Neutral Citation Number: **[2021] EWHC 2637 (TCC)**

Case No: HT-2021-BHM-000020

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

Birmingham Civil and Family Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Date: 28/09/2021

Before :

HER HONOUR JUDGE SARAH WATSON

- -

Between :

QUADRO SERVICES LIMITED	**Claimant**
- and -	
CREAGH CONCRETE PRODUCTS LIMITED	**Defendant**

- -
- -

Mr John Aldis (instructed by **Hickman Construction Law**) for the **Claimant**
Mr Ben Graff (instructed by **Brodies LLP**) for the **Defendant**

Hearing date: 19 August 2021

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JUDGMENT

The application

1. In these proceedings, the Claimant, Quadro Services Limited, seeks summary judgment to enforce an adjudication decision against the Defendant, Creagh Concrete Products Limited. The Defendant resists enforcement on the ground that the Adjudicator had no jurisdiction because three disputes were referred to him. It is settled law that an adjudicator does not have jurisdiction to adjudicate more than one dispute in a single adjudication.

2. The test on an application for summary judgment is whether there is a real prospect of successfully defending the claim. The prospects of success must be real, as opposed to fanciful. The Defence must carry some degree of conviction. It must be better than merely arguable. The court must not conduct a mini-trial. It can take into account the evidence before it and also take into account evidence that can reasonably be expected to be available at a trial even if it is not available at the summary judgment hearing. The court should hesitate to make a final decision without 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.

The Facts

3. The parties entered into an oral agreement for the provision of construction labour to the Defendant. The contract was a Construction Contract and the Housing Grants, Construction and Regeneration Act 1996 applied to it. The contract did not contain any written adjudication provisions. The Scheme for Construction Contracts (England and Wales) Regulations 1998 (as Amended) applied.

4. During the course of the contract, the Claimant made applications for payment and raised invoices for the amounts claimed. Three invoices are outstanding and were the subject of the adjudication.

5. The first was dated 24 July 2020 and was stated to be the third application for payment for work on the project. It claimed £58,870, less the previous application for £43,912. The application was for the balance of £14,925.

6. On 3 August 2020, the Defendant's Senior Quantity Surveyor approved the application stating: "*Please raise VAT invoice as per application*."

7. The Claimant's Director responded the same day, in the following terms: "*Thanks for the approval. Please find attached our VAT invoice for the certified amount. Any queries please call."*

8. The Claimant raised an invoice dated 24 July 2020 for the amount that had been approved, being £17,910 inclusive of VAT.

9. The second application that was the subject of the adjudication was dated 27 August 2020. It was stated to be the fourth application on the project. It claimed £72,897, less the previous application for £58,897. The application was for the balance of £14,000.

10. On 15 September 2020, the Claimant's Director emailed the Defendant's Senior Quantity Surveyor, chasing approval of the August application in the following terms: "*Could you please forward your valuation by return. Please give me a call to discuss if there is a problem*".

11. The Defendant's Senior Quantity Surveyor responded: "*Please raise invoice as per application*".

12. The Claimant's Director responded: "*Thanks for the approval. Please find attached our VAT invoice for the certified amount. Please advise when we can expect to receive this payment. Any queries please call*."

13. The third application that was the subject of the adjudication was dated 12 October 2020. It was stated to be the sixth application on the project. It claimed £101,007.40, less the previous application for £96,577.40, leaving a net claim of £4,430.

14. It is not clear what, if any, response there was to the third application. There is no correspondence in the bundle from the Defendant expressly agreeing it. No pay less notice was issued. The Claimant raised an invoice dated 12 October 2020 for the sum claimed in it.

15. It is clear from the documentation that the payment applications were cumulative, with each payment application being for the full value of the work done, less the previous payment applications. No pay less notices were issued by the Defendant in respect of any of the applications. The total value, inclusive of VAT, of the three invoices is £40,026.

16. On 2 December 2020, the Claimant's solicitors wrote to the Defendant in the following terms:

> *"We are instructed in relation to debts owed to Quadro under five separate contracts as follows:-*
>
> | | £ |
> |---|---|
> | *Woking* | *40,026.00* |
> | *Chatham* | *94,180.20* |
> | *Paddington* | *6,903.00* |
> | *Uddingston* | *2,520.00* |
> | *Newcastle* | *8,970.00* |
> | *Total Debt* | *152,599.20* |
>
> *We enclose a statement of account in the above respect.*
>
> *We are aware of an "incident" that you have claimed is the responsibility of our client in respect of a slab installed at the Newcastle project. We note that by email to our client on 5 November 2020 (at 6:53) from your James McKeague enclosing a "report" (which was prepared by yourselves – not independent and, in the opinion of our client, fatally flawed) , ….*

We understand that you have no issues with regard to the value for payment claimed by our client in respect of the five contracts (this is confirmed by the fact there are no valid pay less notices in respect of the monies due). It seems that your refusal to pay is based upon the incident at the Newcastle project. Our client does not consider that to be their responsibility. However, without prejudice to that position, if it is established to be any liability on our client at all, you are fully covered by our client's insurance. See attached email dated 27 November 2020 (at 16:52) from our client's insurance broker. As such, there would be no loss to you in any event.

Further, as a matter of contract law, you cannot set off a potential claim for damages/losses (which is disputed) on the Newcastle contract against monies due on the other contracts. ……

It is not permissible for you to refrain from paying debts due (and now overdue) to our client over the five contracts because: -

1 There is no credible evidence of default on the part of our client in respect of the Newcastle project;

2 If there is any evidence of fault in respect of the Newcastle project, you have no loss because that is fully insured;

3 There are no pay less notices.

In addition to the above, your Stephen Armour stated to our client that if they continued working for you they would be paid at least monies due in September and October 2020 (at 12:16). No monies have been paid in respect of October 2020."

17. From that letter, it is clear that the Claimant understood the Defendant's failure to pay the invoices that are the subject of the adjudication and other invoices for work on other projects was a result of the issue on the Newcastle project.

18. The letter goes on to make a claim for interest pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 and collection costs and offers to waive those claims if the full sum of £152,599.20 was paid within five days. The letter continues:

"Our client has the option of pursuing claims against you under each of the contracts. We are sure that you would wish, for example, to avoid the time and cost of dealing with five separate adjudications when monies are clearly due. We trust that it will not be necessary for our client to instruct us to proceed further by way of formal actions."

19. The Defendant does not appear to have responded to that letter.

20. On 30 March 2021, the Claimant issued a Notice of Intention to Refer a Dispute to Adjudication. The adjudication that is the subject of these proceedings related only to the outstanding invoices under the Woking contract. The Notice contained the following description of the dispute:

> *"4.1 A dispute has arisen between the parties under the Contract. The dispute concerns the non-payment by CCPL of agreed monies due to QSL.*
>
> *4.2 CCPL have agreed monies due to QSL and agreed to receiving invoices ("the Invoices") in respect of the same, as follows:…."*

21. It also contained a list of the invoices by date, number and amount and showed the total of £40,026. A claim pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 for interest at 8% above base and compensation was included.

22. The Notice gave the following description of where and when the dispute had arisen:

> *"5.1 CCPL have refused to pay the Invoices within 30 days of the rendering of the same as agreed. QSL has not received payment into its bank account or at its offices and considers that is where and when the dispute arose.*
>
> *5.2 On 2 December 2020, Hickman Construction Law, solicitors acting for QSL requested by email to CCPL, payment of the invoices within five working days. No payment has been made.*
>
> *5.3 A dispute has clearly arisen."*

23. The Notice contained the following description of the redress sought:

> "6.*1 QSL seek the appointment of an adjudicator to make the following decisions: -*
>
> *6.6.1 CCPL immediately pay the sum of £40,026 to QSL or such other such (sic) as the Adjudicator considers is appropriate…"*

24. By its Referral Notice, the Claimant gave the following additional information to the adjudicator:

> "*Introduction*
>
> *……*
>
> *1.3 the dispute concerns QSL's entitlement to payment of £40,026 (including VAT) in respect of agreed invoices dated 24 July 2020, 27 August 2020 and 12 October 2020. CCPL agreed the invoices and has not served any timely and/or valid Pay Less Notices."*
>
> *"Dispute*

QSL are owed monies by CCPL on four other contracts which will be subject to separate action. An issue has arisen between the parties in respect of a separate contract at a site in Newcastle in respect of which QSL refutes liability and is subject to insurance. Regardless, for the reasons set out above there is no basis for CCPL having not paid the invoices in full.

On 2 December 2020, HCL, Solicitors for QSL sent a letter by email to CCPL … in respect of all monies outstanding from CCPL to QSL on the five contracts including the Invoices. CCPL has refused to make any payment and as such this dispute has arisen."

25. From that, it appears that the Claimant still understood that the only reason for the Defendant's failure to pay was the Newcastle issue.

26. On 12 April 2021, Brodies, solicitors for the Defendant, wrote to the Adjudicator challenging jurisdiction. They wrote in the following terms:

"We do not consider that you have jurisdiction to consider this matter because the Referring Party has in fact referred three separate disputes to adjudication under one notice and referral.

The Referring Party sets out at paragraph 3.1 of the Referral Notice that the Referring Party issued three applications for payment under the contract. The Referring Party's position, put shortly, is that in each instance an application has been made, no pay less notice was issued and accordingly the sum invoiced is the sum due in terms of the Housing Grants Construction and Regeneration Act 1996. Each application, its validity, whether a pay less notice was issued and the sums due in terms of that application is a separate dispute.

You can test that point by observing that the Referring Party's reliance upon an absence of any pay less notices will mean that the Referring Party contends it is liable to be paid the "notified sum" under the Act. But the notified sum cannot be the sum claimed in the adjudication because no application for that sum has ever been made. Rather, three disputes have been referred on three separate applications.

You do not have jurisdiction to determine more than one dispute at one time without the consent of the parties and that consent is not being given by the respondent.

…

In the circumstances, we invite you to resign ….

If you take a different view, the respondent shall maintain this jurisdictional challenge and reserve its entire rights, remedies and please. Further, the respondent will not participate in this adjudication…."

27. On 13 April 2021, the Claimant responded on the jurisdiction issue in the following terms:

> *"The dispute is clear in that it is the failure to pay a debt in the sum of £40,026 under one contract for works that the Referring Party has carried out for the Responding Party….However the consideration of the sums agreed and rendering of the invoices are really only sub issues to be considered in resolving the one dispute (i.e. the debt). Further, and decisively, the three interim applications are for cumulative amounts."*

28. The Defendant took no further part in the adjudication. The Adjudicator considered the jurisdictional challenge and reached the non-binding conclusion that he had jurisdiction, as *"a single dispute had been referred, namely a dispute over an amount owed in the sum of £40,026 or such other sum as the Adjudicator may decide arising out of one cause of action".*

29. On 27 April 2021, the Adjudicator issued his decision. He confirmed the non-binding decision he had already made as to his jurisdiction. He considered the validity of the Claimant's invoices as applications for payment and concluded they were valid. He noted that two of the three invoices had been expressly agreed and that time had long since lapsed for the challenging of the third invoice. He awarded the Claimant £40,026 inclusive of VAT, interest in the sum of £2,078.70 to the date of the award and £8.88 per day thereafter and £100 compensation. He also directed the Defendant to pay his fees and expenses in the sum of £2,633.75.

30. The Defendant has not paid the Adjudicator's award.

The parties' positions

31. The sole issue before me is whether the Defendant has a real prospect of success on the basis that the Adjudicator had no jurisdiction because three disputes were referred to him.

32. The Claimant contends the Adjudicator had jurisdiction because one dispute was referred to him, being whether the sum of £40,026 was due for payment. Mr Aldis argues that there were sub-issues as to the validity of the individual invoices, and that there is no principle of law that each payment application gives rise to a separate dispute. He relies on the passage at paragraph 33 of the judgment of Akenhead J in *Witney Town Council v Beam Construction (Cheltenham) Limited* [2011] EWHC 2332 (TCC) and argues that it makes clear that a single dispute can involve sub-issues.

33. Mr Graff for the Defendant submits that the referral is of three disputes for the following reasons:

33.1. If claims can be individually decided, whilst it does not definitively mean they cannot form part of a single dispute, it strongly points to the conclusion that there are multiple disputes. He argues that this is the corollary of the "rule of thumb" in paragraph 38 (vii) of the judgment in *Witney Town Council v Beam Construction (Cheltenham) Limited.*

33.2. The claims in this case can be decided without reference to each other. The questions of whether there was a valid payment application, the due date, the final date of payment, whether a pay less notice was served, and whether the final date for payment has passed, have to be considered separately for each claim.

33.3. The only evidence of the payment applications being considered together is in the Claimant's solicitors' letter of 2 December 2020, and that letter demanded £152,599.20, not £40,026, or at least, not only £40,026.

33.4. The three applications are in any event distinguishable from each other in that the first two were expressly agreed but there is no evidence that the third was expressly agreed, and therefore there are differences between them.

The law

34. In *Witney Town Council v Beam Construction (Cheltenham) Limited*, Akenhead J considered in detail the existing case law and gave guidance on what is meant by "a dispute".

> *"33. It is important to bear in mind that construction contracts are commercial contracts and parties, at least almost invariably, can be taken to have agreed that a sensible interpretation will be given to what the meaning of a dispute is. It is conceivable that there may be a dispute on a construction contract which is simply: what is due to one or other of the parties? That could be a very broad dispute covering a large number of issues. For instance, there may be a dispute between the parties about an interim valuation with the contractor saying that it is entitled to payment for 50 variations but overall it is claiming £100,000; the Architect certifies £80,000 and disagrees with the contractor on each of the 50 variations (a) the amount of work done and (b) the rate or price. One could say that there were 100 disputes, namely 2 per variation. Alternatively, and obviously sensibly, one could and should say that there was one dispute with 100 sub-issues. The parties can not sensibly have intended in these circumstances that each sub-issue for the purposes of adjudication and even arbitration gives rise to a separate dispute which must be referred to a separate adjudication or arbitration. The dispute in this example will be as to what sum the contractor was entitled to on the interim valuation. A particular dispute, somewhat like a snowball rolling downhill gathering snow as it goes, may attract more issues and nuances as time goes on; the typical example in a construction contract is the ever increasing dispute about what is due to the contractor as each monthly valuation and certificate is issued; a later certificate may accept amounts in issue previously not certified but then reject some more items of work. One may in the alternative have a dispute, like the*

proverbial rolling stone gathering no moss, which remains the same and unaffected by later events; an example might be disputed responsibility over an accident on site."

"38. Drawing all these threads together, I draw the following conclusions:

(i) A dispute arises generally when and in circumstances in which a claim or assertion is made by one party and expressly or implicitly challenged or not accepted.
(ii) A dispute in existence at one time can in time metamorphose in to something different to that which it was originally.
(iii) A dispute can comprise a single issue or any number of issues within it. However, a dispute between parties does not necessarily comprise everything which is in issue between them at the time that one party initiates adjudication; put another way, everything in issue at that time does not necessarily comprise one dispute, although it may do so.
(iv) What a dispute in any given case is will be a question of fact albeit that the facts may require to be interpreted. Courts should not adopt an over legalistic analysis of what the dispute between the parties is, bearing in mind that almost every construction contract is a commercial transaction and parties can not broadly have contemplated that every issue between the parties would necessarily have to attract a separate reference to adjudication.
(v) The Notice of Adjudication and the Referral Notice are not necessarily determinative of what the true dispute is or as to whether there is more than one dispute. One looks at them but also at the background facts.
(vi) Where on a proper analysis, there are two separate and distinct disputes, only one can be referred to one adjudicator unless the parties agree otherwise. An adjudicator who has two disputes referred to him or her does not have jurisdiction to deal with the two disputes.
(vii) Whether there are one or more disputes again involves a consideration of the facts. It may well be that, if there is a clear link between two or more arguably separate claims or assertions, that may well point to there being one dispute. A useful if not invariable rule of thumb is that, if disputed claim No 1 can not be decided without deciding all or parts of disputed claim No 2, that establishes such a clear link and points to there being only one dispute."

35. Mr Graff relies on the judgment of Coulson J in the case of *Deluxe Art & Theme Limited v Beck Interiors Limited* [20016] EWHC 238 (TCC), particularly on the following passages:

"15. Thirdly, I consider that, on an application of well-known principles, the dispute about extensions of time and loss and expense was a different dispute to the dispute about retention. Mr Choat sought to argue, by reference to the decision of Akenhead J in ***Witney Town Council v Beam Construction (Cheltenham) Ltd*** *[2011] EWHC 2332 (TCC); [2011] BLR 707, that, on an application of the principles set out in this case, the delay claim and the retention claim were both part of the same dispute because they both related to what was due on 30 June 2015, the date of practical completion. But in my view,*

> *the proper application of Akenhead J's principles, referred to at paragraph 38 of his judgment in **Witney Town**, leads to the opposite conclusion.*
>
> *16 Akenhead J said that: "A useful if not invariable rule of thumb is that, if disputed claim No 1 cannot be decided without deciding all or parts of disputed claim No 2, that establishes such a clear link and points to there being only one dispute." In this case, DATL's claim for an extension of time and loss and expense, as noted in paragraph 5 above, could easily be decided without any reference to the claim for the failure to reduce retention (as noted in paragraph 7 above), which was a separate and stand-alone claim. Indeed, at one point Mr Choat appeared to accept that, when he submitted that, in order to reach his decision in Adjudication 2, "the Adjudicator did not need to decide decision 3". I respectfully agree. That demonstrates that these were not part of the same dispute."*

36. The following passages of that judgment are also relevant:

> *"17. There is nothing in Mr Choat's argument that both claims related to what was due on 30 June 2015. That date is not identified in either of the relevant notices of adjudication. Moreover, the relevant date for Adjudication 2 was the date of the critical application for an interim payment (see **Section 5** below); the relevant date for Adjudication 3 was the date of practical completion.*
>
> *18. Finally, it should be noted that there is no authority to support the proposition that two different disputes, deliberately raised by the claiming party in two separate adjudication notices, and described in very different terms, could still somehow be part of the same dispute. All of the authorities about the reference of more than one dispute, which culminate in **Witney Town**, were cases where there was one notice of adjudication, and the outcome depended on the nature of the issues that had been referred to the Adjudicator under that single notice. Thus, whilst I accept that the mere fact that there were two notices may not necessarily be determinative, it might be thought that it would take a very unusual set of circumstances to conclude that the disputes referred to in the adjudication notices, started at different times, both formed part of the same dispute."*

37. I do not read the judgment in *Deluxe Art & Theme Limited v Beck Interiors Limited* as meaning that, if it is possible for issues to be decided independently, they cannot form sub-issues to a wider dispute, no matter how that dispute is framed.

38. Mr Aldis relies on the judgment of Veronique Buehrlen QC sitting as a Judge of the TCC in the case of *Prater Limited v John Sisk & Son (Holdings) Limited* [2021] EWCH 1113 (TCC) and in particular the following passage:

> "33 Ms *Hannaford Q.C. is right when she submits that each of the matters referred to Mr Molloy in Adjudication 2, and set out in paragraph [31] above, could have been decided independently. However, I do not read Akenhead J's guidance in the Witney case as meaning that unless each claim cannot be decided without deciding all or part of the other claims, each claim constitutes*

a separate dispute. Clearly a single dispute in the context of a construction contract may include several distinct issues such as when determining appropriate deductions for the purposes of a payment application or final account. One needs to look at the facts of each case and to use some common sense."

39. I agree with Veronique Buehrlen QC. I consider that it is clear from the authorities that one dispute can include numerous sub-issues which might be capable of being determined independently from each other. Whether they are sub-issues or separate disputes is a question of fact.

Analysis

40. It is necessary to consider what, as a matter of fact, was the dispute between the parties that was referred to adjudication. The Notice of Intention to Refer a Dispute to Adjudication described the dispute as follows:

"The dispute concerns the non-payment by CCPL of agreed monies due to QSL.

CCPL have agreed monies due to QSL and agreed to receiving invoices ("the Invoices") in respect of the same, as follows:

Date	*Invoice No*	*£*
24/7/2020	*20/6905*	*17,910*
27/8/2020	*20/6916*	*16,800*
12/10/2020	*20/6944*	*5,316*
		40,026"

41. The dispute that was referred to adjudication was the failure to pay £40,026. The redress sought in the adjudication was that the Defendant immediately pay the sum of £40,026 or such other sum as the Adjudicator considered appropriate.

42. The Referral Notice also made clear that the dispute concerned the Claimant's entitlement to payment of £40,026. It stated as follows:

"Introduction
……
1.3 The dispute concerns QSL's entitlement to payment of £40,026 (including VAT) in respect of agreed invoices dated 24 July 2020, 27 August 2020 and 12 October 2020. CCPL agreed the invoices and has not served any timely and/or valid Pay Less Notices."

"Dispute
QSL are owed monies by CCPL on four other contracts which will be subject to separate action. An issue has arisen between the parties in respect of a separate contract at a site in Newcastle in respect of which QSL refutes liability and is

> *subject to insurance. Regardless, for the reasons set out above there is no basis for CCPL having not paid the invoices in full.*
>
> *On 2 December 2020, HCL, Solicitors for QSL sent a letter by email to CCPL … in respect of all monies outstanding from CCPL to QSL on the five contracts including the Invoices. CCPL has refused to make any payment and as such this dispute has arisen."*

43. The Defendant is correct to observe that the adjudication involved the consideration of the payment process of three separate payment applications, each of which could be decided in isolation from the other. However, unusually, that was not because the Defendant had taken any issue with the payment process before the adjudication. It had not raised any issue as to the validity of the payment applications or suggested that it had issued any pay less notices. It had simply not paid and had apparently raised with the Claimant a claim in relation to the Newcastle incident. Otherwise, the only issue raised was jurisdiction.

44. In the absence of any substantive dispute as to liability to pay the invoices raised by the Defendant, the Adjudicator considered the validity of the payment notices and concluded they were valid applications for payment. He noted that the Defendant had not issued any pay less notices and that accordingly the sums claimed on the invoices became the notified sums. Whilst it was necessary for him to do so to satisfy himself that the sum of £40,026 was due before directing the Defendant to pay it, that does not mean that each separate payment application that made up that sum was the subject of a separate dispute so that they must be the subject of separate adjudications.

45. In the case of 50 variations that might form part of a payment application, being the example given by Akenhead J in *Witney Town Council v Beam Construction (Cheltenham) Limited,* the adjudicator would have to consider the validity of each claimed variation. It would be possible separately to determine their validity independently from other variations forming part of an interim payment application. However, as Akenhead J made clear, that does not mean that there are 50 disputes that must be referred separately to adjudication. The validity of each variation can be sub-issues to the single dispute as to the amount due under one interim payment.

46. In just the same way, the fact that it is technically possible to determine whether each individual invoice is due without determining whether the other invoices are due does not mean that those issues cannot be sub-issues in the wider dispute as to the whether the Claimant is entitled to the sum it claims is due to it under the contract.

47. If the Defendant's argument were right, the result would be that the parties would be put to the very significant cost and inconvenience of numerous separate adjudications to recover a single claimed balance under a single contract. That

would be contrary to the policy underlying the adjudication process of efficient, swift and cost-effective resolution of disputes on an interim basis.

48. Mr Graff also argues that the only thing tying together the payment applications in this case was when they were all claimed in the Claimant's solicitors' letter of 2 December 2020. I do not agree. The payment applications were cumulative, with each application being for the full value of the work less a deduction for the value of work already invoiced. Each payment claim built on the previous one. There is a clear link between them.

49. Finally, I do not consider there is any merit in the argument that, because two of the three applications were expressly agreed and the third was not, they are distinguishable from each other so that they are not sub-issues to the dispute as to whether the Claimant is entitled to payment. No pay less notice was issued in respect of the third application. None of the payment applications were disputed on substantive grounds or on procedural grounds. The fact that two were expressly agreed and one not challenged does not mean they must be separate disputes.

50. In my judgment, the Adjudicator was right to conclude that he had jurisdiction because only one dispute had been referred to him. The dispute was whether the Claimant was entitled to payment of the sum of £40,026. I consider the Defendant has no real prospect of successfully defending the claim on the ground that the Adjudicator lacked jurisdiction and will give summary judgment to enforce the award.