lake**) for the **Defendant**

Hearing dates: 22nd October 2016

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Judgment

Insert Judge title and name here :

Introduction

1.
This is an application by the Claimant, Dacy Building Services Ltd. (“Dacy”) for summary judgment to enforce the decision of the adjudicator, Mr Philip Eyre, made on 9 August 2016, that the Defendant should pay to Dacy the sum of £247,250 plus interest. The Defendant, IDM Properties LLP (“IDM Properties”), resists enforcement on the basis that Mr Eyre lacked jurisdiction. IDM Properties says simply that there was no contract between it and Dacy; there could, therefore, be no dispute between it and Dacy capable of being referred to adjudication; and the adjudicator lacked jurisdiction to make the award that he did.

2.
The facts of this case are a little unusual and it is easiest to explain how this issue arises by setting out those facts in a little detail.

3.
The case arises out of a project to construct a mixed development of residential flats and retail space at 315-317 Camberwell New Road, London SE5 (“the project”). The main contract was made on 9

September 2014 between a company called O'Loughlin Leisure (Jersey) Limited and HOC (UK) Limited ("HOC"). O'Loughlin was, in fact, in joint venture with a company called Fastmild Ltd. ("Fastmild") which was a subsidiary of IDM Investment Holdings Ltd., although Fastmild was not a party to the main contract. The main contract was made on a standard form JCT Design and Build Contract 2011 edition. Under that contract, Scott Walder of IDM Properties was the Employer's Agent.

4.
Dacy had been engaged by HOC as a sub-contractor on another project in London. Dacy had had difficulties with payment from November 2015 and contends that it was well-known that HOC was in financial difficulty.

5.
That is not accepted by the Defendant on this application but IDM Properties' evidence is that from October/November 2015, O'Loughlin and Fastmild were aware that HOC was suffering cashflow problems. What is said is that an arrangement was therefore reached with HOC in which IDM Construction London Limited (another IDM group company) would be brought in to assist with site management. An arrangement was also made under which payment would be made directly to sub-contractors. An independent quantity surveyor, Randol Taylor, was brought on to the project and HOC was to send sub-contractor applications for payment to Mr Taylor for approval on behalf of O'Loughlin and Fastmild. Mr Taylor would also ensure that HOC was happy for payment to be made on its behalf and payment would then be made directly to sub-contractors by IDM Investment Holdings Limited. Corresponding pay less notices would be issued to HOC. On this application, Dacy point out that only one such pay less notice had been exhibited.

6.
On 3 December 2016, Dacy became involved in this project. Mr Keran's evidence in the adjudication (which he adopted on this application) was that he was contacted by Brian Cutmore, whom he knew from other work for HOC, about an opportunity to work for a client called IDM on a site at Camberwell New Road. Mr Cutmore has been variously described as a foreman or project manager for HOC. Mr Keran says that Mr Cutmore told him that the site was at a standstill because other sub-contractors had walked off site. Mr Cutmore told him that he had attended a meeting with HOC's MD and "IDM's partner and contract manager, Nial McLoughlin" to try to find a solution which was that IDM would take over the site, Mr Cutmore would be engaged by them to manage the site and IDM would pay all contractors.

7.
That led to Mr Keran agreeing to meet Mr McLoughlin on site on 3 December 2015 and providing some labour that day. They met at a nearby bus station; they discussed the plan for the project that Mr Cutmore had already outlined. Mr Keran said he asked expressly who he was going to be working for and who would pay him and Mr McLoughlin said he would be working for IDM and IDM would pay. In the adjudication Mr Cutmore gave a statement that supported that account.

8.
In the adjudication, Mr McLoughlin gave a very different account of what happened. He accepted that he met Mr Keran that day but it was a chance encounter with Mr Keran and Mr Cutmore which lasted no more than 5 or 10 minutes. Mr Cutmore introduced Mr Keran as a sub-contractor who was already providing labour on site. Mr McLoughlin said that Mr Keran indicated that he would like to work for IDM (and they discussed other jobs IDM was involved in) and wanted to show how well, on this site,

Dacy performed as a sub-contractor. Mr McLoughlin said that Mr Keran mentioned his concerns about getting paid by HOC and that, whilst sympathetic, Mr McLoughlin said that on the Camberwell job he was working for HOC not IDM.

9.
I note that in his first statement on this application, Mr McLoughlin gives a broadly similar account but does not specifically repeat that he told Mr Keran that on this job Dacy was working for HOC. Rather he says that he told Mr Keran that if he came to work for IDM Construction London Ltd. on other jobs he would get paid for work done.

10.
It is on the basis of this meeting that Mr Keran and Dacy say that an oral contract was concluded with IDM Properties for the provision of sub-contract labour on the project. In support of his evidence that a contract was formed with IDM Properties (and not some other party), Mr Keran relies on a business card given to him by Mr McLoughlin which identifies him as a Contracts Manager at IDM Properties LLP.

11.
In summary, therefore, it was the Claimant's case in the adjudication (and was on this application) that there was an oral contract between them and IDM Properties. That is disputed by IDM Properties.

12.
There is no dispute, however, that thereafter Dacy supplied labour, plant and materials to the project and, as I set out more fully below, that Dacy's invoices nos. 1 to 3 were paid in full (save for retention). Dacy's invoices nos. 4 to 6 were not paid in full. On 4 May 2016 Dacy left site and subsequently commenced this adjudication.

The progress of the adjudication

13.
Dacy first attempted to adjudicate in June 2016 and obtained the appointment of Mr Philip Eyre as adjudicator. However, they did not serve their Referral in time and had to serve a fresh Notice of Intention to Refer. By e-mail, Dacy's solicitors asked whether Mr Barron, the claims consultant acting for IDM Properties, would agree to Mr Eyre's nomination. Mr Barron confirmed his agreement.

14.
Dacy then sought Mr Eyre's nomination by the RICS. Dacy's Notice of Intention to Refer was dated 5 July 2016 and Mr Eyre was nominated on 8 July 2016.

15.
The Notice of Intention to Refer alleged an oral agreement reached at a meeting on 3 December 2015 (at a bus station adjacent to the site) attended by Mr Keran, Mr McLoughlin of IDM Properties and Mr Cutmore of HOC. The nature of the agreement was that Dacy would carry out works as directed by Mr Cutmore and IDM (referring to IDM Properties). IDM would pay. Mr Cutmore, as Project Manager, would verify the hours expended and plant, material and equipment supplied.

16.
The contract was said to be evidenced by documents including e-mails dated 16 December 2015 and 10 March 2016 and an SMS sent on 4 May 2016 and "the considerable volume of subsequent instructions issued by the Responding Party (IDM) to the Referring Party (DCS) and payments made

by IDM to DCS." The claim was for the amounts unpaid on invoices nos. 4 to 6 and retention monies "unlawfully retained" on invoices nos. 1 to 3.

17.
On 12 July 2016, Mr Eyre e-mailed the parties with his Terms of Appointment, commenting that the RICS had advised him that both parties had been notified of his nomination. He also acknowledged receipt of the Referral Notice which was served the same day.

18.
Mr Barron responded to Mr Eyre on 12 July 2016. He said that he had not been advised of Mr Eyre's appointment. He also stated that there was no contract between Dacy and IDM Properties and asked the adjudicator to resign. He expanded on that position the following day and again on 17 July 2016, repeating his request that the adjudicator resign.

19.
On 18 July 2016, Mr Eyre responded. The key point of his response was that whether there was an oral contract turned on the evidence about what was said on 3 December 2015 and, at that point, he had undisputed evidence from Mr Keran that there was such a contract. He, therefore, declined to resign but indicated that he would reconsider his preliminary view in the light of any statement from Mr McLoughlin.

20.
A statement from Mr McLoughlin was then served on 19 July 2016 and led to further exchanges about jurisdiction (which I do not need to recite). IDM Properties' Response was served on 21 July 2016. The first paragraph of the Response stated that it was served on a without prejudice basis and that IDM maintained that "there is no contract between the Referring Party … and themselves. In consequence there can be no dispute and thus the Adjudicator will have no jurisdiction." It seems to me entirely clear that the reference to the Response being "without prejudice" meant that it was served without prejudice to IDM Properties' position that the Adjudicator lacked jurisdiction.

21.
Dacy served a Reply on 27 July 2016 and IDM Properties served a response on 1 August 2016.

22.
The adjudicator made his decision on 9 August 2016. He decided that there was an oral contract between the parties and that he therefore had jurisdiction. He decided that IDM Properties was liable to pay and should make the payments claimed by Dacy.

23.
In support of his conclusion that there was an oral contract, he relied on the following matters: (i) that Dacy had not been on site prior to 3 December; (ii) that all attendees at the meeting on 3 December knew that a new sub-contractor would not agree to provide labour in reliance on HOC's ability to pay; (iii) that there was no evidence of a contract between HOC and Dacy and that Mr Cutmore, as site foreman, did not have authority to enter into such a contract; (iv) that there was no reason for the meeting on 3 December 2016 if Dacy was contracting with HOC; and (v) Mr Taylor's "due diligence" on Dacy (to which I will return below) would have been unnecessary if they were engaged by HOC.

The issues on this application

24.

I come now to the issues on this application and I set these against the background of some general propositions.

25.
Firstly, it is well-established that if the responding party in an adjudication contends that the adjudicator lacks jurisdiction for whatever reason, he must raise that objection promptly and clearly. If he does, he may then participate in the adjudication without affecting his right to resist the enforcement of any decision on the grounds of lack of jurisdiction.

26.
If there is an issue raised as to the adjudicator's jurisdiction, he does not have jurisdiction to determine his own jurisdiction unless it is agreed by the parties that he may do so. The parties may also confer jurisdiction on him to do so other than by express agreement, for example, where a party fails to take objection to the adjudicator's jurisdiction or where both parties argue the case on jurisdiction within the adjudication and ask the adjudicator to determine the point. On these propositions the parties referred me to and I rely on the decision in Pegram Shopfitters v Tally Weijl (UK) Ltd. [2003] EWCA Civ 1750, applied by Coulson J in Pilon Ltd. v Breyer Group plc [2010] EWHC837, and on Akenhead J.'s summary of the principles in Aedifice Partnership Ltd. v Shah [2010] EWHC 2106 (TCC) at [21].

27.
If it remains open to the party who took the jurisdictional point to rely on that point at the stage of enforcement, the test then is that in Part 24, namely whether he has a real prospect of successfully defending the claim.

28.
These propositions were, I think, uncontroversial on this application but:

(i)
The Claimant argued that the Defendant had agreed to or submitted to the adjudicator's jurisdiction.

(ii)
The Claimant suggested, but did not seriously pursue, an argument that the adjudicator had jurisdiction to determine his own jurisdiction in any event.

(iii)
The Claimant argued that the Defendant has no realistic prospect of establishing that there was no contract between the Claimant and the Defendant.

Reservation of the right to challenge the jurisdiction of the adjudicator

29.
I can deal with this point shortly because I am in no doubt that IDM Properties did not submit to the adjudicator's jurisdiction and effectively reserved their right to object to his jurisdiction.

30.
Dacy's argument is founded on two things: firstly, that IDM Properties agreed to the nomination of Mr Eyre not only once but twice and, secondly, that once they had agreed to his nomination, it was too late to challenge his jurisdiction. It seems to me that these are really one point, namely that that if a party agrees the nomination of a particular adjudicator it cannot then object to his jurisdiction. Although there may well be circumstances in which that was the case, I cannot see that the mere

agreement to the nomination of an adjudicator can have that effect. Parties may often want to agree the identity of a putative adjudicator rather than leave it in the lap of a nominating body but something more would be needed for that to amount to agreement to his appointment with jurisdiction over a particular dispute.

The adjudicator's jurisdiction to determine his own jurisdiction

31.
Since an adjudicator's jurisdiction derives from the terms of the contract between the parties – either express terms or those implied by the Housing Grants, Construction and Regeneration Act 1996 – it is axiomatic that the issue of whether or not there is a contract at all between the parties to the adjudication is an issue going to the adjudicator's jurisdiction. It was common ground between the parties that if there was no contract between them, there was no jurisdiction under s.108(1).

32.
Since the deletion of s.107 of the HGCRA 1996 by the Local Democracy, Economic Development and Construction Act 2009, oral contracts have fallen within the ambit of the adjudication provisions of the Act. On behalf of Dacy, Mr Rifat, in his skeleton argument suggested that a consequence of that change was that an adjudicator now had jurisdiction to determine whether or not there was an oral contract. That was not an argument that he pursued at the oral hearing.

33.
However, he drew my attention to the decision of Coulson J. In Penten Group Ltd. v Spartafield Ltd. [2016] EWHC 317 (TCC) in support of the argument that the Court should and would take a more generous view of the scope of the adjudicator's jurisdiction where an oral contract was concerned. In that case, there was a tortuous history of adjudications. Adjudication no. 1 was commenced by Spartafield seeking a declaration that there was a valid construction contract which incorporated the terms of the standard form ICD 2011 and making various financial claims. The adjudicator decided that a valid construction contract existed but that it was on the terms of a letter of intent. Penten commenced Part 8 proceedings seeking declarations that the decision was enforceable. Penten argued that the adjudicator was asked to decide whether there was a valid construction contract and what its terms were. The financial claims were separate and required a decision to be made as to the terms of the contract before the claims could be considered.

34.
Coulson J. held that to answer the question whether there was a valid construction contract, the adjudicator had to decide what the terms of the contract were. In any case, Penten had relied on the defence that the terms of the contract were those in the letter of intent so that that issue was within the scope of the adjudication. He then said this:

"27. Finally … there is a wider point for consideration here which, although it has been the subject of some commentary, has not been the subject of any previous judicial observation. The point concerns the statutory amendments in respect of written contracts. Before the amendments to the 1996 Act, adjudication could only happen when there was a contract in writing. That was so as to ensure that the adjudicator did not have to deal with complex questions as to contract formation, appropriate terms and the like, in addition to addressing the underlying claims, all in 28 days. Of course, that certainty has now gone, and the adjudicator may have to do all those things within the 28 day period.

28. This case is, I think, a good example of the change. In my view, this would not have been a dispute that could have been referred to adjudication under the old law. However, following the change in the

law, it was validly referred to Mr Gupta [the adjudicator] for decision in Adjudication 1. Thus, Mr Gupta had to deal with all of the issues (both contractual and financial) within the limited timetable allowed by adjudication. In my view, in such cases, the courts are going to have to give adjudicators some latitude as they grapple with these difficulties. In an ordinary case, and depending on the words of the notice, it may be unduly restrictive to conclude that an adjudicator could decide what the contract was not, but not what the contract was. Similarly, it may be unduly restrictive to say that any notice of adjudication which raised the existence of the contract and/or its precise terms (on the one hand), and the financial claims thereunder (on the other), somehow involved more than one dispute."

35.
Both of those points are plainly well made but neither of those examples is concerned with the position where there is a fundamental question as to whether there is a contract at all between the parties to the adjudication and Mr Rifat did not seek to persuade me otherwise. Coulson J.'s observations do not amount to saying that an adjudicator has jurisdiction to determine whether a contract exists at all if that dispute is not referred to him or one party objects to his having jurisdiction to do so and, given IDM Properties' clear reservation of its position on jurisdiction, it is not arguable that they somehow conferred upon the adjudicator jurisdiction to determine whether or not there was a contract.

Contract or no contract?

36.
It follows that the key issue on this application is whether IDM Properties has a realistic prospect of success on its defence that it had no contract with Dacy and, as I have said, it was common ground between the parties that if there was no contract, there was no jurisdiction under s.108(1).

37.
On behalf of IDM Properties, Mr Townend relied on the decision of Akenhead J in Estor Ltd. v Multifit (UK) Ltd. [2009] EWHC 2108. In this case, Estor resisted enforcement on the basis that it was not the contracting party. Akenhead J pointed out that, in the Technology and Construction Court, if the jurisdictional point was simply a matter of law (for example of contractual or statutory construction) the court would deal with it summarily. The position was different if the jurisdictional challenge was dependent on fact and evidence, where the court then had to consider whether the defendant had no or a realistic prospect of establishing that there was no contract.

38.
The issue in such cases is often whether or not there was a concluded contract at all and the courts will be reluctant to find that there was no concluded contract if the subject matter of the putative contract has been performed. A recent example of such a case in the context of adjudication enforcement is to be found in Purton (t/a Richwood Interiors) v Kilker Projects Limited [2015] EWHC 2624, in which Stuart-Smith J had little difficulty in concluding that there was a concluded contract between the parties and not a series of works carried out by Mr Purton for which Kilker had paid without being under any contractual obligation to do so.

39.
The present case is, however, not that kind of contract/no contract case. Rather it is a case about who any contract was with (as it was in Estor). In such a case, and it is comparatively unusual that that is the issue, what happened after the contract was allegedly formed may also provide an answer by illuminating the credibility of the parties' cases. To give a simple example, if all contractual exchanges

have been between parties A and B, it may be difficult, to say the least, for party B to then contend that the contract was between party A and party C.

40.
So far as the events of 3 December 2015 are concerned, there is, as I have said above, a direct conflict of factual evidence about what happened and what passed between Mr Keran and Mr McLoughlin. In support of his version of events, Mr Keran says that he would not have agreed to enter into a contract with HOC so it is simply not credible that he would attend the site and provide labour for HOC. But Mr McLoughlin suggests that Mr Keran may well have been persuaded to do so if he was assured that the employer would pay. IDM Properties in contrast points to the fact that it was the Employer's Agent and that it would be wholly exceptional for an Employer's Agent to contract with a sub-contractor.

41.
I, therefore, turn next to consider the evidence before me as to what happened subsequently, to see whether it assists.

December 2015 to February 2016

42.
On 7 December 2015, Mr Cutmore (using a HOC e-mail address) e-mailed to Mr Keran a list of works to be carried out. This e-mail was copied to Graham Hewson of IDM Construction London and two other people on HOC e-mail addresses.

43.
On 10 December 2015, Mr Keran e-mailed Randol Taylor. Mr Keran's evidence was that Mr McLoughlin asked him to meet Mr Taylor and the e-mail referred to a meeting on site that day and enclosed a schedule of rates for men already on site (plus Dacy's VAT certificate and other information). The e-mail continued "We will also send you a diary of what we have performed on site up to date together with the list of materials and a draft scope of works as agreed with Brian Cutmore."

44.
Mr Taylor gave a statement in the adjudication in which he asserted that Dacy had been engaged by HOC as a joinery sub-contractor and general builder. He said that at the same time, "IDM" had made inquiries of another sub-contractor who quoted more competitive rates "but HOC nevertheless elected to continue with [Dacy]". He said that he sought HOC's approval to Dacy's rates and that they were agreed in writing by HOC on 15 December 2015. I have seen a sequence of e-mails on 15 December 2015 passing between Mr Taylor and Richard Appleton of HOC. The e-mails refer to a sub-contractor but there is no express reference to Dacy. Mr Appleton said that he had not been involved in engaging "this sub-contractor". Mr Taylor replied that HOC had called in this resource and instructed these works. Mr Appleton responded that "As per IDM instruction I am not involved in the Project day to day only the monthly application." Mr Taylor said HOC still had to sign off the work and accept the rates as reasonable which Mr Appleton then did.

45.
On 16 December 2016, Mr Keran e-mailed Mr Taylor in these terms:

"Thanks for your time today and we now understand what are the procedures for that job. management, instructions, timesheets will be done by HOC. we will be invoicing HOC and once HOC

are happy with the invoices and also with the works performed on site then they will send the invoice to IDM. IDM will pay Dacy on a monthly basis."

This e-mail was copied to Mr Cutmore and Mr Hewson. This is one of the e-mails which Dacy expressly relied on in the adjudication as evidencing the contract but**,** on its face, the e-mail is consistent with an arrangement under which Dacy was engaged by HOC (who give instructions for work, deal with timesheets and so on, are invoiced and consider the validity of the invoices) but payment is made by IDM, with the IDM company appearing to be IDM Construction London.

46.
Dacy's invoice no. 1 is dated 7 January 2016. It was addressed to Mr Cutmore, HOK UK Ltd. at the site address. Mr Cutmore's evidence was that the invoices were sent to him for information only so that he could approve them for IDM to pay and he never sent the invoices on to HOC's head office.

47.
On 10 January 2016, Mr Taylor signed a Sub-Contractor Payment Instruction accompanied by a document headed Payment no. 1 which I am told was also signed by Mr Taylor. It is not entirely clear but these appear to have been sent to Dacy. The latter showed a sum due to Dacy and explained how it had been calculated. Adjustments had been made to the sums claimed and a 5% retention withheld. The document stated that "although a Subcontract package has not been established DBS are carrying out Contractor measured works and quality check will be taken to ensure workmanship compliance with Specifications". Further "Retention will be released on handover of your works and sign off by IDM". This documentation appears to show Mr Taylor checking the validity of the sums claimed by Dacy (rather than HOC) and the paying party deducting a retention as if it were in contract with Dacy.

48.
There is no dispute that this invoice was paid (with a retention being withheld). There is very little evidence from either party as to who paid this invoice. Mr McLoughlin, in his second statement on this application, and Mr Starr, the Defendant's solicitor, assert that payment was made by IDM Investment Holdings Ltd.

49.
Dacy's invoice no. 2 was issued on 26 January 2016 and invoice no. 3 on 23 February 2016. Both were also addressed to Mr Cutmore at HOC.

50.
Although it takes things slightly out of order, I observe that the invoices exhibited were accompanied by some dayworks sheets. These included some signed by Mr Hewson; some by Mr Hewson on behalf of HOC; and some with a squiggle signature that appears to be Mr Cutmore's. As well as the dayworks sheets there are CVIs (Confirmation of Verbal Instructions) nos. 1 (dated 13 December 2015) to 107 (dated 18 April 2016). The CVI forms (which appear to be a Dacy form) have a box for Client's Representative. On CVI no. 1, the names of Brian Cutmore and Graham Hewson have been entered (in type) below Client's Representative but that was not repeated on other CVIs. All the CVIs appear to have been signed by Mr Cutmore.

51.
Further:

(i)

A handful of e-mails was also exhibited from Mr Cutmore to Mr Keran requesting the supply of labour and/or materials. All of these are copied to Graham Hewson and some to Randol Taylor.

(ii)
There are a number of e-mails from Mr Hewson requesting or instructing work. Although these are sent from Mr Hewson's IDM Construction London e-mail address, the standard signature at the bottom of the e-mails gives a link to the IDM Properties website and states "This is a communication from IDM Properties LLP".

(iii)
These e-mails included the following: (a) From 13 December 2015 to 19 December 2016, e-mails from Mr Hewson to Mr Keran copied to Mr Taylor and Mr McLoughlin; (b) on 22 December 2016 an e-mail to Mr Keran (no ccs) requesting supply and installation of locks stating that "This instruction is on behalf of HOC for the Camberwell new Road Site"; (c) a further e-mail on the same date telling Mr Keran that the joinery contractor has pulled out, asking him to carry out works and saying "Please acknowledge your acceptance of this instruction of and on behalf of HOC".

(iv)
I have seen further e-mails sent to Dacy by Mr Hewson in 2016. These were usually copied to Mr Cutmore and some were copied to Randol Taylor. In this early part of 2016, the mantra "For and on behalf of HOC" appears on one e-mail dated 12 January 2016 and on one Site Instruction which refers back to "HOC authorization" by e-mail dated 11 December 2015 (which I have not been able to identify).

(v)
I have seen further e-mails from 25 February 2016 from Patrick Beglane to Dacy (no ccs) either instructing or confirming the instruction of work. Mr Beglane used an Outlook address and signed himself "Patrick IDM".

52.
I have set this out in some detail because it demonstrates that there was little or no consistency in the issuing of instructions. Mr Hewson appears to be acting on behalf of IDM Construction London but by e-mails that state they are communications from IDM Properties. On some occasions he states that he is acting for and on behalf of HOC. There is no other evidence about the arrangements between Mr Hewson and HOC.

<u>March 2016</u>

53.
On 3 March 2016, Mr Keran e-mailed Mr Cutmore and Mr Taylor, copied to Mr Hewson and Mr McLoughlin. Mr Keran said that they had only been paid 50% of their invoice. He had been informed that a meeting was going to take place between "IDM" and HOC to discuss costs and expected the balance of the invoice to be paid after that. He was therefore concerned that the meeting had not taken place and that Dacy might not get paid. The same day Mr Keran sent an e-mail (it is unclear to whom) stating that Dacy might need to reduce the number of men on site. Mr McLoughlin replied, saying that they were discussing with HOC (Mr Cutmore) the provision of Dacy's labour supply and inviting Mr Keran to meet with Messrs Cutmore, Taylor, Hewson and Bentham, and Mr McLoughlin if necessary, to agree a scope of remaining works and cost.

54.

On 10 March 2016 there appears to have been a meeting attended by Mr Taylor, Mr Cutmore and Richard Appleton of HOC and 3 people from Dacy including Mr Keran. Mr Keran sent an e-mail following this meeting (which is also relied on as evidencing the contract) referring to the points discussed. These included the following:

“The purpose of the meeting was to identify and allocate the cost of works done by Dacy, to be supported by either HOC, IDM or to be deducted from other Subcontractors.”

“Payment application 1 and 2 were paid in full by IDM whereas payment application 3 was paid on account only 50% of its value. As described by Randol before IDM will commit to pay Dacy’s application No. 3 in full, HOC will have to agree as well to the cost of the works carried out by Dacy.”

“Richard requested Dacy supply him with all applications and back-up claiming that he has never received anything and not agreeing to any payments until he is satisfied (as far as we are concerned we have been told from day one that HOC will manage and IDM will pay, hence we’ve invoiced IDM on a monthly basis). ….”

It is worth noting that Dacy had not in fact invoiced IDM but had invoiced HOC.

55.
On 10 March 2016, Mr Hewson e-mailed Mr Keran about labour required for the following day. The e-mail is headed (bold and underlined) “For and on Behalf of HOC labour required for Friday 11th March 2016.” Mr Hewson said:

“I realise that Brian has been called into the office and has not left any labour requirements for tomorrow or the weekend, after consulting with Dragos (Dacy) we believe the HOC Site requires the following ……. “

56.
The e-mail brought a response from Mr Keran saying that he would provide the required labour “despite the financial issues we are encountering now” but, noting that it was sent on behalf of HOC, Mr Keran said “Do we need approval from HOC for this to happened or this e-mail from you as IDM suffice and if it does, on what basis?”

57.
Mr Hewson responded that he had HOC authorisation to communicate to all sub-contractors on the project. He said: “To clarify once again it is still a HOC project IDM are assisting financially and administratively, Brian was called to the office without leaving Dragos [Dacy] instructions for tomorrow, I have stepped in to assist.”

58.
That e-mail was copied to Mr Cutmore who then responded by e-mail early on 11 March 2016. He said “To clarify further, an instruction has to come from one direct source in this case idm or hoc.” He went on to say that he had work planned for the next 7 days and Dragos was aware of the plan.

59.
These e-mails imply that it was Mr Cutmore who usually set levels of labour on site. Mr Cutmore’s e-mail implies that instructions could come either from IDM or HOC. Mr Keran’s e-mail suggests that he expected such instructions to come from HOC and was querying why they were being given by IDM (although he had not raised such queries before).

60.

By a further e-mail on 16 March 2016, Mr Hewson instructed Dacy to carry out works to an area of concrete pavement. The e-mail was copied to Mr Cutmore and headed “For and on behalf of HOC”. There was a response from Mr Cutmore the same day stating that the instruction for these works had to come directly from IDM and saying “As you are aware we have problems with cost so going forward we will need a cost for ALL works on site in advance.” Mr Cutmore’s meaning is not at all clear.

61.
On 22 March 2016, Dacy wrote to IDM Properties advising that Dacy had not received payment in full on its invoice no. 3, that no pay less notice had been received and that, therefore, Dacy considered that a dispute had crystallised. The following day, Dacy issued its invoice no. 4 still addressed to HOC. There does not appear to have been a response to the letter but invoice no. 3 was later paid in full (save for retention). Invoice no. 4 was not paid.

62.
On 2 April 2016, Dacy issued invoice no. 5. This was the first invoice addressed to anyone other than HOC. It was addressed to Mr Taylor at IDM Properties at the site address. There was apparently no response stating, for example, that the invoice was addressed to the wrong company.

63.
On 27 April 2016, Dacy wrote to IDM Properties in relation to invoice no. 4. The letter was in similar terms to the letter of 22 March 2016 but also gave notice of intention to suspend works.

64.
On 4 May 2016, Mr Keran texted Mr McLoughlin asking Mr McLoughlin to give him a ring. Mr McLoughlin’s reply was that there was no point because he couldn’t do anything until HOC came back to him. His reply made the point that “IDM” were only ever funding HOC and that HOC employed Dacy and had to sort out their account. Mr Keran’s reply said that he just wanted to finish the job and didn’t see why “you” can’t just pay. He continued: “Last but not least I met you mid December at Camberwell New Road together with Brian, and prior to any works, I have asked the question as in Who was I going to work for and who is going to pay me and YOU looked me in the eye and said that I AM WORKING FOR YOU AS IDM AND YOU AS IDM WILL PAY ME AND BRIAN FROM HOC WILL MANAGE THE SITE FOR YOU.” That is, of course, entirely consistent with Mr Keran’s evidence as to what happened.

65.
As I have said, Dacy left site on 4 May 2016.

66.
On 19 May 2016, Dacy issued invoice no. 6 addressed to IDM Properties. On 26 May 2016, Dacy sent a further letter to IDM Properties relating non-payment of invoice no. 5 and asserting that a dispute had crystallised.

Conclusion

67.
In my judgment, this is a case where the Defendant has a realistic prospect of succeeding in its defence that there was simply no contract between it and Dacy.

68.
Dacy argues that IDM Properties’ defence is “fanciful” because Dacy would not have contracted with HOC which was potentially insolvent; HOC would not have taken on liability to a further sub-

contractor; and IDM Properties (or any other IDM company) would not have entered into the direct payment arrangement.

69.
However, this is very much a case that turns on the facts and the evidence and I cannot say that IDM Properties' case is "fanciful". On the facts as presented on this application, it is not at all clear who Dacy contracted with if anyone. There is a direct conflict of evidence both as to the background to, and circumstances of, the meeting on 3 December 2015 and what happened on that occasion. The subsequent conduct of those involved points at different times in different directions and does not make it clear which of Mr Keran or Mr McLoughlin is right as to what happened on 3 December 2015. If I refer back to the matters that Dacy specifically relied on in the adjudication as evidencing the contract, whilst the text message of 4 May 2016 gives some support to Mr Keran's credibility, the e-mails of 16 December 2016 and 10 March 2016 arguably do not evidence the alleged contract; it is not at all clear that subsequent instructions were issued by IDM Properties; and there is no evidence that payments were made by IDM Properties.

70.
A point that was relied on heavily by Dacy was the absence of any evidence of a contract with HOC but, as I have identified, there are a number of pieces of evidence that suggest that Mr Keran at least believed that he did have a contract with HOC.

71.
I conclude, therefore, that this is not the kind of dispute which I can resolve on a summary basis. Although I have addressed the available evidence at some length for the purposes of this application, I make it clear that I do not at this stage make any findings of fact on any of these matters but I dismiss the application for summary judgment.