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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
TECHNOLOGY & CONSTRUCTION COURT (QBD)
[2021] EWHC 3117 (TCC)

No. HT-2021-000259

Rolls Building
Fetter Lane
London, EC4A 1NL

Monday, 6 September 2021

Before:

HER HONOUR JUDGE SARAH WATSON

B E T W E E N :

CHANGING CLIMATES LIMITED

Claimant

- and -

WARMAWAY LIMITED

Defendant

MS K GOUGH (of Counsel) appeared on behalf of the Claimant.

MR J WARD (of Counsel) appeared on behalf of the Defendant.

J U D G M E N T
(Via Microsoft TEAMS)

(Transcript prepared without the aid of documentation)

JUDGE WATSON:

THE APPLICATION

- 1 This is an application for summary judgment by the claimant, Changing Climates Limited, against Warmaway Limited, to enforce the decision of the adjudicator of 17 June 2021 in which he ordered the defendant to pay the claimant the sum of £223,328.20, excluding VAT, and his fees and expenses of £7,764.50 excluding VAT. The defendant issued separate Part 8 proceedings which were not listed to be heard with the summary judgment application. Some of the issues are replicated in the two sets of proceedings and some of the Part 8 claim will effectively be disposed of as a result of the application in these proceedings. In the Part 8 proceedings, the defendant seeks a declaration that the adjudicator had no jurisdiction and also seeks a final determination on the merits.
- 2 The background to this dispute is that, in 2018, a company called Broadley Limited, which I shall refer to as “Broadley”, put out to tender to subcontractors various elements of a contract in which it was the main contractor. The claimant and the defendant, together with a third party, Dynamic Networks Limited, whom I shall refer to as “Dynamic”, decided to put in a joint bid for the heating, ventilation and air conditioning (or HVAC), the plumbing and the electrical work respectively. Each of them had worked with Broadley in the past and the defendant and Dynamic had worked together in the past. The claimant had not worked with or for either the defendant or Dynamic.
- 3 After discussing with Broadley whether a joint bid would be likely to be attractive, they agreed to submit a bid for the entire M&E works, which included each of the three companies’ quotations for the share of the work they proposed to undertake. When Broadley accepted the bid, it issued an order to the defendant for the whole of the work. After some discussion, the payment process that the parties adopted involved:
 - the claimant sending its applications to the defendant,
 - the defendant submitting the applications to Broadley with its own application,
 - the defendant issuing certificates for payment to the claimant,
 - the claimant invoicing the defendant for the elements of the work approved,
 - Broadley paying the defendant for all of the work, including that completed by the claimant and Dynamic, and
 - the defendant making payment to the claimant from its bank account to the defendant’s.
- 4 Towards the end of the project, Broadley went into liquidation owing money on the project. There was an outstanding invoice from the claimant to the defendant of £223,338.20, plus VAT. Some time later, the claimant referred the dispute resulting from the defendant’s

failure to pay to adjudication. The adjudicator was Mr Roy Pickavance. The defendant disputed jurisdiction in the adjudication on the ground there was no construction contract because there was no contract at all between the claimant and the defendant. The adjudicator made the non-binding decision that there was a construction contract between the parties and he had jurisdiction and directed the defendant to pay the outstanding invoice. The defendant has not paid the adjudicator's award and continues to dispute jurisdiction in these proceedings and in the Part 8 claim.

5 The issues for determination today are:

- whether there is a construction contract under the Housing Grants, Construction and Regeneration Act 1996 ("the Act") i.e. whether there is a contract at all (there being no argument that, if there is a contract, it is not a construction contract);
- whether there is an estoppel by convention that prevents the claimant from relying on any contract that otherwise might exist; and
- whether there was a breach of natural justice because the adjudicator failed to apply the correct legal test, and instead accepted the claimant's submission that effectively reversed the burden of proof that was on the claimant.

6 I should mention also that the defendant argues that the adjudicator failed to take sufficient account of its argument as to the validity of the claimant's payment application and that it would be unjust to enforce the award before all the issues can be considered by the court. There was insufficient time in the hearing, which was listed for two hours, for this to be explored in any detail. In any event, in the absence of any evidence that the enforcement would lead to manifest injustice so as to justify a stay on enforcement and in the absence of any application for a stay on enforcement, it is trite law that, even if wrong, the adjudicator's decision should be enforced. Therefore, the issue of the validity of the payment application is not a live issue for today. The issues for today are those that I have identified.

7 This is a summary judgment application. It is not a trial. The test is whether there is a real prospect of success. Briefly, that means real, as opposed to fanciful. The defence must carry some degree of conviction. The court must not conduct a mini-trial. It takes into account the evidence before it and also takes into account evidence that can reasonably be expected to be available at trial, even if it is not available at the summary judgment hearing. The court should hesitate to make a final decision without a trial but, if the court has what it needs to decide that a defence has no real prospect of success, it should grasp the nettle and give summary judgment.

CONSTRUCTION CONTRACT

8 The first issue is whether there is a contract. This is by far the most significant issue and the one that has taken up the time in this hearing. The law is not contentious. Adjudicators' decisions are to be enforced, even if they are wrong, subject to a few narrow exceptions. The exception relied on by the defendant in this case is that the adjudicator lacked jurisdiction. The parties are agreed that the defendant reserved its position in the adjudication and the adjudicator made a non-binding decision as to his jurisdiction and that

it is open to the defendant to challenge jurisdiction in these proceedings. Its participation in the adjudication was without prejudice to the issue of jurisdiction.

- 9 The adjudication provisions of the Act apply to construction contracts. There must be a contract between the parties. The parties are agreed that, if there was a contract in this case, it was a construction contract. The issue is whether there was a contract at all.
- 10 The defendant's position is that there was no contract because the parties intended to and/or did form a consortium, that intention continued even after the contract with Broadley was made and the defendant entered into the contract with Broadley as the claimant's agent in respect of the work for which the claimant had tendered. It argues that any contract the claimant entered into was with Broadley, through the defendant, as the claimant's agent and that the claimant and the defendant did not contract with each other. It argues that the payment process the parties adopted was purely administrative.
- 11 The claimant's position is that, whatever the parties had originally intended, when the contracts were in fact made, Broadley entered into a contract with the defendant and the defendant entered into a sub-contract with the claimant. (In fact, Broadley was the main contractor, so the defendant was its sub-contractor and the claimant would be the defendant's sub-sub-contractor, though it is convenient, for the sake of simplicity, to refer in this judgment to Broadley as the employer.) The claimant's position is that, when the parties actually contracted, they did so on the traditional basis of contractor and sub-contractor.
- 12 A substantial amount of contemporaneous documentary evidence was included in the bundle and I have a number of witness statements. The documentary evidence makes clear, as is not really contentious, that the parties tendered jointly for the Broadley contract, that Broadley understood that the tender was joint and that the parties and Dynamic intended to form a consortium for that purpose. Where the parties disagree is whether, after the tender was submitted, a contract was formed between Broadley and the defendant for the entire work and a subcontract was formed between the claimant and defendant, or whether an agency arrangement came into being.
- 13 I remind myself when considering the evidence that this is not a trial. It is a summary judgment application and I must take into account evidence that is available and also evidence that might not be before me today but might be available at trial. I must decide whether there is a real prospect of the defendant defending the claim successfully. Only if I am satisfied that there is no real prospect should I give judgment for the claimant.
- 14 I am going to go through the contemporaneous documentation in some detail because it is unavoidable if I am to consider the evidence properly. In mid-June 2018, the defendant, having received an invitation from Broadley to submit a tender, wrote to Broadley saying:

“Thank you for the invitation to tender for the full M&E works. The consortium tender has been put together in partnership with Changing Climates and Dynamic Networks. It is to be read in conjunction with the attached quotation, both from Dynamic and Changing Climates, a combined tender for the full M&E package.”

It is clear that, at the outset, the defendant made clear to Broadley that it was a joint tender from three companies.

- 15 On the same date, Mr Redgwick of the defendant sent to Mr Baird of Dynamic and to various others a copy of the figures sent to Broadley and said:

“I will put together a package to present at the meeting on Tuesday. I will require all costs as sent to Broadleys as soon as you can please.

We intend producing a family tree showing exactly who is doing what and as much detail as you can would be appreciated.....

As agreed Scott [of the Defendant] will be the lead person at Tuesday’s meeting.

On the basis that the three no. individual quotes were sent with very little time to prepare..... following the consortium meeting last Friday it was evident that some of the works had been overlapped, hence the need to produce a “plan of works” to show who is responsible for what, this allows us to use the documents sent by Chris to correct what was duplicated or missed on our initial quotations without implicating Chris.”

It is clear, therefore, that the defendant proposed to put together a revised tender for checking for omissions and duplication between the individual quotations so that the joint tender was complete.

- 16 On 26 June 2018, the defendant sent an email to various people, including Mr Naylor, of Broadley, saying, “Please find attached the consortium tender.”

- 17 On 6 July 2018, the defendant emailed Broadley, copied to various others, saying:

“On behalf of the consortium, I confirm we will lose the £40,000, as suggested earlier today.

The email then detailed how the £40,000 saving would be allocated between the three companies. It is clear at that stage that the defendant was discussing the tender with Broadley on behalf of all three companies. It is unclear exactly how any contracts would be made.

- 18 On 6 July 2018, the defendants sent to Broadley the revised tender:

“Thank you for the invitation to tender for the full M&E works. The consortium tender has been put together in partnership with “Changing Climates” and “Dynamic Networks”.”

The tender showed the various elements of the work, with inverted commas around “Warmaway”, “Dynamic”, etc, to show which elements of the work were to be carried out

by which entity. It also showed the total costs of £1,610,292.57. I assume it attached the quotations from the three individual companies, although that is not entirely clear from the bundle. The defendant made clear to Broadley that the tender had been put together “in partnership” with the other two companies, whatever that meant. It did not say whether they had formed any legal entity or what would be the legal structure, but simply that the tender had been put together “in partnership”.

- 19 On 9 July 2018, Mr Naylor, who was the quantity surveyor at Broadley who seems to have been responsible for the details of the payment application and the contractual arrangements, sent an email to the defendant:

“Further to our recent telephone discussions and your email quote for the complete manufacture, supply, delivery and installation of the complete plumbing, electrical, mechanical and associated works, we confirm acceptance of the rates within your quotation in the sum of £1,610,292.57. Your terms and conditions will be acknowledged but where these conflict with TBG’s T&Cs and/or that of the main JCT contract, then these will take precedence over Warmaway Limited’s t’s and c’s.

Please find attached your formal order documents for review.”

The letter then listed the various documents that are included as order documents.

- 20 It enclosed a document headed “sub-contract order front sheet”. The order was issued only to the defendant. It stated:

“Please carry out the design, supply and installation of mechanical, electrical and plumbing works in accordance with the documents listed below for the sum of £1,610,292.57 plus VAT.”

The documents listed include Broadley’s terms and conditions of subcontract. There were some pre-order minutes, the main contract, schedules of drawings, etc., Broadley’s enquiry, the subcontractor’s quotation (and I note that that is expressed in the singular) and draft warranties for review. The breakdown shows the individual figures against the individual companies who are to execute the various parts of that work that make up the £1,610,292.57.

- 21 It seems clear to me from that document that Broadley’s order was addressed only to the defendant. It was for a global sum for the entire M&E package. Broadley was, on the face of that document, seeking to appoint one subcontractor for the whole of the works. Broadley did not issue three orders to the three separate parties. It issued one order.
- 22 I do not know on what date, but I assume it was a little time later, the order was executed by the defendant as a deed. It was signed by two directors of the defendant. There is nothing about their execution of the deed to indicate they were doing so on behalf of any other party or as agent. They simply executed it in the name of the defendant company.

23 On 9 July 2018, the defendant sent to the claimant and to Dynamic a copy of the official order:

“Please see attached the official order. This order has come through in the name of Warmaway but we will discuss the payments and applications at the meeting, as suggested by Phil and Chris, one order 3 payments.

It has been a struggle to get there but we are there. Now we need to make it work.”

It is clear that the defendant was notifying the other parties that the order had come through to it and that they were going to explore the possibility of “one order, three payments”. It is not clear what is meant by that. I would only comment at this juncture that it is not immediately clear to me that the expression, “one order, three payments” equates to three contracts. It rather reads to me as one contract but possibly the payment arrangements being separate, with three separate payments. It is a moot point as to what would have been the legal effect of what the defendant sought, because in fact it did not happen,

24 On 9 July 2018, in response to that email, Mr Baird of Dynamic responded:

“John, could I ask that you issue us with an order for our respective parts, please, just to keep things in order?”

25 There was a prompt response to that. On the same day, the defendant sent to Dynamic and to the claimant:

“As per James’ email, yes, we need to issue a formal order to both Changing Climates and Dynamic. I will draw up an order form and send across to you both. Could you please both send me your amended quotations as per the order please?”

26 Mr Keyl for the claimant responded:

“Good news, everyone. I am away all next week so will sort out next week.”

27 I pause here to note that this is the date on which the claimants allege in the particulars of claim the contract was formed between the claimant and the defendant. From the documents, that would appear to be right. The defendant had stated that the Broadley order was with them, that it would need to issue orders to the claimant and to Dynamic and that it needed amended quotes to be able to do so. The claimant had confirmed its agreement to that in response, by saying, “Good news, everyone,” and, “will sort next week,” presumably meaning, “I will sort out sending the amended quotation next week.”

28 On 3 October 2018, there was an email from the defendant to Mr Campbell of Broadley:

“There seems to be some confusion re applications and payments which I hope you can clarify for me.

We, Warmaway, have received the official order but during the last meeting, which I was not present, it was said that you had no objection to receiving three separate payment applications and Broadleys making three separate payments, although Phil [I assume that means Phil Naylor, who is the QS to whom I referred earlier at Broadley] initially said one application, one payment.

We do not want to appear as if we are going behind Phil's back, but from our point of view, we would prefer three separate payments until the legalities are finalised with the set up of the consortium, and then of course one application and one payment will be better for all.

Can you confirm if it can be three separate payments?"

29 I note that the defendant, in that email, acknowledged there that the consortium had not been set up and that setting up the consortium might make a difference to the payment process. It envisages some structure being set up. Although not wanting to go behind Phil's (ie Broadley's Quantity Surveyor's) back, there is clearly a direct relationship with Mr Campbell and a request to him that payments be separated out whilst the order is still from Broadley to the defendant.

30 On 3 October 2018 Mr Campbell responded:

"I have no issue with the initial claims to be forwarded as individual until we fully understand the legals. I'll send an email to the team to explain so it looks like it's come from me."

From this, it appears that, at that time, Mr Campbell was open to there being separate payments and thought that, if he presented this to the team, presumably to Mr Naylor, that might assist.

31 The defendant forwarded that email to the claimant and Dynamic with the following comment:

"I trust this now finally clears up the issue regarding applications and payments.

We (Warmaway) will invoice monthly for the non-working site foreman and, on this project, take on the Martin designs payments. Although it does implicate us with the five per cent retention on the £35,500 fee, albeit with no mark-up.

Moving forwards, the design costs in future will be part of our total application from this group."

Clearly, at that stage, the defendant was hoping and anticipating that payments would be made directly and that they would be invoicing monthly for certain elements of the work for which they were taking responsibility.

32 On 15 October, the defendant sent an email to the claimant and to Dynamic:

“As Ian has agreed, initially, to make three separate payments for the early part of the project, we really do need to get ourselves sorted.

In the meantime, can I suggest we all make our own applications, all in the same format (attached) and copy me in, as it is Warmaway who has the order.

If we can all make the applications on the 22nd of the month and forecast to the end of the month as usual. This way helps me keep things in order with the contract order.”

33 Although three payments were being proposed at this stage and it appears that the defendant was optimistic that that would be agreed, it acknowledged that the order was with the defendant and that it needed to keep things in order with the contract. As I have remarked earlier, it is far from clear to me, if the payment applications had in fact been separated out in the way that the defendant hoped, what the defendant’s position would have been, and whether that would mean (as the defendant contends) that would be no contract between the claimant and the defendant. As I have already remarked, the separating out of the payments so that payments would be direct does not create an order between the other parties. In any event, it is a moot point.

34 On 16 October 2018, Mr Redgwick for the defendant emailed the claimant and Dynamic:

“Reference Consortium setup:

I realise I keep banging on about this but we need to get it sorted.

1st question is: are we still up for it? Warmaway are.

Obviously, issues need clearing, 1st regarding shareholders’ agreement, tax issues, insurances, administration, etc.

We all have businesses to run independently, as well as setting up the consortium also.

Can I suggest we make a plan of action.

Shareholders’ agreement: we need to identify what we all need from the SA, then agree which solicitor we use, then set up a meeting with them.

In the meantime, we need our own accountants, who we all pay for advice, and attend a meeting, either together or independently to discuss tax, accountancy and administration issues. Following that, we agree which way/ how to move forward.

As it doesn't seem we are moving forwards.

Before we know where we are Christmas will be upon us. I would like to think that by the new year we are sorted. We don't want too many projects going ahead without being sorted.

Can we arrange the next meeting to discuss individual needs....?"

35 It is clear that, even after the contract has been placed by Broadley, it was not an absolute certainty that the parties would set up a "consortium" (at least, not one with any separate legal structure). The defendant was asking whether the other parties are "still up for it", and whether they were willing to enter into a consortium. It is clear that, at that stage at least, the defendant envisaged that establishing a consortium would involve setting up a company and there would be a need for a shareholders' agreement. Presumably, the company would be co-owned by the respective parties. At this stage, they have not agreed what they need from the shareholders' agreement. They would need to consider insurance, tax and the administrative arrangements. The defendant did not want "too many projects going ahead without this being sorted", from which it is clear that the parties had in mind establishing a consortium in the form of a company for future projects.

36 In response to that, Mr Keyl of the claimant responded:

"I am still all for it. I thought we had chosen a name and that James [who I assume is Mr Baird of Dynamic] was setting things up."

37 Mr Baird responded on the same day:

"Lots to bottom out but I'm still up for it too."

38 It is clear that the parties were willing to consider setting up a consortium for future projects, that they needed to discuss the terms and the details and then do it.

39 Shortly after that dialogue, on 22 October, there was an email from the defendant to the other parties:

"As the official order has been given to Warmaway, we technically need to send out orders to each of you."

40 It is clear that, even after the parties had reinforced their intention to set up some sort of consortium in the future, if they could agree terms, the defendant was acknowledging shortly thereafter the need for an order to be placed by the defendant to the claimant. In that email, Mr Redgwick for the defendant raised a discrepancy of about £8,000 in the figures and said,

"I cannot give an order until this amount is cleared up."

He continued:

“Phil has agreed to meet me to discuss this and the application procedure. Phil said he wasn’t aware of three separate applications and three separate payments but after explaining Ian had agreed this, he knows now. What I’ve initially agreed with Phil is that Warmaway are the lead on this job and take responsibility for the job. Broadleys will retain all retentions until due.”

- 41 From this, it seems clear to me that, even at the time the parties were still discussing the need to set up a joint venture or a consortium structure for future contracts, the defendant was acknowledging the need to issue an order to the claimant and to Dynamic and that the defendant had agreed with Broadley that it will be the lead on the job and take responsibility for the job. It is not clear to me what that could mean other than that it was going to be legally responsible, i.e. the main contractor. The email went on to say that the claimant and Dynamic were to complete a spreadsheet:

“Warmaway will forward all three applications to Broadleys and Warmaway’s application will contain a tab showing the running total for the whole project. Each time I submit an application to Broadleys, will copy in each of you to be perfectly transparent.”

I pause there to note I do not think that Broadleys did actually copy in the claimant or Dynamic.

“Broadleys will send payment certificates to each of us as well as Warmaway and you will then send invoices to Warmaway who will forward to Broadleys for payment. Payment will be made direct to your accounts.”

- 42 Therefore, whilst it is unclear exactly what that meant, it does appear that it was envisaged that Broadley would still be making the payments through the defendant, though I think there is some ambiguity in the interpretation of that email. However, at this stage, it is clear that the defendant was still hoping that Broadley would be persuaded to make three separate payments. It is clear, however, that that did not happen and Broadley did not agree to do that. I assume that Mr Naylor decided that he was not prepared to have an arrangement where there was one order and three payments.

- 43 On 21 November 2018, the defendant sent to the claimant an application template, saying:

“I have created an application template for you to complete and send through to us for payment each month.”

- 44 On 22 November, the defendant sent to Broadley application number 2, enclosing the consortium application, as he described it, and three separate detailed applications. It is clear that the breakdown of the three separate applications from the three entities was sent to Broadley.

- 45 On 13 December there was an email from the defendant to Broadley, saying:

“Application number 2: please find attached the communal application for Roomz, York, plus the individual ones for Warmaway and Dynamic. On this application, Changing Climates are not claiming anything.”

It seems that the process was for one application for payment being made and the individual figures and applications behind that forming part of it.

46 On 6 January 2019, there was an email from the defendant to the claimant and Dynamic headed, “Payment meeting”:

“As promised, Broadley transferred the full payment last night with your payments going out this morning.”

It appears that the defendant had attended a meeting with Broadley, that they had agreed to make payment that Broadley had paid the defendant in full and that the defendant was about to pay the claimant.

47 On 16 January 2019, there was an email from the claimant to the defendant in the following terms:

“Thank you. You will need an invoice from us, I don’t recall doing one??”

48 The defendant responded:

“Yes, we will need an invoice. Lynne mentioned it yesterday. Can you send that ASAP?”

49 The parties were clearly agreed at that point that there was a need for the defendant to receive an invoice from the claimant so the defendant could pay the claimant.

50 On 16 January 2019, the claimant sent to the defendant its first application for payment, or an invoice for the first application.

51 On 17 January 2019, there was an email from the defendant to the claimant, asking for the invoice “ASAP”, so it could be forwarded. I can only assume actually that invoice dated the 16th January 2019 had not been received at that particular point in time and was presumably sent just after this email was sent.

52 On 11 February 2019, the defendant sent to the claimant an email headed, “Warmaway payments certificate”:

“Please see attached payment certificates 1 and 2. Please provide me with an invoice to match certificate 2. Certificate 1 has already been paid previously. This is for information only.”

Attached was certificate number 1, headed, “Warmaway Limited subcontract interim certificate,” and under the subcontract name it states, “Changing Climates.” This document

appears to be a traditional, straightforward interim payment certificate from Warmaway to the claimant, Changing Climates, certifying the payment due from it.

53 On 2 February 2019, the claimant sent an invoice for payment number 2. It was addressed to the defendant. It is a VAT invoice. There was some discussion at the hearing as to whether there are any implications either way as a result of this being a VAT invoice and it was concluded that neither counsel nor I had sufficient knowledge of VAT to know whether there were any implications, so I am making no assumptions as to the effect of it being a VAT invoice addressed to the defendant, only that the invoice is addressed to the defendant.

54 I just pause to note that, whilst it relates to another party (Dynamic) on 31 May 2019, Broadley issued a pay less notice. The principal reason for the issue of that pay less notice seems to have been an issue with Dynamic's work. Although there is no reason that the contractual relationship between Dynamic and the defendant had to be identical to that between and the claimant and the defendant, it is noteworthy that pay less notices were issued to the defendant in respect of issues with Dynamic's work. In fact, all pay less notices in this contract issued by Broadley, as far as I am aware, were issued to the defendant.

55 On 19 September 2019, there was an email from the defendant to the claimant in relation to one of the claimant's payment applications, saying that:

"Scott tells me that the variation reduction and some variation additions have been sorted with Chris Walker, but as we are heading up Roomz York, we need authorisation from Broadleys in writing. Hence when you return your application showing all details, we will submit, asking for approval and authorisation."

It is clear from this that the defendant was making clear to the claimant that it must deal with requests for authorisation for variations on the claimant's work through the defendant because they were, as they put it, heading up the project.

56 On 26 November 2019, the claimant sent the defendant an invoice for £223,328.20, which is the subject of this adjudication, addressed to the defendant.

57 I believe that deals with that the chronological correspondence, other than to remark that there are some further documents. There are various bank statements showing that the payments were always made from the defendant's bank account to the claimant's bank account, so the payments were clearly made by the defendant to the claimant.

58 There are various applications for payment to Broadley which were submitted by "Warmaway Limited (Consortium)". Of course, there is and was no separate consortium vehicle. Warmaway Limited is the defendant. There is no other entity called Warmaway Ltd (Consortium).

59 Broadley's interim's certificates named the subcontractor as Warmaway. They did not name the other defendants as subcontractors. Broadley's pay less notices were addressed to Warmaway.

- 60 Before I move on to the witness evidence, drawing together that documentation, it is clear that the defendant had noted that the order had been issued to it and that it needed to issue orders to the claimant and to Dynamic, that the parties then discussed whether they are still willing to enter into a consortium, which would involve setting up a company, shareholders' agreement, tax, insurance, and administrative arrangements, etc. The parties agreed that they were still interested in a consortium in relation to future projects, but it is clear that that was for some time in the future, and that the parties needed to meet and agree terms. It is also clear that, shortly after that, the defendant reconfirmed that it needed to issue orders to the claimant and to Dynamic, and it confirmed to the claimant and to Dynamic that it had agreed with Broadley to take responsibility for the contract. The parties had explored the possibility of "one order, three payments" but that did not in fact come about. The defendant made clear in correspondence that variations had to be dealt with through it, to keep matters in order. The payment process was entirely consistent with the existence of a contract between the defendant and the claimant, with payment certificates being addressed by the defendant to the claimant, the claimant issuing invoices to the defendant and the defendant paying those invoices from its own bank account. There is no documentary evidence referring to, or otherwise pointing to, agency, as the defendant's contend.
- 61 I turn now to the witness evidence, because of course I must take into account the fact that, at trial, there would be witness evidence. I have witness statements from the solicitors for both parties and from Mr Keyl, who is a director of the claimant. In addition to the witness statement from Mr Brackup, who is the solicitor for the defendant, I have various witness statements which he annexes to his witness statement, which were witness statements in the adjudication. They include witness statements from Mr Redgwick, who is a director of the defendant, from Mr Baird, who was a director of Dynamic, and Mr Campbell, who was, I think, a director, but in any event was clearly a key player, at Broadley.
- 62 Dealing with the claimant's evidence first, Mr Keyl gave evidence that the parties had met and discussed forming a separate company, which they referred to as the consortium, that there were no detailed discussions about it other than its name. He confirmed that the idea of setting up a consortium or joint venture was discussed into 2019. His evidence was that it was not in fact ever formed and the three companies remained separate entities and that they carried out the works as contractor and subcontractor, as between the claimant and the defendant.
- 63 Turning to the Defendant's evidence, Mr Brackup gave evidence that he was instructed by Mr Redgwick that the involvement with the project was not a typical contractor/subcontractor basis. Instead, Warmaway and CCL formed part of what they called the consortium, a joint venture, also including Dynamic, which jointly tendered for all the relevant work package. There was no construction contract between Warmaway and CCL, whether for the purposes of the Act or indeed more generally. There was no process of offer and acceptance. There was simply no contract.
- 64 Warmaway maintains that the relationship which existed was an informal and practical relationship whereby Warmaway and CCL would cooperate to win and then perform the subcontract with Broadley and the relationship did not mean that Warmaway had engaged CCL to carry out construction works. Had that been the nature of the relationship, Warmaway would have demanded a mark-up on CCL's works to reflect the additional risks it was taking. Mr Brackup went on to describe the tender process and argues that the parties

did not intend to create legal relations but intended instead jointly to tender for the contract with Broadley.

65 As I understand his evidence, based on his instructions from Mr Redgwick, it is that the parties had formed part of a consortium or did form part of a consortium at the time the tender was submitted, although the evidence is extremely vague as to what that means, in terms of what the consortium was or how it would operate. The evidence focuses rather on the negative, what was not agreed, than what was agreed, although of course I am mindful of the fact that it is for the claimants to prove their case and not the other way round.

66 Mr Redgwick did not give evidence in these proceedings but did give a witness statement for the adjudication, which is in the bundle. In that he said:

“CCL, the company [by which he means the claimant company] and another company called Dynamic entered into an informal and flexible arrangement to tender for the Broadleys project. In practice, this translated as none of the consortium companies charging any of the usual subcontract commission and fee and onsite management costs being built into the tender process. Each of the companies in the consortium agreed to tender on this basis. The loose arrangements between us was that one of the companies would take the lead for each of the projects.”

67 He referred then to a meeting following an email of 12 June 2018:

“The result of that meeting was the formation of what we called the consortium, comprising Dynamic, CCL and the company. We produced a combined tender incorporating the three separate tenders of the constituent companies. We would work as a consortium under a consolidated name, namely that of the company. The company would administer the contract with Broadley on behalf of all three companies. There was never any formal or suggested or implied arrangement of a legal nature.”

His evidence appears to be that the consortium was formed, that it submitted the tender and that the parties agreed they would work as a consortium and that they simply did not enter into a contract, and there was never any suggested or implied arrangement of a legal nature that went beyond this and indeed that was established at the outset.

68 He explained the correspondence about the need for orders from the defendant. I should have mentioned earlier that, although there was discussion about orders, the defendant never in fact issued an order to the claimant. What happened was the parties continued with the project and entered into the payment arrangements that I have already discussed and outlined. Although the need for an order was acknowledged in correspondence, the defendant never actually issued a formal order to the defendants. However, in paragraph 22 of his witness statement, Mr Redgwick sought to explain the correspondence about the need to issue an order and the documentation in relation to payments. He said:

“In order to ensure that there was a correct paper trail and that all members of the consortium could trace payments, orders and so on, it was necessary for the lead company to provide appropriate documentation and in this case

that was left to the company to provide individual orders and I confirmed to all the people within the consortium that the company would draw up order forms to send across.

The issue of the order was a purely internal mechanism in order to provide an appropriate paper trail. The issue of the orders was not the creation of a legally binding contractual relationship between the members of the consortium.”

69 It appears that Mr Redgwick, at the point he prepared this witness statement seems to have been under the impression that a formal order probably had been given. He continues:

“By October 2018 and having had some initial success particularly with the Broadley Roomz contract the three companies comprising of the consortium had various discussions with a view to meeting and setting up the consortium as an independent company.Although that was never independently formed of the consortium, it does emphasise in my view the fact that we were working together without creating legal obligations to one another and that a more formalised approach so that the relationship between us on joint projects would be dealt with through the medium of a new limited company subject to various additional issues, such as shareholders’ agreement and the like.

.... the company were acting really as a distributor or post box for the other companies, effectively on the basis that the money would come into the company and the company would then disseminate it with each individual company creating their own paper trail. We did request that three separate payment applications be made and each constituent company paid separately until such time as we had formalised our own internal arrangements but Broadley subsequently indicate that only one payment could be made, hence the paper trail arrangements to which I have referred. In short, we assisted the constituent companies within the consortium. We did not create and never intended to create legally binding obligations to make a payment. That was never agreed, other than to pass on in accordance with the payment applications any money received from Broadley, which we did.”

70 As discussed in the hearing, the issue before me is not what were the terms of any agreement between the parties were but whether there was any agreement at all between the parties. There is, it seems to me, a difference between not intending to create an obligation to pay in circumstances where you are not paid and not creating a contract at all. Mr Redgwick’s statement that they did not intend to create an obligation to make payments other than to pass on monies received is not quite the same as there being no contract at all between the claimant and the defendant.

71 It is not entirely clear what the defendant’s position is as to what form the consortium took, or was to take, in relation to the contract with Broadley. It appears to be that the parties did form a consortium, at least according to Mr Brackup’s evidence, but that the parties were discussing setting up a separate company in the future, which would be a consortium. Mr Redgwick did not say in his evidence that the parties ever expressly agreed that the

defendant would act as the claimant's agent. He asserted it was the intention of the parties, and that there was no intention to create an obligation to pay. He asserted that it was the intention of the parties with regard to drawing up orders that there was an internal paper trail. He refers to a "correct" paper trail. He confirmed that he would draw up order forms to send across an "appropriate" paper trail, and it was necessary for the lead company to provide "appropriate" document. I pause there to note the wording there. He refers to a "correct" paper trail, "appropriate" documentation, and an "appropriate paper trail." That language is consistent with the parties understanding, and the defendant understanding, that the paperwork was correct and appropriate. That means that they reflect the legal reality. It does not seem to me that they reflect something that is not legally correct.

- 72 Mr Baird of Dynamic also gave evidence in the adjudication. He made clear he had not seen the papers in the adjudication and that his view was that it was not correct that there was a legally binding subcontract between the defendant and the claimant. He stated that various projects under the consortium banner were undertaken with Broadley. He said that, on some of the jobs, applications for payment were processed individually, and on other jobs they were processed collectively. In relation to the project for Roomz in York:

"WW were nominated to receive the application monies and then distribute in accordance with the direct and individual applications we all made. On occasions payments were split on other projects and quotes went in on our own letterhead and Broadley would process quotations and payments separately. It just so happens that on the Roomz project it was a single payment after there had been some discussion as to whether or not three separate payments could be processed, which at first Broadley agreed to and subsequently decided to act otherwise. Broadley's philosophy was to see the consortium as three separate businesses but process matters administratively as if they were one."

- 73 I note that his evidence did not deal with the fact that there was only one contract with Broadley, which was between Broadley and the defendant. He did not say that he understood that the defendant was the claimant's agent. He said it just so happened on this project there was a single payment. He said that, on other occasions, Broadley contracted with the parties individually. That does not mean that, when Broadley was not prepared to do so and contracted only with one party, they contracted on the same basis as they did on other contracts. It would seem to me to indicate the opposite - that Broadley considered how it wished to contract in each case and, in this case, it contracted only with one of the entities, not all three.
- 74 Importantly, his evidence did not explain why he himself asked the defendant for an order, when the defendant confirmed that Broadley had issued the contract only to the defendant.
- 75 There is a further witness statement from Mr Campbell, formerly of Broadley. He made clear that he did not have the benefit of access to any of Broadley's documents. Broadley was in liquidation and presumably the documents were with the liquidator. He made clear that he was not privy to the internal arrangements between the three companies. He said that he recalled the discussion about whether or not the companies would need to submit single applications on a monthly basis and, so far as he was concerned, there was no difficulty with doing so, but that he discussed it with Phil Naylor. Unfortunately, some of

his evidence is not clear because part at the top of the page of the copy in the bundle is so faint that it is impossible to read and neither counsel nor I could read it. He stated that:

“That is not to say each individual company could not submit an application but Phil wanted three separate applications and a cumulative front sheet which was the primary application. Dynamic, CCL and Warmaway were successful with their tender and the company were advised about Phil’s preference for processing payment which led to my being advised that Warmaway would be the lead contractor for these purposes.”

- 76 He did not say that Broadley considered it contracted with any of the companies other than the defendant, or that he understood there was an agency arrangement. He made clear that he could not speak to the relationship between the parties and that the payment had to be a single payment and that, as a result, he understood that the defendant would be the lead contractor. He also stated that the front sheet was the primary application, which I take to mean it was the document which they would treat as the application for payment and that it was up to the parties how they divided things up between them. His witness statement does not appear to me really to support the defendant’s case.
- 77 Therefore, on a close analysis of the witness evidence of the defendant, and obviously before any cross-examination, which is not likely to improve the defendant’s case, none of the witnesses actually said there was any agreement between Broadley and the claimant. None of them give any evidence there was any express agreement that the defendant was to act as agent for the claimant or that there was any discussion of agency, or why there would be a natural inference from the correspondence which in any way contradicted what the correspondence appears to show. Nor do they explain why the defendant twice confirmed it needed to place an order with the claimant because Broadley had placed the order with it, if the arrangement was that of agency. The evidence instead suggests that, because the parties had bid jointly as a “consortium” or with a view to setting up a consortium vehicle (and it still is not clear exactly which of those is the defendant’s position, though I am assuming that it must be that it had already formed some sort of consortium), when it became clear that Broadley would only contract with the defendant, there was a need for an order between the claimant and the defendant. Whilst it is stated that was only to provide a paper trail, the defendant’s own evidence is that it was an “appropriate” paper trail, or “correct”. It does not explain why the court would be likely to conclude that the “paper trail” did not reflect the true legal analysis.
- 78 An important question is what the word “consortium” means in this context. The defendant’s case is that, because the parties were acting as a “consortium”, there was no intention to create legal relations between the parties and no contract was formed. That was discussed at some length in the hearing because I asked the question as to what the defendant actually meant by “consortium”- whether it meant a separate legal entity or whether it meant something else. As was discussed during the hearing, it is my understanding that it is common for parties to put in joint bids, particularly in the public sector. Sometimes those bids make clear the legal basis on which the relevant parties will contract if they are successful and sometimes they do not, and it is left until the tender has been accepted in principle for the parties to discuss exactly what the legal framework will be for the joint bid to be put into contractual form. It is my understanding that there several ways in which this is commonly done.

- 79 The first seems to be the method or the model that the parties had in mind, at least for future contracts. It is that they contract through a special purpose vehicle owned by the parties, such as a company, an LLP, a partnership or something of that nature, i.e. a legal entity which has the ability to enter into contracts so that the contract will exist between the employer and that special purpose vehicle. The contractual relationship between the members of the consortium would be in the form of partnership agreements, shareholders' agreements and possibly other agreements.
- 80 The second method is that each bidder or member of a joint bid enters into a contract separately with the employer. Therefore, the members do not contract with each other directly in relation to the contract for the work. This, according to Mr Baird's witness statement provided for the purpose of the adjudication, appears to be what happened with Broadley on other contracts.
- 81 The third method is that one of the parties takes the lead and enters into a main contract with the employer and then enters into subcontracts with the other parties, so the contractual arrangements are the traditional arrangements with a main contract between the employer and the lead contractor or main contractor and subcontracts between the lead contractor or main contractor and the other members of the consortium.
- 82 As I understand it, simply put, the claimant's case is that the parties entered into the last of these arrangements, i.e. a straightforward contractual relationship, and the defendant's position is that it entered into the second of those, which is the arrangement where the parties enter into contracts directly with the employer. The defendant's case seems to be that there must be some logical inconsistency between the existence of a "consortium" and a traditional contractual arrangement. As I explored with counsel in the hearing, I simply do not see that logical inconsistency. I see no reason why the parties cannot bid as a "consortium", if that means a group of parties who are jointly bidding to win work on the basis that, if successful, they will enter into a main contractor/subcontractor arrangement in the traditional way with one of the members being the main contractor and others being subcontractors.
- 83 It is clear that the parties envisaged setting up joint venture vehicle of some kind such as a company, in due course. However, it is not clear what the parties had in mind when they put in the bid before they had set up that entity. It may have been hoped that an order would be placed with the three separate companies. It appears that the parties were probably open-minded at the point the tender was submitted as to how the parties and Broadley would contract. What is clear is that, once the order came through from Broadley, all parties understood that Broadley had awarded the contract only to the defendant, and the order makes that absolutely clear. There is one addressee - the defendant. There is a figure for the entire value for the work. The order sets out the terms and conditions, including the defendant's terms and conditions. It makes no reference to the claimant's terms. Only the defendant executed the contract, which it executed as a deed. It did not purport to do so on behalf of the claimant.
- 84 No steps were taken by the defendant to seek to limit its contractual obligation with Broadley. I say no steps were taken. That is probably not the correct way of putting it, because there was clearly some discussion about the payment process and an attempt to ensure that, although there was one order, there might be three payments. That attempt, as it turned out, was not successful. However, there does not appear to have been any attempt to

limit the defendant's contract to the works it was to carry out or to vary the contract so that it was split into three or to limit the defendant's liability under the contract to Broadley. It does not appear that Broadley was asked to issue contracts to the other members, as would be required if the arrangement was to be that each of them was contracting directly with Broadley. As I have already commented, the expression, "one order, three payments" does not to my mind mean three contracts.

- 85 It is clear that all parties understood that the contract was between Broadley and the defendant. Although the defendant argues that, even if it was Broadley's intention to contract only with the defendant, that does not mean it was the parties' intention, it is clear from the correspondence that all parties, i.e. the claimant, the defendant and Dynamic, understood that the contract was solely with the defendant and that had implications for the relationship between them. Dynamic's immediate response was that there would be a need for a purchase order or an order from the defendant. The defendant immediately confirmed that. In response to emails, it confirmed that it would issue orders and the claimant immediately confirmed that it would do what was needed to enable that to happen the following week. The parties then acted on that basis. They did the work. The claimant did most of the work under its contract and was paid for much of it by the defendant. During the course of the contract, when variations were discussed with Broadley, it was made clear that they needed to be routed through the defendant as the order was with the defendant.
- 86 The payment applications followed a traditional process and are entirely consistent with a contractor and subcontractor relationship between the defendant and the claimant. Applications were submitted by the claimant to the defendant. The defendant submitted payment applications to Broadley, which included the breakdown of the various work packages for the three individual companies, but there was an application for a single payment on the cover sheet. Broadley paid the defendant a single payment. Any pay less notices were issued to the defendant, even if they related to the other parties' work. Importantly, the defendant issued payment certificates to the claimant headed, "Subcontractor payment certificate", identifying the claimant as its subcontractor. The claimant raised invoices addressed to the defendant at the defendant's express request and with their agreement. The defendant paid those invoices. All payments were received by the claimant from the defendant from the defendant's bank account and there were no direct dealings between the claimant and Broadley in relation to the payment process at all.
- 87 Therefore, all the documents are entirely consistent with the existence of a contract between the claimant and the defendant. Whatever may have been envisaged between the parties before receiving Broadley's order, it is clear that Broadley contracted solely with the defendant and the parties knew that. They all knew there would therefore be a need for contracts between the defendant and the claimant and Dynamic. That was reinforced even after the parties had discussed and reinforced their intention to discuss their desire to set up a formal consortium for future works. It was repeated, "As the official order is being given to Warmaway, we technically need to send out orders to each of you." The defendant raises an argument that the use of the word "technically" somehow means that that was not what was really happening. That is not my understanding of the word "technically". To my mind, it indicates the true position legally, and that the parties acknowledged there was a need to send orders to reflect the correct legal relationships.
- 88 It is also clear that all parties understood that the defendant had agreed that it would take responsibility for the job with Broadley. As I said, I consider that means take legal

responsibility, or be the contracting party who is liable under the contract. All of that evidence is entirely consistent with the traditional contractor and subcontractor arrangement and is not consistent with the defendant's case that all parties understood that the true nature of the contract was between the claimant and Broadley through the defendant as its agent. There was no reference to agency in any of the documents and the contemporaneous documents are entirely inconsistent with the defendant's position.

- 89 I should mention some other arguments raised by the defendant, for the sake of completeness. The defendant has argued that there was a lack of consideration for any subcontract because the defendant did not apply any mark-up to the claimant's part of the works. I am aware that it is usual for a main contractor who is entering into a contract and proposing to subcontract part of it, to put a mark-up on the subcontractor's works to cover administration costs, risks, insurance costs, etc. However, the absence of a mark-up does not mean there was no consideration. Consideration can consist of mutual promises and there can be good consideration even in an unprofitable contract. In any event, it was clear in this case that there was benefit to the defendant in entering into the contract and subcontract because it enabled it to win the work that it was proposing to carry out and make a profit on its element of the work. It is obvious to me that there was consideration, the consideration being the mutual promises. The absence of a profit for the defendant on the claimant's element of the work does not mean there was no consideration.
- 90 The defendant also argues that there was no offer and acceptance. I think this is largely argued in Mr Brackup's witness statement. It seems to me that that is simply wrong. There was clearly an offer in the form of the email correspondence at the time when it was clear that the order had been issued by Broadley and it was clarified that there would be a need for purchase orders, and acceptance in the form of Mr Keyl's response that it was good news and that he would do what was necessary the following week, with all parties then acting on that basis and carrying out the work. It seems to me erroneous to say there was no offer and acceptance or intention to create legal relations or no consideration in this case.
- 91 The defendant also points to the fact that the claimant's payment applications have got Broadley's name on the top of them, not the defendant's. However, it is clear from the correspondence that the claimant was using the defendant's template which named Broadley on them and also the applications were never sent by the claimant to Broadley but were always sent to Broadley by the defendant. It does not seem to me that that name or the heading on the payment applications alters the contractual arrangements which were, in any event, formed in July of 2018.
- 92 The defendant also points to the fact there was some considerable delay between Broadley's insolvency and the claimant pursuing the claim against the defendant. It seems to me that that is not relevant to the issue of what the parties agreed at the time the contract was made. That is a question of fact and later delay does not alter the fact.
- 93 Finally, a further argument that is raised is that there was no precedent for the defendant engaging the claimant as a subcontractor and that the contract on which the claimant relies is at odds with previous arrangements where the parties were contracting with Broadley independently. This does not seem to me to be a good point. It is clear that this was the first time the parties had attempted to coordinate and put in a joint bid and therefore what had happened previously was no guide to what would happen in the future.

94 In summary, as I have said at far too great a length (as happens when you give an oral decision rather than a written decision - you find yourself saying things several times, and I apologise for that) it is clear to me that the parties tendered jointly and that they may have considered themselves in a consortium. However, if “consortium” means a separate legal entity or a special purpose vehicle, the parties had not formed that consortium at the time they contracted. It was envisaged they would do so for future contracts, but it had not happened at the time this contract was formed. If, by “consortium” is meant is a group of individual parties to tender for a contract on terms to be agreed, it seems to me there is overwhelming evidence in this case that the parties agreed in relation to this contract that they would give effect to the joint tender of the consortium in a traditional way, with the defendant being the main contractor and the claimant being its subcontractor, and not by the parties each contracting separately with Broadley. The contemporaneous documents do not support any other finding. In my judgment, for the reasons I have explained, the witness evidence does do so either.

95 I do not consider there is any real prospect that, if the case were to go to trial, the court would find, despite the contemporaneous documents, that there was no contract between the claimant and the defendant and there was a direct contract between Broadley and the claimant through the defendant’s agency. I consider that there is no real prospect of defending on the basis there was no contract.

ESTOPPEL BY CONVENTION

96 I will turn now, you will be relieved to hear, to the much shorter question of estoppel by convention. The defendant argues that, even if there was a contract, the claimant is estopped from relying on it as a result of estoppel by convention. The parties are not at issue as to the law. I have been referred to the case of *Republic of India & Ors v India Steamship Company Limited* [1997] UKHL 40 and Lord Steyn’s dicta therein:

“It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption... It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention.”

97 In Mr Ward’s skeleton, on which he relied but not much expand in oral submissions, he argued that the contemporaneous documentation illustrates the parties’ approach to the tender, that it would be on the basis of a consortium or joint venture. He argues that is also reflected in the absence of any margin on the part of the defendant on the claimant’s work and the lengthy delay between the payment application and raising the dispute and that the events of the meeting following Broadley’s financial difficulties are also relevant though these are likely to be a matter for cross-examination at trial. He argued that it would be most unjust to permit the claimant now to resile from the shared understanding which underpinned the tender for the project and to attempt to reanalyse the underlying facts by reference to the provisions of the Act, even if it would otherwise be said the construction contract had been formed.

98 However, the defendant has not adduced any evidence as to any assumed understanding of facts or law other than the discussions and negotiations which I have concluded amount to the parties having entered into a contract for the work. I have found that there is no real prospect that the court would find otherwise. There is no evidence of any statement or communication relied on as giving rise to an estoppel in circumstances where there is a contract. There is simply no evidence in this case for a reliance-based estoppel on which it would be possible to find that, despite there being a construction contract, the claimant is estopped from relying on it.

NATURAL JUSTICE

99 The third issue that the defendant has raised is breach of natural justice. The issue here is that the claimant in its referral asserted that, in order to defeat its claim in the adjudication, the defendant needed to prove various matters, including that there was no contractual relationship. The point that the defendant objects to is the assertion that the defendant would need to prove something when, of course, the burden of proof is on the claimant.

100 The defendant took issue with that assertion in its response in the adjudication, making the point that the onus of proof was on the claimant to satisfy the adjudicator of its case and that the defendant did not need to prove anything. In his decision, the adjudicator did not expressly refer to those submissions or, as far as I am aware, the burden of proof. However, he did give a careful and detailed analysis of the evidence before him and concluded that there was a contract between the parties.

101 The defendant argues in Mr Ward's skeleton that there is a breach of natural justice because the claimant invited the adjudicator to reverse the burden of proof, the adjudicator did not take issue with the relevant submission and it is far from clear whether he properly weighed the evidence and looked for proof of all of the claimant's material averments. The skeleton continues:

“The defendant took issue with the claimant's reversal of the burden of proof but it is far from satisfied from the purported award that the adjudicator engaged with the matter or recognised its significance. The claimant having invited the adjudicator to adopt an unfair and procedurally irregular approach to the evidence can hardly complain the defendant is raising such matters in defence of the claim.”

102 The defendant has not pointed at anything in the decision to suggest the adjudicator did in fact misdirect himself as to the burden of proof or that he was misled. This is a long way from a breach of natural justice. There is no evidence that the adjudicator did anything other than adopt a fair process. He took submissions from both parties. The defendant countered the claimant's submission and pointed out the error. There is nothing in the careful and reasoned decision that gives any indication that the adjudicator had not applied the correct standard of proof. It is common for a judge or an adjudicator not to refer expressly to the burden of proof because it is one of those things that everybody knows and is so obvious that it is not considered necessary to mention. If the burden of proof was referred to in every judgment, it would be surprising. In this case, despite the lack of express reference to the burden of proof, there is not a shred of evidence that the adjudicator accepted the erroneous submission or that he applied the wrong test or that there was any breach of natural justice.

CONCLUSION

103 It follows that, in my judgment, there is no prospect of a successful defence on any of the bases argued by the defendant, and there should therefore be summary judgment for the claimant to enforce the award of the adjudicator. I am satisfied that there was a construction contract between the parties. Therefore, the adjudicator did have jurisdiction. There was no breach of natural justice and no estoppel. There will be summary judgment for the claimant to enforce the award.

L A T E R

104 There is a reason that the court requires a standard form for a schedule of costs in litigation. It is because the parties, solicitors, counsel and judges develop a degree of familiarity with the format. They know what costs go where and it becomes quite easy to look at the schedule, with the various headings, in the way that the defendant produced its schedule, and form a view as to whether the costs are reasonably incurred and proportionate in amount.

105 There are two problems with the claimant's costs schedule today. One is the fact that the court does not have the updated costs schedule, which I understand has been prepared. Also the defendant did not receive it until this morning and of course it needed to be served at least a day before the hearing.

106 The second problem, which is to my mind not a purely formal problem, not a question of form for the sake of it, is that the schedule is not in the correct form. What I have got is a schedule which in some respects largely replicates the headings of form N260, but it confuses matters because it contains additional headings, which the court is not used to, including "Preparation for the hearing on 18 August," which includes work that one would normally expect to see properly allocated to the other headings, such as attending on the claimant, attending on the defendant, attending on others or work on documents.

107 Normally, under the heading, "work done attending the claimant," you have a breakdown of "personal attendances" (meetings or, these days, Skype meetings or Teams meetings) "letters in and out" and "telephone". Under "attendance on opponents" and "attendance on others" you have the same breakdown. Obviously, site inspection is not relevant here. Then you have "attendance at the hearing" and "work done on documents", which is normally broken down in the way that the defendant's schedule is, so you can see how long was spent on the pleadings, how long was spent on the acknowledgement of service, preparation of witness statements etc. That is the correct form and that enables the court to take a view.

108 The problem I have with this schedule is that that detail is not given and it is much harder for the court to assess, and for defendant to make detailed submissions as to, whether something is reasonable or proportionate in amount in the absence of the level of detail you would expect and the categorisation in the usual form. I do have concerns here that the descriptions of the work seem to duplicate each other to some degree in that we have in the "work done on documents", "review of evidence", "drafting claimant's further evidence", "reviewing and amending" and "producing bundles". Those seem to be part of work done on documents. Yet, work for the preparation for the hearing is described as "drafting, bundling, travelling, waiting" (obviously waiting is not relevant for a remote hearing) and

“application”. That suggests that it includes some work relating to the application itself. There is also a heading “letters and emails in and out; telephone attendances and meetings.” The schedule is hopelessly confused and not in the correct form and it does not enable the court easily to form view as to what is proportionate.

- 109 Therefore, all I can do is do the best I can, taking into account that, on the face of it, whilst there does not seem in there anything disproportionate about the rates charged, there does seem to be confusion and possible overlap between the various headings, particularly “attendance on documents” and “preparation for the hearing,” which seem to overlap, and also, possibly, “attendance on the claimant,” because it is suggested that the reason that there are nine and a half hours of assistant solicitor’s time is for attending on the claimant and taking a witness statement. If that includes taking witness statements, “attendance on documents” and “preparation for the hearing” together seem on the high side.
- 110 All I can do is the best I can, taking a broad-brush approach and looking at the overall costs. It seems to me that the solicitors’ time is high. I am not suggesting they have double-counted the same work, but it is not clear what work has been allocated to which category. In terms of the work done under “preparation for the hearing”, there is a staggering twenty-one hours of trainee solicitors’ time and seventeen hours of assistant solicitor’s time for a hearing at which the claimant was represented by counsel who produced an excellent dramatis personae and chronology and skeleton. Counsel did the work in terms of the preparation for the hearing, other than the preparation of the bundle. I do appreciate that there was considerable work in preparing the bundle, as there always is. I also recall that I thanked the claimant for preparing an additional chronological bundle, which was extremely helpful. It was suggested that it was necessary to do that to get the parties through the hearing which was listed for two hours when they had asked for a three-hour hearing. That time estimate was probably optimistic.
- 111 I pause here to say, for solicitors to take into account, that this case was underlisted. I appreciate in this case that the court reduced a three-hour time estimate to two hours. It seems to me that this case was never a two-hour case or a three-hour case. If I had not had an opportunity to do a considerable amount of reading before the hearing, it would probably have been adjourned part-heard. The parties should, in my view, have asked for a hearing with a time estimate of a day.
- 112 I take into account the fact the complexity and the amount of documentation in this case was that it really should have been a day’s hearing. Taking into account the rather chaotic schedule of costs I have in front of me, even though this is a £750,000 claim with some complexity which led to my delivering an oral judgment that took about an hour and a half to deliver, nonetheless it seems to me that the costs are higher than I would expect, given the heavy reliance on counsel. Counsel has been involved at all stages, settled the pleadings, settled the witness statements, prepared the skeleton, prepared the additional documents to accompany with the skeleton, so there has been heavy reliance on counsel. I also take into account the fact that, as I have said, the schedule of costs, the supplemental schedule was not served on the court at all, or at least, it has not reached me. More importantly, was not served until this morning on the defendant. Taking a broad-brush approach and looking at the overall total, I summarily assess the in the sum of £35,000 in total, which is the figure that I consider reflects costs that are reasonable and proportionate in amount for this application. I order that the defendant shall pay the claimant’s costs, summarily assessed in the sum of £35,000.

L A T E R

- 113 I am not going to give permission to appeal. I have given the reasons for my decision in my judgment, which I will not repeat. It is not a criticism, but no specific issue has been raised as to where I erred or why I should not have reached the conclusion that I did. I refuse permission.
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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital*

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