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The construction law specialists

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Dispatch

Dispatch highlights a selection of the important legal developments during the last month.

Disputes arising under two contracts referred to a single adjudicator

Supablast (Nationwide) Ltd v Story Rail Ltd
[2010] EWHC 56 TCC

Story resisted Supablast's attempts to enforce an adjudicator's decision on the grounds that the adjudicator did not have jurisdiction to decide the final account dispute as there were two contracts for the works, one for the blasting, painting and scaffolding and another for steelwork. Story argued that the adjudicator had been asked to decide more than one dispute in relation to two contracts. The works at the centre of the dispute were in relation to the substantial refurbishment of a railway bridge known as Carr Mill Viaduct in St Helens, Merseyside. The first time the two contracts point emerged was within Story's Response in the adjudication proceedings. As far as Supablast were concerned there was a single agreement and all elements of the works were covered by that agreement. Supablast emphasised that a single payment mechanism had been adopted by Story throughout the project which must support the contention that there was a single contract.

The Notice of Adjudication dated 3 September 2009 sought the determination of the Supablast final account pursuant to the sub-contract. As part of the defence to Supablast's claims, Story raised the jurisdictional issue of multiple disputes and two contracts. Having received submissions from both parties, the adjudicator stated that he believed he had jurisdiction and that there was one sub-contract:

"I noted that at 16 January 2008 (the date of the Preliminary Meeting) the Responding Party was dealing with the works of grit blasting, painting, scaffolding and steel repair works as one body of work and I was of the view that the said minutes were evidence of this position. I noted that the Subcontract Price included the steel works sum; the sub contract period related to all work; the client's particular specification requirements included a steel and bolt specification (i.e. for the steel repair works); the name and contact details for the Responding Party's steelwork Contracts Manager was to be advised; and the number of men the Referring Party proposed to have on the steel repair works was minuted.

I also noted that the Referring Party's applications for interim payments sought monies for all works, including steel repair works and I noted that the Responding Party's payments and payment notices dealt with the sums applied for on an all encompassing basis and payments were not separated out on a "two contracts" basis, as now alleged.

Also, it appeared to me that the argument now raised regarding "two contracts", was a new argument raised in resistance of the adjudication proceedings…I noted the Responding Party's email dated 25 March 2009 in respect of the Referring Party's "fully substantiated Final Account" and was again not appraised by the Responding Party that two separate "final accounts" were being sought or required at that time.

I am of the view that whilst the Responding Party issued two similar "standard form" orders of the works of (1) grit blasting, painting and scaffolding and (2) steel repair works, the true intent for the Parties was that these works were to be carried out as one sub contract and as a fact they were administered as such during the period (and after) the subcontract works…"

The adjudication continued and was decided in Supablast's favour. Story failed to comply with the decision of the adjudicator and Supablast commenced enforcement proceedings in December 2009. Story, as before, raised the issue of two contracts and suggested that the single payment mechanism was a matter of convenience only and did not support the argument that there was one contract. During the assessment of the evidence it was noted by the Judge that the adjudicator:

"In his Decision, he reviewed in detail the differences between, and the evidence of, the parties and decided that the value of Supablast's final account was £2,117,741.34 which, allowing for retention, previous payments and interest, left the sum of £262,366.09 to be paid by Story to Supablast together with VAT and the adjudicator's fees and expenses of £19,651 plus VAT to be paid by Story. He referred at several places in his Reasons to his view that the steelworks "constituted a variation to the originally contracted work and that all steelwork repair works were the subject of a variation as well as a re-measure."

He also promptly held that there was only one contract concluded between the parties. The Judge considered that it was not necessary to decide whether or not there were one or two sub-contracts because it was clear that there was only one contract, that the parties agreed that the two sets of works were to be treated as governed by the same contract and that the works had proceeded on this assumption. Substance and jurisdiction had possibly overlapped and the adjudicator was acting within his jurisdiction in deciding that the steelworks were to be treated as a variation. It was beyond doubt that a contract for the blasting, painting and scaffolding had been created by letters sent by Story and Supablast dated 17 and 18 December 2007 respectively.

On 20 December 2007 Supablast had finalised its quotation for the steelworks and the factual matrix confirmed that the parties knew Supablast had tendered for the steelwork. The minutes of the meeting of 16 January 2008 unequivocally showed that all the works were to be carried out under the umbrella of a single agreement. This was demonstrated by the description of the subcontract works, the reference to a single subcontract price which was broken down to include the steelwork, and single dates for the commencement and completion of the works.

A compelling element of the case was that Story did not communicate to Supablast at any time throughout the contract works that the parties were operating under two contracts. The first time it was mentioned was in response to the adjudication. This meant that even if there were two contracts Story was estopped by its conduct from relying on this issue.

Use of CPR Part 8 Proceedings to sever an adjudicator's decision

Geoffrey Osborne Ltd v Atkins Rail Ltd
[2009] EWHC 2425 TCC

GOL and ARL were the parties to two cross-applications before the TCC. One application was to enforce an adjudicator's decision, the other was for a declaration that a significant element of the decision was wrong and was to be set aside.

GOL and ARL were parties to a subcontract for civil engineering works taking place on National Rail infrastructure near Basingstoke. A dispute arose between the parties in relation to sums owed to GOL in respect of two items: ground investigations carried out by GOL; and variations in connection with the construction of a signal control centre. Assessments for the items of work had been included in ARL's Interim Certificate No 35 totalling £912,147, but overall the certificate had a negative value and £400,000.00 was deemed to be owed to ARL due to previous overpayments. GOL then issued Payment Application No 36 and ARL failed to issue a certificate for this application. GOL subsequently referred the two items of work to adjudication on 19 March 2009.

The adjudicator assessed the value, but in doing so neglected to deduct the £912,147 already certified in Interim Certificate No 35. On 15 July 2009 the adjudicator decided that ARL was to pay GOL £504,385 (rather than the £400,000 owed by GOL to ARL) and that ARL should pay his costs. As this was an obvious and significant error, ARL invited the adjudicator to correct his mistake under the slip rule which he declined to do by letter on 20 July 2009. Following this, GOL commenced enforcement proceedings on 6 August 2008 which were met by a cross-application from ARL on 11 August 2009. As it is well-established that adjudicators' decisions are binding until they have been finally determined by court proceedings, ARL issued Part 8 proceedings as a pre-emptive strike to defeat GOL's application to enforce the adjudicator's decision. GOL submitted that Part 8 proceedings were inappropriate unless they were being used to determine the whole of a dispute, rather than part of one, as in this case.

However, the Judge stated that this was an entirely legitimate approach, provided that the Court was not being asked to decide on a substantial dispute of fact. As such, the court was able to sever part of an adjudicator's decision by way of Part 8 proceedings and finally determine that issue:

"Whilst I agree that the court must be in a position to answer whatever question is under consideration, I can see no reason why the court has to adopt an all or nothing approach to the decision. If there is part of an adjudicator's decision that can be isolated and determined by the court, then it seems to me that, if the court considers it just and expedient for the court to do so, such a course would give effect to the overriding objective of the CPR"

Turning to the application itself, the Judge considered that under its sub-contract GOL was only entitled to payment of an amount stated in a payment certificate. The applicable Adjudication Rules provided that the adjudicator is to reflect "the legal entitlement of the parties" and to decide that a party to the dispute is liable to make payment "under the contract". Also, the Notice of Adjudication was written in such terms that GOL was not intending to ask the adjudicator to order ARL to pay the total value of the ground investigations and the variations for the signal control centre without deducting the amounts already included in Interim Certificate 35.

Therefore, in not taking into consideration the sums previously certified for these two items the adjudicator's decision did not reflect the legal entitlement of the parties under the contract. The adjudicator was therefore wrong in law to order ARL to make a payment without taking account of sums already paid for these items. As ARL had pleaded that the adjudicator was wrong in law on this specific point, the Judge decided it was entitled to a declaration to that effect.

The Judge's declaration in ARL's favour, however, did not change the position on costs. The adjudicator had the jurisdiction to make a costs order. Even though it may have been the case that, had the adjudicator not concluded that such a large amount was owed to GOL, there may have been a different costs order, it was not obvious that he would have done so.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

Dispatch is a newsletter and does not provide legal advice.

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