

## ADJUDICATING DISPUTES - CAN TWO CONTRACTS BE TREATED AS ONE?

- In *Delta Fabrication & Glazing Ltd v Watkin Jones & Son Ltd [2021] EWHC 1034 (TCC)*, the claimant sub-contractor sought to enforce an adjudicator's award in respect of a payment application that amalgamated applications in respect of two sub-contracts it had entered into with the defendant contractor.
- The defendant contractor argued that the adjudicator did not have the requisite jurisdiction as the referral concerned disputes under two separate contracts.
- The Court refused to grant summary judgment on the basis that the defendant contractor had a real prospect of successfully defending the claim on the basis of a lack of jurisdiction.
- The Court also rejected a claim by the claimant to make payment into Court of the adjudicator's award a condition of defending the claim.

### WHAT'S IT ABOUT?

*Delta Fabrication & Glazing Ltd* (Delta) entered into two separate subcontracts with *Watkin Jones & Son Ltd* (Watkin) (one for brick slip cladding work and the other for roofing works). Delta referred an amalgamated payment application in relation to both subcontracts to adjudication and obtained an award. Delta then sought to enforce the award at Court and Watkin resisted this on the basis of a lack of jurisdiction due to the referral concerning disputes arising under separate contracts. Whilst it was accepted by both Delta and Watkin that if the referral did concern disputes under two separate contracts the adjudicator would have no jurisdiction (and the award would thereby be invalid), Delta argued 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;
- even if the parties' 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 Construction Act; alternatively
- Watkin is estopped from denying that there is a single contract within the meaning of the Construction Act.

To explain the background a little further, in the absence of consent, the 'Construction Act' does not permit an adjudication referral to concern more than one dispute/disputes arising under more than one contract – hence the parties' accepted starting position and the above counter arguments from Delta.

With regard to the first argument, Delta argued that Watkin made an 'offer' to amalgamate the contracts by issuing one payment notice in relation to both contracts and Delta accepted this 'offer' by issuing its subsequent payment application 'as one' in relation to both contracts.

The judge decided that, in order to find for Delta, the parties' conduct would have to be "*unequivocal and consistent with them having agreed to vary the contracts so that a single contract came into existence.*" The judge decided this was not the case here and, in fact, the evidence suggested the opposite; relevant factors included that the 'single Watkin payment notice' relied on by Delta contained separate breakdowns for the two packages in the build up to the certified sum, the subsequent Delta payment application also broke the sums claimed into the two distinct parts and later correspondence and documentation (such as in relation to variations and collateral warranties) was also referencing/in relation to two separate contracts.

Delta's second argument was that even if there was no agreement as to an amalgamation for all purposes, then there was for the purposes of the Construction Act. In essence, Delta argued that where 'the parties had unequivocally operated and administered two purchase orders as one' what was required to satisfy the 'test' of whether two contracts could be treated as one 'Construction Contract' under the provisions of the Construction Act, was somehow less than that required to establish a formal variation to the Contract. The judge rejected this argument also – on the basis that there was nothing to suggest that the references to 'contract' and 'agreement' in the Act shouldn't be given their ordinary and natural meanings (i.e. one contract) and there was, in any event no evidence that the parties had 'unequivocally operated and administered two purchase orders so as to qualify as one contract' – for the reasons given in relation to argument one.

As to the third argument, Delta maintained that Watkin was prevented (estopped) from denying there was a single contract on the basis that Watkin's payment notice(s) amounted to a representation that the contracts were to be treated as one, Delta relied on that representation and Delta suffered consequent detriment.

The judge dismissed this argument also as she was not persuaded that the payment notice(s) amounted to any representation as to 'one contract' (for the reasons above). Further, there was no evidence of any reliance by Delta on the alleged representation and/or any evidence of detriment (if anything – there would likely be a cost saving benefit).

Finally, Delta raised a novel argument in relation to the adjudicator's award in that it asked the Court to order Watkin to pay the adjudicator's award into Court as a condition of Watkin defending the claim, Delta tried to persuade the judge that Watkin should have to pay the award into Court if it wished to defend the claim on the basis that the adjudicator's decision is "*right until it is proved otherwise and the only challenge is jurisdiction*". It appears from the judgment that Watkin was challenging the adjudicator's award on a number of substantive grounds (as well as jurisdictional ones). This was also dismissed by the judge as 'not appropriate' in the circumstances.

## WHY DOES IT MATTER?

This case is another example of the importance of clarity as to the contractual basis of an adjudication referral in relation to matters of jurisdiction. It should be remembered that (absent the parties' consent) an adjudicator cannot decide more than one dispute between them at a time (whether under one contract or under separate contracts) and, on a related point, can't adjudicate (again, absent consent) on 'non construction operations' in a 'hybrid' contract. Should an adjudication referral offend these requirements then the referral may be rendered invalid. In addition, the test for resisting enforcement is only that a defendant demonstrates a 'real prospect' of successfully defending the claim. Where a claimant relies on arguments such as 'agreement by conduct' or 'waiver/estoppel' to displace the ordinary contractual position and provide the requisite jurisdiction, anything short of unequivocal behaviour by the parties in support of this reliance (which can be a 'high bar') may allow a defendant to satisfy the 'real prospect' requirement and successfully resist enforcement of an adjudicator's decision.

The case also confirms that a Court will be reluctant to distinguish between the Construction Act and the general common law position when considering what level of evidence is required to establish some form of agreement between the parties as to the basis of the contract for the purposes of conveying jurisdiction on an adjudicator.

## WHO TO CONTACT?



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