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Dispatch

Adjudication: separate contracts

Delta Fabrication & Glazing Ltd v Watkin Jones & Son Ltd

[2020] EWHC 1034 (TCC)

Delta sought summary enforcement of an adjudicator's decision. Watkin said that the adjudicator did not have jurisdiction because Delta had referred disputes under two separate contracts to the adjudicator in the same adjudication. It was agreed that if the referral did concern disputes under two separate contracts, the adjudicator did not have jurisdiction and the award should not be enforced. Delta also agreed that they entered into two separate contracts. Watkin subcontracted both brick slip cladding work (order 3197/S7200) and roofing works (order 3197/S7218) to Delta.

Delta said that the award was valid because the parties later agreed, by their conduct, to vary the contracts so that they were amalgamated and so that there was only one contract with effect from 21 February 2020 and that if that conduct did not amount to a variation so that there was only one contract for all purposes, it had the effect of amalgamating the contracts into one contract for the purposes of the HGCRA. Finally, Delta said that Watkin was estopped from denying that there was a single contract within the meaning of the HGCRA.

Delta argued that the parties reached agreement by their conduct in the way they dealt with payment applications. One of Watkin's assistant quantity surveyors issued a payment notice, which related to both contracts. Delta said that it accepted that offer to amalgamate the contracts by issuing its request for payment of 21 February 2020 as one payment application relating to both the contracts.

HHJ Watson said that to find for Delta she had to be satisfied that the parties' conduct was unequivocal and consistent only with the parties having agreed to vary the contracts so that a single contract came into existence. Here, where the contracts were originally separate written documents, the Judge would need to be satisfied that, despite the existence of the separate written contracts, the parties had agreed that the contracts be amalgamated.

In fact, here the evidence suggested that Delta wanted the payment applications to be combined, not that they wanted the contracts themselves to be combined. The payment notice too contained references to both subcontract orders. Therefore, although the payment notice was for one figure for both contracts, the supporting documentation did not confuse or amalgamate the contracts but dealt with the calculations separately.

Further, when the parties agreed variations to the contracts, they numbered them consecutively under each of the separate contracts or works packages. Variations for the cladding work were prefaced "VO" and those for the roofing work were prefaced "RVO". In each case, the variations were numbered consecutively. That was indicative of the fact that the parties viewed the contracts as distinct.

The referral stated that all payment notices had been issued under one payment notice, and that the final account had been agreed as a single agreement "making it difficult to differentiate between the 'sub' contract agreements and the figures in relation to each element and as such, we consider the monies deducted in relation to all elements and agreed under the 1 nr agreement, can be administered under the 1 nr adjudication procedure as it is our consideration that it was WJSL intention of all elements to be treated and administered as one nr contract". Again, this submission did not include any statement that the parties agreed by their conduct to vary the contracts so as to amalgamate them. The position was that Delta considered, as a result of the way the final account statement was prepared, that Delta intended the subcontracts to be "treated and administered" as one contract.

The Judge concluded that if the parties had intended that the contracts be amalgamated or understood that they had been, then it was surprising that there was not a single document expressly referring to the fact that the contracts had been amalgamated or giving the new contract a new purchase order number or reference number.

Further, it was far from clear that, by adding together the two individually calculated amounts claimed in respect of the contracts and claiming the total in a single payment application supported by detailed breakdowns by reference to the separate contracts or work packages, the parties had "unequivocally operated and administered two purchase orders as one" so that they should "qualify as a single contract for the purposes of the Construction Act".

In terms of the estoppel argument, Delta tried to argue that Watkin's representation, by its payment notices, amounted to a representation that the contracts were to be treated as one contract; Delta relied on the representation and that Delta had suffered detriment. Perhaps unsurprisingly in light of the comments above, this argument failed. As a consequence, the Judge dismissed the application for summary enforcement. Delta also asked that Watkin should be required to make a payment into court of the adjudication award as a condition of defending the claim. The basis for this was that if the adjudicator was right, Watkin was in breach of its lawful obligation to pay the amount awarded, because the adjudicator's decision is "right until it is proved otherwise" and the only challenge is jurisdiction.

The Judge considered that, based on the evidence before her, Watkin's prospects of defending the claim on the grounds of jurisdiction were strong. Watkin also disputed the adjudicator's substantive decision as to repudiatory breach and the financial awards that followed, and the Judge was not persuaded that it was appropriate to make leave to defend conditional on a payment into court.

Professional negligence & adjudication

Beattie Passive Norse Ltd & Anr v Canham Consulting Ltd

[2021] EWHC 1116 (TCC)

At the end of this unsuccessful claim for professional negligence against a firm of consulting engineers, Mr Justice Fraser said this:

"Finally, there is an adjudication scheme for claims in professional negligence, operated by the Professional Negligence Bar Association. It was re-launched in 2017, and if it had been used in this case, would have led to an experienced Queen's Counsel in the field considering the claims and (given it is not a statutory adjudication) issuing a non-binding decision. It is supported by the insurance industry, amongst others. It is a great pity that the parties did not adopt that method of resolving their dispute in this case. It would have been far quicker, and much more economical, than conducting a High Court trial which lasted over three TCC weeks, with all the costs to the parties that such a trial entails. In essence, this case really concerned issues of factual causation. Although they were not all called, there was a total of six different experts instructed in this case, with a claim against Canham for £3.7 million. The negligence was admitted in certain limited respects (or at least was agreed by the experts in the structural engineering joint statement). There were unusual facts, but in the event BPN have succeeded to the tune of only £2,000. Even though there were contested issues of fact, adjudications can in suitable cases proceed with oral evidence and cross-examination of witnesses. Using the scheme to which I have referred, to resolve a dispute such as this one, would have been a far better way for the parties to have proceeded."

Another useful example of the potential advantages of alternative forms of litigation and arbitration.

Expert evidence

Beattie Passive Norse Ltd & Anr v Canham Consulting Ltd

[2021] EWHC 1116 (TCC)

One of the issues Mr Justice Fraser had to consider here, was the nature of the expert evidence. In doing so, he provided a helpful analysis of the reasons why he preferred the evidence of one of the structural engineering experts to the other. Those reasons included the following, that the expert:

1 "*[C]onstantly embellished his criticisms of Canham, and, I regret to say, exaggerated.*"
2 "*[C]onstantly introduced new concepts or issues, which were not identified in his report.*" The result was that "he appeared to be seeking to bolster the Claimants' case".
3 Relied on material that had no relevance to the issues under consideration in this trial.
4 "*[C]hanged his agreement with, and reliance upon, the work of his associate.*" The Judge suggested that because the point did not assist the claimant's case, he disavowed it.
5 Went beyond his own expertise, giving geotechnical engineering evidence not structural engineering evidence. The Judge agreed that this demonstrated a lack of objectivity.
6 Did not, as his opposite number had, sensibly agree with points put to him, whether they advanced his client's case or not. As his cross-examination demonstrated, he failed to approach his expert exercise applying a completely objective approach to the expert issues.
7 Did not, unlike his opposite number, give the Judge the impression that his evidence would have been exactly the same had he been instructed by the other side.
8 Introduced concepts into his cross-examination which were not issues for the court.
9 Took positions on contested issues of fact. This was a point the Judge said had "*been made in many cases*" and was "so obvious as to go without saying". Further, if a witness of fact makes a telling concession, then this was something that experts ought to take into account when they come to give their own oral evidence. The expert here did not change or alter his position. In the words of the Judge: "*He effectively ignored it, again (probably) because it was not helpful to the claimants' case.*"

Unsurprisingly, the Judge preferred the evidence of the other expert witness.

Expert evidence

Kang & Anr v Pattar LLP

[2021] EWHC 1101 (TCC)

In contrast to the *Beattie* case, this was a case where there were opposing quantum experts who in the opinion of HHJ Watson had understood the nature of the duty they owed to the courts.

One expert had conceded in his oral evidence that he had done some consultancy work for his client on a couple of occasions previously. It was suggested that he was not independent as a result. He also on occasion provided explanations in answering questions that were based on what he had been told by his client. This did not mean he was not independent. The Judge was clear that having heard the expert give evidence, she had no concerns that he did not understand his duty to assist the court or that he lacked independence.

Further, both experts had clearly discussed the case with their respective clients in addition to obtaining instructions from the solicitors. Where they relied on what they had been told, they made it clear that their comments were based on his instructions. By acting in this way, they were not seeking to give factual evidence but simply reporting their understanding of events based on those instructions. Issues of fact are for the Judge to decide.

The other expert had been involved at an early stage including, as it appeared from the pleadings, in advising them as to the value of the work carried out by the other side and the quality of the work. The expert introduced his clients to their solicitors. His advice was referred to in the first letter of claim. Although the Judge recognised that the expert had discussed matters with his clients outside of the formal process of solicitors instructing an expert, she was duly satisfied that he was doing his best to assist the court and was mindful of his duties to the court.

Edited by **Jeremy Glover, Partner**
jglover@fenwickelliott.com
Tel: + 44 (0)20 7421 1986
Fenwick Elliott LLP
Aldwych House
71 - 91 Aldwych
London WC2B 4HN