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TOO MUCH OF A GOOD THING: SERIAL ADJUDICATION, MULTIPLE DISPUTES AND NEC

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Adjudication has now become the default dispute resolution method for construction disputes, to the extent that some parties use it on multiple occasions and for multiple disputes. But that carries its own risks and complexities, as highlighted in the recent decision in *Prater Ltd v John Sisk and Son (Holdings) Ltd*.

This decision concerns the *NEC3 Engineering and Construction Subcontract* (ECS), and highlights the issues that come up with serial adjudication, as well as the need to take further steps beyond just issuing a notice of dissatisfaction under *Option W2* and how the courts view the issue of whether more than one dispute can be referred to adjudication under that clause.

What happened?

John Sisk engaged Prater to design and install cladding and roofing works to a new Boeing Fleet aircraft maintenance hangar at London Gatwick Airport under an amended NEC3 ECS, Option A (2013).

Over the course of the project, the sub-contract works were subject to delays and changes. The works were completed in November 2019 and the parties then engaged in a series of adjudications in 2020 and 2021 as follows:

- Adjudication 1: Prater sought an amendment to the original subcontract completion date which was awarded.
- Adjudication 2: Prater sought decisions on a number of matters including:
  - the correct subcontract completion date based on Adjudication 1;
  - the status of provisional sums; and
  - Sisk's entitlement to deduct indirect losses from any sums due to Prater.

- Adjudication 3: Sisk sought a declaration that certain compensation events claimed by Prater were not compensation events under the subcontract.
- Adjudication 4: this concerned the only adjudication whereby payment was sought as a remedy, in which the adjudicator decided that Sisk was liable to make payment to Prater of around £1.75 million plus VAT.

Sisk resisted the enforcement of Adjudication 4, but unusually this was done on the basis of *challenging the decision* in Adjudication 2, arguing that Prater's referral included multiple disputes for determination, rather than a single dispute, with no clear link between the issues. It claimed that as Adjudication 2 was unenforceable and Adjudication 4 was based, in part, on the decision in Adjudication 2, in which the adjudicator lacked the *requisite jurisdiction*, Adjudication 4 could also not be enforced. This was a novel challenge to enforcement.

Prater claimed that Adjudication 2 was binding and enforceable as a matter of principle as well as contractual obligation unless and until revised by a court pursuant to clause W2.3(11) of the subcontract. In any event, it claimed that a challenge based on an assertion that an earlier decision upon which an adjudicator is asked to proceed is unenforceable, is not a challenge to the adjudicator's jurisdiction in the current adjudication (Adjudication 4).

The decision on jurisdiction

The TCC decided that Sisk's novel challenge to Adjudication 4 was incorrect, relying on the amended NEC3 W2 dispute resolution clause. Clause W2.3(11) stated:

> *"The Adjudicator's decision is binding on the Parties unless and until revised by the tribunal and is enforceable as a matter of contractual obligation between the Parties and not as an arbitral award. The Adjudicator's decision is final and binding if neither Party has notified the other within the times required by this subcontract that he is dissatisfied with a matter decided by the Adjudicator and intends to refer the matter to the tribunal."*

Clause W2.4(2) further provided:

> *"If, after the Adjudicator notifies his decision a Party is dissatisfied, that Party may notify the other Party of the matter which he disputes and state that he intends to refer it to the tribunal. The dispute may not be referred to the tribunal unless this notification is given within four weeks of the notification of the Adjudicator's decision."*

Sisk had served a notice of dissatisfaction in relation to Adjudication 2 but, by the time this case was heard, it had not taken any further steps to refer the decision in Adjudication 2 to the court for final determination. The judge relied on the words used in W2.3(11) to find that a decision remained binding until it had been reversed by a tribunal. She also made it clear that it was not enough for

Sisk to simply issue a notice of dissatisfaction. It also had to take the further step of challenging that decision in court if it did not want it to remain binding.

Multiple disputes being referred in one adjudication

As Adjudication 4 was enforceable, there was no need to consider whether Prater did refer more than one dispute in Adjudication 2. Veronique Buehrlen Q.C. nonetheless considered this issue.

To start with, she rejected Prater's argument that NEC3 Option W2 did not expressly preclude referring more than one dispute to an adjudicator. She noted the reference to a singular dispute ("a" or "the" dispute) throughout the clause and commented that the subcontract contemplated that a single dispute is to be referred to the adjudicator at any one time, not multiple disputes.

She then went on to consider the guidance for determining what constitutes a single dispute set out in *Witney Town Council v Beam Construction (Cheltenham) Ltd* and whether the correct subcontract completion date, the status of provisional sums, and Sisk's entitlement to deduct indirect losses were separate disputes.

She agreed that the issues could have been decided independently but held that a dispute may consist of a single issue or any number of issues within it. *What a dispute is* will be a question of fact and if there is a clear link between the issues, this suggests that they comprise one dispute.

In this case, this was a final account dispute which centred around Sisk's payment certificate dated 22 January 2020. Each matter relied upon by Sisk as giving rise to a separate dispute was no more than an aspect of a dispute as to the proper amount of Sisk's payment certificate. The issues therefore comprised a single dispute and a jurisdictional challenge on that basis would not have succeeded in any event.

Final thoughts

This case is a good reminder that under the NEC form, a party that wishes to challenge a decision must issue a notice of dissatisfaction or the decision will become final and binding. The decision also highlights that while this is a necessary step, the decision is binding in the interim and if a party is concerned about the validity of an adjudicator's decision, it needs to take this forward to the tribunal to have the decision revised.

There are also some useful lessons about final account disputes. In this case, Prater argued that a final account adjudication would be lengthy and complex and that to bring a "kitchen sink" final account adjudication (as described by HHJ Coulson QC (as he then was) in *William Verry (Glazing Systems) Ltd v Furlong Homes Ltd* would have been inappropriate, not least given the summary nature of the adjudication procedure. This is indeed why sometimes parties choose to have a series of adjudications, but the case highlights the risks in that approach and the need to consider very carefully what issues are being referred in each adjudication and how they interact with each other.

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MEET THE TEAM

Shy Jackson

London

shy.jackson@bclplaw.com
+44 (0) 20 3400 4998

James Clarke

London

james.clarke@bclplaw.com
+44 (0) 20 3400 3507

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