

**TRANSCRIPT OF PROCEEDINGS**

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[2020] EWHC 3804 (TCC)

HT-2020-MAN-000047

IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS IN MANCHESTER  
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Manchester Civil Justice Centre  
1 Bridge Street West  
Manchester M60 9DJ

**Before HIS HONOUR JUDGE EYRE QC**

**IN THE MATTER OF**

**EX NOVO LIMITED**

**Claimant**

**-v-**

**MPS HOUSING LIMITED**

**Defendant**

**Tom Owen** (instructed by **Hill Dickinson LLP**) for the **Claimant**  
**George Woods** (instructed by **Mears Group Plc**) for the **Defendant**

**JUDGMENT**  
**17 DECEMBER 2020, 15.46-16.33**  
**APPROVED TRANSCRIPT**

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JUDGE EYRE QC:

1. This is a summary judgment application to enforce Dr Andrew Milner's adjudication award dated 9<sup>th</sup> November 2020 in favour of the Claimant in the sum of £307,357.45.
2. The Defendant contends that the adjudicator lacked jurisdiction because the reference to him related to at least four separate contracts. Dr. Milner had addressed that issue and had set out his conclusion at various points in his decision, but in particular at [26] where he summarises what he said elsewhere. Dr. Milner concluded that the allegedly separate contracts were not in fact separate contracts but that the sundry instructions given by the Defendant were all in accordance with an initial sub-contract order of 20<sup>th</sup> November 2018.
3. There are, accordingly, two key issues before me. First, whether the adjudicator had jurisdiction. That turns on whether there was in fact a single contract with multiple instructions under it or multiple contracts it being common ground that although there can be an adjudication reference of multiple disputes under the same contract an adjudicator does not, absent the agreement of the parties, have jurisdiction to determine disputes under multiple contracts. Second, whether the adjudicator's decision that there was a single contract was a decision which he had jurisdiction to make so that even if it were thought to be incorrect or erroneous that error cannot be a defence to summary judgment. The latter of those is in fact Mr Owen's primary submission on behalf of the Claimant.
4. The test on both those issues is the summary judgment test namely whether the Defendant's resistance to enforcement has a real prospect of success in the sense of being real rather than fanciful albeit not necessarily one which has sufficient prospects that it is more likely than not to succeed. That test must be applied against the background of the policy underlying adjudication enforcement which is that of maintaining cashflow and of maintaining the principle of the parties being required to pay now and argue later.
5. Those are the two core issues but there is a subsidiary issue as to whether even if the adjudicator lacked jurisdiction and even if he was in fact not entitled to conclude definitively that he had jurisdiction there could be severance of elements of the award and the enforcement of some severed elements of the award. In addition there was an issue as to whether there should be a stay of any judgment in the Claimant's favour. However, sensibly and properly the Defendant has chosen not to pursue that line of argument in the light of the material provided by the Claimant.
6. I will not in this extempore judgment recite the history in extenso but the relevant elements are as follows.
7. On 24<sup>th</sup> October 2018 Mr Dawson of Mitie sent an email to Mr Vagnoris of the Claimant attaching a schedule of rates and a void pricing template. That was in the context of the works in question here being in relation to what have been described as "Wrexham voids" namely the renovation of void, as I understand it, local authority properties in Wrexham. The despatch of that schedule was followed by an exchange of emails on 30<sup>th</sup> October. Ex Novo sent an email attaching a pricing template and giving a discount of 20% from National Housing Federation rates. There was a response the same day asking if that discount could be extended to 22% and then an acceptance on 31<sup>st</sup> October from Ex Novo that it could be. It is common ground that that was an agreement as to a 22% discount.

8. At that stage the correspondence was between Ex Novo and Mitie, or least Mitie companies. The Defendant was incorporated on 1<sup>st</sup> November 2018 and there is no dispute for current purposes that a contract was formed between the Defendant and the Claimant.
9. On 20<sup>th</sup> November 2018, an email was sent by Mr Dawson, now apparently of the Defendant, albeit that does not appear from the email address or the footer. This said “Please see attached your first void for Mitie, purchase order to follow.”. That email was sent at 09.22 on 20<sup>th</sup> November. One minute later there was a further email which had attachments bearing an order number and a contract number and which said, “Please see attached purchase order.” The purchase order was described as a sub-contract order purchase order number and there was a number ending 8299 and the words “purchase order 20/11/18” and “invoice to be sent to Mitie Property Services” at an address in Airdrie. The document refers to Ex Novo’s account number and gives a contract number of MPMNH00052.
10. That exchange was in November 2018. Thereafter works were done on various properties. The Claimant performed work on just over thirty one properties although there is an issue as to whether the work was performed pursuant to that agreement or a different agreement.
11. In 2019 there were negotiations between the Defendant and the Claimant with a view to replacing that arrangement with a framework agreement. Indeed, a sub-contract framework agreement was signed on 10<sup>th</sup> June 2019. The terms of that agreement provided for what was described as the onboarding of the Claimant to take place on 1<sup>st</sup> July 2019. However, that date was deferred and on 11<sup>th</sup> September there was an email from Mr Dawson indicating that the start date had been delayed until, it was anticipated, the end of September and saying at the end of the email: “Until such time as you are notified, we will continue on your existing old terms”.
12. That email was on 11<sup>th</sup> September. On 3<sup>rd</sup> September there had been an email from Mr Hodgson of the Defendant to the Claimant saying:

“As discussed on site today, please see attached a list of the damages owed. As of today’s date from the start of contract these will be deducted from your next valuation. Steve [presumably, Mr Dawson] will review the damages on a monthly basis with you and deductions for late voids will be made on this contract. These deductions will be on a back to back basis with the damages MPS receives from the client. Also, as agreed, any new voids that were released to you after 1<sup>st</sup> August will be applicable to your price increase”.
13. On 4<sup>th</sup> September there was an email from Mr Hudson of the Defendant referring to a property in Wrexham , 2 Beech Tree Avenue and then, on 5<sup>th</sup> September, Mr Dawson sent an email which had two attachments. The attachments were described in the email as being an amended document ending 8299 and a further document ending 2216 and those were purchase orders. The first of them was a sub-contract order purchase order bearing the 8299 number and saying “Purchase order date 20/11/18”. It bore the same contract number and relevant address as before and set out a list of 25 properties in respect of which by 5<sup>th</sup> September 2019 renovation work had been undertaken. The second attachment was also a sub-contract order purchase order document. This bore the number ending 2216 and the date 5<sup>th</sup> September 2019. It had the same account number and again the same address for the Defendant. It did not bear a contract number and it said this, “As agreed, 17% as of 1<sup>st</sup> August 2019 on NHF 6.3 for Wrexham voids.”. The Claimant says that those words

reflected a change in the level of discount which had been agreed by way of variation of the existing agreement. That document refers to four properties all of which it appears not to be disputed had had the renovation work undertaken before the date of that order number.

14. Then on 11<sup>th</sup> September 2019 there was a further short email referring to a property at 23a High Street in Wrexham.

15. The Claimant says that all those exchanges are referable to the single contract which it says was formed in November 2018 with the Defendant stepping into the shoes of Mitie and placing instructions for properties to be renovated under a single contract. There was a variation, the Claimant says, as to the level of discount from NHF rates but that was a variation of the same contract.

16. The Defendant accepts that there was a contract in November 2018 but says that that was not the only contract. It says that there were at least four contracts between the parties: namely that formed in November 2018 referable the Defendant says to 25 properties; a further and separate contract shown by the order number with the 2216 closing numbers; and potentially two further separate contracts constituted by acceptance of the instructions in the emails of the 11<sup>th</sup> and 4<sup>th</sup> September 2019. It is probably implicit in what I have just said that the consequence of the Defendant's contention that there were multiple contracts is the Defendant's further contention that the reference to adjudication was a reference which the adjudicator did not have jurisdiction to determine it being a reference of sums due under and of disputes in relation to multiple contracts rather than an single contract.

17. The Claimant's primary case is that the adjudicator's decision as to whether there was a single contract with variations or multiple contracts was a decision which he had jurisdiction to make and to make definitively so that an error made by the adjudicator in that decision cannot be a defence to enforcement proceedings.

18. The proposition of law which Mr Owen said could be derived from the authorities is (and this is my slight modification of the wording that Mr Owen put forward) that where an adjudicator is properly appointed in circumstances where the parties do not dispute that there is at least one contract then that adjudicator has jurisdiction to decide if works were performed under that contract as varied or under separate contracts and so to decide whether he has jurisdiction to determine the matters put before him or her. It follows, Mr. Owen says, that a decision that the works were performed under a single contract as varied is one which the adjudicator has jurisdiction to make and which cannot be challenged.

19. Mr Woods for the Defendant says the authorities on which Mr Owen relies for that proposition only support the proposition that an adjudicator has such jurisdiction in a case where the issue in the adjudication is whether the works were variations or not.

20. What then is the effect of the authorities to which I have been referred? The starting point can be seen in the quotation at [79] of HH Judge Stephen Davies' decision in *Viridis UK v Mullaley and Company Limited* [2014] EWHC 268 (TCC). There Judge Davies quoted parts of the decision of Akenhead J in *Supablast (Nationwide) Ltd v Story Rail Ltd* [2010] EWHC 56 (TCC). In particular Judge Davies quoted [30] of that decision where Akenhead J was in turn quoting the judgment of Simon Brown LJ in the case of *Thomas-Fredric's (Construction) Ltd v Keith Wilson* [2004] BLR 23. Akenhead J said that in the latter case the

Court of Appeal “confirmed broadly the uncontroversial view that an adjudicator does not have jurisdiction to decide his or her own jurisdiction unless the parties have effectively agreed or permitted him or her to do so”. That is of course an uncontroversial statement of basic principle. An adjudicator cannot pull him or herself up by his or her own boot straps and cannot confer on him or herself jurisdiction to determine jurisdiction.

21. The proper analysis of the authorities and of the approach to be taken must depend on whether the reference to the adjudicator necessarily involves the adjudicator having jurisdiction to determine jurisdiction. If that is an integral part of the reference then the decision as to jurisdiction is indeed unchallengeable. However, if that is not an integral part of the reference but is only being determined as a preliminary to determination of the reference proper then the decision of an adjudicator as to jurisdiction is not unchallengeable. That means that the court must consider the circumstances and determine whether a reference does involve an adjudicator being entitled to determine jurisdiction as part of the substantive reference rather than as a necessary preliminary matter which has to be decided if jurisdiction is challenged.

22. It is in that context of considering when it is that a reference entitles and adjudicator definitively to determine jurisdiction that I turn to the authorities. I begin with the decision of Akenhead J in *Air Design (Kent) Limited v Deerglen (Jersey) Limited* [2008] EWHC 3047 (TCC) and in particular at [22] where Akenhead J said:

“However, there are two further factors which effectively override considerations as to whether or not there were one, two, three or four contracts between the parties which establish that the Adjudicator was acting within his proper jurisdiction:

- (a) The substantive decision-making process upon which the Adjudicator had to embark in relation to the disputed claim put before him necessarily involved a consideration of whether there was more than one contract.”

23. I pause to place emphasis on Akenhead J’s use of the word necessarily. He continued:

“It was thus within his jurisdiction to decide in effect that there was one contract, albeit one that may have been varied by agreement.

- (b) ... There may be cases, and this is clearly one, where substance and jurisdiction overlap so that it is within the Adjudicator's jurisdiction to decide as matters within his or her substantive jurisdiction whether there have been in effect variations to the contract pursuant to which he or she has properly been appointed Adjudicator. ...”

24. Akenhead J reverted to this topic in *Camillin Denny Architects Ltd v Adelaide Jones & Co* [2009] EWHC 2110 (TCC) at [29] and [30]. Referring to the *Air Design* case he said that that had been a case in which there were arguably four contracts between the parties all of which related to the same project and the issue arose as to whether or not the adjudicator had jurisdiction to resolve disputes arising in one adjudication but in relation to the four contracts. There was an issue which was partly factual and partly legal as to whether the subsequent agreements were simply variations of the first. Akenhead J quoted [22] to [24] inclusive of the *Air Design* judgment and then said this:



“That was a case in which there could be no doubt that the adjudicator was properly appointed under the first contract and there could be no argument that, in that capacity, he had jurisdiction to decide whether later "contracts" were simply variations of the first contract or stood on their own entirely separately as contracts in their own right. I am not convinced that this case is authority for any proposition other than that there may be cases in which adjudicators properly appointed have jurisdiction to resolve jurisdictional issues if and to the extent coincidentally those issues are part of the substantive dispute referred to adjudication.”

25. Akenhead J provided further elucidation of the position in *Supablast* at [29] where he said:

“One must bear in mind that variations, that is additional, altered, substituted or omitted works, are very common and almost invariably feature in payment disputes between construction contract parties. Many of the adjudication decisions which come to be considered by the TCC involve rulings on whether particular work has been varied and if so what price is to be put on it. Generally, an adjudicator properly appointed under the original contract between the parties to the adjudication will have jurisdiction to determine whether or not particular work was or was to be treated as a variation under or pursuant to that original contract. ... That argument will or may in effect give rise both to a substantive defence under the original contract ("there is no entitlement to payment because there is no variation") as well as a jurisdictional challenge ("the adjudicator has no jurisdiction to decide because the extra work can not have been ordered under the original contract which gives the adjudicator jurisdiction in the first place"). This is where there will often be an overlap between jurisdiction and substance.”

26. I return to the decision of HH Judge Stephen Davies in *Viridis* where, at [76], the learned Judge quoted the submission being made to him by Miss Gaynor Chambers in these terms:

“She submitted that the decision in *Air Design* could readily be distinguished on the basis that in that case, both parties were agreed that there was an initial "Basebuild Contract", which incorporated the terms of the standard form JCT Intermediate Contract, and the central issue was whether three further agreements subsequently entered into between the same parties were separate contracts or variations to the Basebuild Contract. Thus in that case the parties were agreed that the Adjudicator was validly appointed pursuant to the adjudication provisions contained in the Basebuild Contract...”

27. Judge Davies then quoted from *Camillin* and *Supablast* and at [80] he said:

“It appears to me therefore that by reference to the subsequent observations of Akenhead J himself Miss Chambers is right to say that the decision in *Air Design* is authority only for the proposition that where an adjudicator is properly appointed under a contract about which there is or can be no dispute, then he may also have jurisdiction to resolve jurisdictional issues if they are coincidentally part of the substantive dispute referred to him.”

28. As it happens, at [81], Judge Davies explained that that proposition did not assist in the case before him because in that case there was never any initial concluded contract under which there was no dispute.

29. In my judgement the effect of these authorities is that it is necessary to distinguish between two separate kinds of case.
30. The first relates to those matters which it is necessary for an adjudicator to decide as a preliminary to deciding the reference substantially. The question of whether the adjudicator has jurisdiction is a paradigm example of such a matter which will need to be determined on a preliminary basis.
31. The second category relates to those matters which need to be determined by the adjudicator in order to resolve the dispute referred to him or her. There would sometimes, perhaps often, be an overlap between those matters and the questions of whether particular dealings gave rise to a single contract or to a series of contracts and of whether the reference is under a single contract or a multiplicity of contracts are questions which can of course give rise to such an overlap namely an overlap between a preliminary determination and a substantive determination.
32. However, the test of whether a determination by an adjudicator is binding or unchallengeable at the summary judgment stage is not simply whether the decision was one which the adjudicator had to make. Almost any decision which an adjudicator has to make is a decision which he or she has necessarily made. Instead, the court must consider the purpose for which it was necessary for the adjudicator to make the decision. So, to put that in slightly different language, it is no answer to say that it was necessary for the adjudicator to make the decision. One must go on to consider why and for what purpose it was necessary.
33. A decision by an adjudicator, whether as to jurisdiction or otherwise, will only be within his or her jurisdiction and unchallengeable if it was necessary for the adjudicator to make that decision not just as a part of the process of conducting the adjudication but also as an element and a necessary element in resolving the matter referred to him or her once the question of jurisdiction has been resolved.
34. The fact that there is an admitted and unchallenged contract and that there is a dispute as to whether particular works were performed under that contract as varied or under a fresh contract or contracts does not mean that a decision on that question (ie as to whether there was a single varied contract or a series of separate contracts) is necessarily conclusive and within the adjudicator's jurisdiction. The court has to look closely at the matter in issue in the particular adjudication to consider whether jurisdiction to adjudicate being present it is necessary to determine that question (the multiple or single nature of the contracts) in order to make an award and if so in what amount.
35. Similarly the fact that there was a contract under which an adjudicator could be validly appointed does not mean that an adjudicator has an unchallengeable jurisdiction to determine whether his purported appointment is valid in circumstances where the challenge to jurisdiction is on the basis of there being multiple contracts and the response is that there was a single contract with variations. Mr Woods is right to say such an approach would drive a coach and horses through the rule that there cannot be a reference of multiple disputes arising out of separate contracts. Not only would such an approach have that effect but in my judgement such an approach does not follow from the authorities.



36. It follows that the question here is whether the decision as to jurisdiction, and inherent in that the decision as to a multiplicity of contracts or a single contract, was one which had to be made by Dr Milner to determine the substantive issue in the adjudication.

37. Dr Milner did have to make a decision as to where there was a single contract or multiple contracts. He had to make that decision for the purpose of determining whether he had jurisdiction and should proceed with the adjudication but he did not have to determine that question in order to determine the substantive issue between the parties. The reference and the response to it make it clear that the substantive issue between the parties was the effect of the absence of a pay less notice from the Defendant. There is reference also to a potential argument about valuation. However, while the question of whether there was a single contract with variations or multiple contracts certainly did have to be decided for the purpose of deciding whether Dr. Milner had jurisdiction it did not have to be decided for the purpose of determining the substantive issue between the parties.

38. The effect of that is that the primary submission made by Mr Owen does not succeed. It cannot be said that the decision by Dr Milner as to his jurisdiction is unchallengeable. That was not a decision which he was entitled to make as within his jurisdiction albeit it was one that he was required to make as part of the process of determining the adjudication.

39. This means that I must address the secondary submission made by Mr Owen and the key question then becomes one of whether there was a single contract under which the sundry works were performed or multiple contracts. Rather, the question is whether there is a real prospect that the Defendant would defeat the argument that there was a single contract the test being as I said earlier whether the contention that there were multiple contracts has a real as opposed to a fanciful prospect of success.

40. Mr Woods points to the change from Mitie; the absence of clarity about the contractual effects of the change; the differences between the documents in September 2019 with one bearing the 8299 purchase order number and a contract number and the other bearing the 2216 number and no contract number. Also, and significantly Mr Woods says, he points to the position that there appears to be a difference in price with the 22% discount at the outset but a reference to a 17% discount on the 2216 document. He also refers to the fact that there were no order numbers or the like in respect of the two emails.

41. It is a commonplace to say that contemporary documents are the best guide to the parties' intentions and to the effect of their dealings. The documents here strongly and in my view persuasively, indicate that there was a single contract. There is no real prospect of a finding that there were multiple contracts and I conclude that the suggestion that there were multiple contracts is untenable such as to lack any real prospect of success.

42. The reasons I come to that conclusion can be stated quite shortly. The dealings with Mitie envisage a schedule of rates and instructions about particular properties. That can be seen as a matter of common sense by looking at the Mitie purchase order of 28<sup>th</sup> November 2018. The September 2019 purchase order with the 8299 number has the same details. The email from Mr Hodgson of 3<sup>rd</sup> September is strongly indicative of a single contract in particular in the reference to "new voids released to you after 1<sup>st</sup> August will be applicable to your price increase". Moreover, the starting reference to an amount being "owed as of today's date from the start of the contract." indicates a single course of dealing.

43. Similarly, the difference between the two documents of 5<sup>th</sup> September with different purchase order numbers is explicable as a consequence of the change of price. Mr Woods made reference to the fact that Mr Vagnoris had in his witness statement referred to negotiations including oral negotiations which were underway in 2019 and said that this gave rise to questions which would need to be explored with evidence at a trial such that it could not be said that there was no real prospect with there being separate contracts. However, that does not in the circumstances here give any real prospect of there being ultimately a finding there were multiple contracts. In context it is clear that Mr Vagnoris was referring to negotiations leading up to the framework agreement and to the modification of price. Moreover, it is significant that there is no positive case put forward by the Defendant postulating a different content for those negotiations. The position might have been entirely different if the Defendant's witnesses had deposed in a witness statement or statements to a contention that there were particular negotiations conducted orally to a different effect from that set out by the Claimant but that was not done.

44. The other aspect is that standing back and looking at the exchanges and the nature of the dealings commercial common sense suggests that what was happening here was the situation put forward by the Claimant that is a single contract with the placing of orders under it, effectively a calling off of work on particular properties, and with a subsequent variation reducing the discount applicable.

45. It follows in those circumstances that the decision by the adjudicator that there was a reference under a single contract was correct or rather there is no real prospect of it being shown that it was incorrect. That means that the adjudicator did indeed have jurisdiction to make the decision he did and it is accordingly enforceable.

46. In those circumstances the question of severance or otherwise of parts of the award is academic though I should briefly say that if I had concluded that there was no jurisdiction I would not have regarded it as appropriate to sever parts of the award. The position would have been that I would have concluded that there had been a reference of multiple disputes under multiple contracts a reference which the adjudicator did not have jurisdiction to determine. In those circumstances, notwithstanding the tentative suggestion of Peppercorn J in the *Willow Corporation v MTD Contractors* case [2019] EWHC 1591 (TCC) that the courts should be more inclined than formerly to consider severance, I would have been very wary of saying it was appropriate to sever parts of an award where ex hypothesi the adjudicator had no jurisdiction and to enforce that part or those parts of an award which would have been within the adjudicator's jurisdiction if there had been a single reference. The difficulty to which such an approach would give rise (if nothing else) would be the question of how the court is to determine which part of the award is to be seen as valid and which not? However, interesting though that issue might have been it is academic in the light of the decision I have reached on the secondary submission of Mr Owen which has the consequence that there is to be summary judgment for the Claimant for the full amount claimed.

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*We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.*

This transcript has been approved by the Judge