



## QUESTIONS OF JURISDICTION LEFT YOU FEELING A LITTLE ‘DOO-LALLEY’?

... then read this case summary about Messrs Mulalley...

Gillian Cruickshanks reviews a recent TCC case on jurisdiction in adjudication

### Summary

Questions of jurisdiction may overlap with determination of the substantive issue, however to resolve that question, there must be an underlying or initial contract between the parties which gives the Adjudicator jurisdiction in the first place.

### Introduction

Viridis UK Limited v Mulalley and Company Limited<sup>1</sup> is a recent judgement from the TCC in which summary enforcement proceedings were withdrawn in favour of a full trial. Viridis had succeeded at adjudication; Mulalley was instructed to pay Viridis in respect of a Final Account claim.

The issue at hand being one of the Adjudicator's jurisdiction, the Court was asked to determine whether the dispute arose under one or several contracts.

### The Facts

Viridis, a windows and curtain walling subcontractor were appointed by Main Contractor Mulalley for the supply and installation of replacement windows and doors to a number of properties across three social housing estates.

Viridis submitted that all works were instructed under one contract known as Order 24, which oversaw the whole relationship and a further six orders were issued, either as works orders under the overarching contract (Order 24) or as a variations to it. Mulalley, however, considered that Viridis had never accepted Order 24 and that the works were instructed under the other, separate orders, with each one forming a different contract.

The issue of jurisdiction arose because Order 24 and the other six orders contained adjudication clauses which varied in terms of adjudication procedure.

### Discussion – The Contracts: Six of One...

The Court first chose to determine the nature of the agreements between the parties; suffice to say the Court found that several key terms of Order 24 were still under negotiation at the time the relevant works commenced and as such, it was not possible to say that Order 24 had been accepted by Viridis.

The Court being satisfied that the origins of the dispute(s) arose under six separate orders, the Court then considered case law on the overlap between jurisdiction and substantive issues and whether determining the number of contracts was part of the substantive issue which the Adjudicator had been appointed to resolve.

### Case Law & Precedent - Viridis

Viridis argued, *inter alia*, that the parties were in agreement that a construction contract existed, either on the basis of one contract (Order 24) or on the basis of the six orders and if it was the latter, then because the process to appoint the adjudicator was the same across all six orders and the

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<sup>1</sup> Viridis UK Limited and Mulalley and Company Limited [2014] EWHC 268 (TCC)



adjudication procedure was substantially similar, it was within the jurisdiction of the Adjudicator to determine whether one or more contracts existed.

Viridis further argued that on that basis, the Adjudicator's decision should stand, relying upon the reasoning of Akenhead, J in *Air Design (Kent) Limited v. Deerglen (Jersey) Limited* [2008]<sup>2</sup>. *Air Design* involved a Basebuild Contract and several subsequent agreements,

*"The substantive decision-making process upon which the Adjudicator had to embark in relation to the disputed claim put before him necessarily involved a consideration of whether there was more than one contract. It was thus within his jurisdiction to decide in effect that there was one contract, albeit one that may have been varied by agreement"*

### Case Law & Precedent - Mulalley

Mulalley argued *Air Design* could be distinguished from the present case on the basis that *both* parties in *Air Design* agreed that an *initial* contract (Basebuild) existed between the parties. Further, that the initial contract contained adjudication terms, upon which the Adjudicator had been appointed.

The question for the *Air Design* Adjudicator was whether subsequent agreements were simply variations or separate contracts. The process of appointment and procedure for adjudication being set out in the initial contract, the decision of Akenhead J was clearly based, so argued Mulalley, on the initial contract giving the Adjudicator jurisdiction to determine the question of subsequent agreements.

Akenhead J confirmed this approach in *Camillin Denny Architects v Adelaide Jones & Co* [2009]<sup>3</sup> and further discussed the overlap between jurisdiction and substance in *Supablast v Story Rail* [2010]<sup>4</sup>,

*"...Generally, an Adjudicator properly appointed under the original contract between the parties to the adjudication will have jurisdiction to determine whether or not particular work was or was to be treated as a variation under or pursuant to that original contract. Of course, it is open to either party to argue that, although the particular work was extra to the scope of works covered by the original contract, it was not a variation envisaged or permitted by that contract. That argument will or may in effect give rise both to a substantive defence under the original contract ("there is no entitlement to payment because there is no variation") as well as a jurisdictional challenge ("the Adjudicator has no jurisdiction to decide because the extra work cannot have been ordered under the original contract which gives the Adjudicator jurisdiction in the first place"). This is where there will often be an overlap between jurisdiction and substance."*

### Decision

In the present case, Davies, J distinguished it on the facts from *Air Design*. Having concluded the Orders constituted six separate contracts, there was no initial contract upon which the Adjudicator had been appointed. There being no single contract under which the dispute arose and no agreed procedure for the adjudication, the Adjudicator had no jurisdiction. The Adjudicator's award of Final Account to Viridis was made without jurisdiction and therefore enforcement of it was denied.

April 2014

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<sup>2</sup> [2008] EWHC 3047 (TCC).

<sup>3</sup> [2009] EWHC 2110 (TCC)

<sup>4</sup> [2010] EWHC 56 (TCC).