Sheridan Gold LLP
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## COMPROMISE, SUPPLEMENTAL AND SIDE AGREEMENTS

### Introduction

Frequently where parties have initially entered into a construction contract, they subsequently enter into a further agreement. The further agreement may be to settle particular or all issues that have been disputed. It may be a further agreement that alters the contract sum, or the completion date, or other matters. Or there may be a side agreement that does not alter the existing contract but adds something new, such as a bonus payment provision.

In the context of adjudication, these second agreements can give rise to jurisdictional issues. Questions may arise as to whether an adjudicator has jurisdiction in respect of a claim which is allegedly settled and therefore not properly a matter in dispute. If a claim is made pursuant to a second agreement, questions may arise as to whether that second agreement is a construction contract and/or whether it contains an adjudication clause. Generally these questions have to be addressed by adjudicators in the first instance but it is generally the task of the court to have the last word on jurisdiction when these questions are raised as grounds for resisting enforcement of adjudicators' decisions.

### Review of the cases

#### *Shepherd v Mecright*

In *Shepherd*,[1] a compromise agreement was made between a main contractor (Shepherd) and a sub-contractor (Mecright) on terms including the following:

> "We, Mecright, Ltd, accept the sum of £366,000 in respect of manufacture, supply, delivery and installation...in full and final settlement of all our claims under the above contract but without prejudice to our outstanding obligations."

Subsequently, the sub-contractor made claims for further payment, which it referred to adjudication. It claimed to have entered into the compromise agreement under economic duress, in that Shepherd was said to have taken advantage of Mecright's straitened financial circumstances by compelling it to take what it was being offered. The main contractor sought a declaration from the court, while the adjudication was under way, that the adjudicator had no jurisdiction.

The judge was clear that a dispute about the settlement agreement was not a dispute under the sub-contract, since the effect of the settlement agreement was to replace the original agreement to the extent to which it applied. The judge was also firmly of the view that a dispute about the settlement agreement was outside s. 108 of the Housing Grants, Construction and Regeneration Act 1996 (the HGCR Act), since a settlement agreement is not a construction contract. He noted that His Honour Judge MacKay had seemed to be of the same view in *Lathom v Cross*.[2]

[1] *Shepherd Construction v Mecright Ltd* [2000] B.L.R. 489.
[2] *Lathom Construction Ltd v Cross* [1999] C.I.L.L. 1568.


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Judge Lloyd stated that a dispute about an agreement which settles a dispute under a construction contract is not a dispute *under* that contract. On the terms of the contract in question (and of the HGCR Act), an adjudicator has jurisdiction in respect of disputes arising under the construction contract in question. If the terms of the construction contract relating to adjudication are broader and include words such as in connection with" or "arising out of", then it may be that a dispute arising out of a settlement agreement will fall within the scope of the adjudication provisions.

The judge was also clear that the effect of the compromise agreement was that all the disputes that existed at the time of the compromise were extinguished, so that there was now no dispute as to further payment capable of being referred to adjudication. The only issue was whether the question whether the agreement was entered into under duress would prevent the judge from granting the declaration.

The sequence of events was that the compromise agreement was made on 15 March 2000, Mecright gave notice of adjudication on 3 July and it was only after that, a few days later, that Mecright alleged the duress on 12 July. The compromise agreement was not void *ab initio*; it might be avoided at the option of a party if it was able to establish duress. The compromise agreement stood and governed the relationship of the parties on 3 July. Therefore, the adjudicator had no jurisdiction. Mecright could seek to establish duress in court; until then it was bound by the compromise agreement.

Draftsmen of the type of compromise agreement at issue in the *Shepherd* case, *i.e.* settling all disputes, would normally be well advised when possible to make the compromise agreement independent of the original construction contract, as a separate, "stand-alone" agreement. Once all claims are settled, the only issue likely to arise under the settlement agreement is non-payment. Recourse to the courts is normally preferable to adjudication for this type of claim.

***Lathom v Cross***

*Lathom v Cross* is a short, ex tempore judgment of Judge Mackay. There was a JCT building contract and the parties were going to adjudicate on various claims and counterclaims, but a compromise was reached. The scope of the compromise agreement is not set out in the judgment. Cross claimed to be entitled to withhold £5,000 pursuant to the compromise agreement. Notwithstanding the compromise, Lathom started an adjudication claiming entitlement not pursuant to the compromise agreement but pursuant to the building contract. The adjudicator found that there was an effective compromise, so Lathom's claims failed; but the adjudicator then went on to consider whether Cross was entitled to withhold the £5,000, found that Cross was not so entitled and decided Lathom was entitled to that sum (and some other monies). The adjudicator was accordingly purporting to decide matters arising under the compromise agreement. It seems to have been accepted by Lathom that the compromise agreement was not a construction contract. Lathom failed to obtain summary judgment to enforce the adjudicator's decision as Cross had a reasonable prospect of success in arguing the adjudicator did not have jurisdiction to make the decision he did about the £5,000.

***Quarmby***

In the *Quarmby* case,[3] a main contractor and employer made a compromise agreement in full and final settlement of the employer's claims for liquidated damages. The agreement

[3] *Quarmby Construction Co. Ltd v Larraby Land Ltd* (Leeds Technology and Construction Court, 14 April 2003) (unreported).



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made clear that the contractor did not admit the sums were due nor did it waive the right to challenge certificates of the architect. Subsequently, the contractor applied for further extension of time, the architect refused and the contractor referred the dispute to adjudication. The adjudicator found that the claim was not barred by the compromise agreement and awarded extension of time, which entailed the repayment of liquidated damages. The contractor brought enforcement proceedings and the employer argued that the adjudicator had lacked jurisdiction by reason of the compromise agreement. It was held that the adjudicator had been correct to consider whether the dispute had been compromised. As it was a jurisdictional issue, the court had to consider that issue again before enforcing. On the facts, it was held that the extension of time claim had not been compromised by the compromise agreement.

***Beckingham***

In the *Beckingham* case,[4] a construction company entered into a contract with Mr Beckingham to refurbish a property for him. Subsequently the parties entered into a further agreement (called the capping agreement in the judgment). The contractor then claimed sums due pursuant to the original contract and succeeded with those claims in adjudication.

One of Mr Beckingham's grounds of objection to the validity of the decision was that the capping agreement amounted to a compromise of underlying disputes arising under the contract and that that agreement put all disputes arising under the agreement to rest. The subsequent claim for sums in excess of the cap did not give rise to a dispute under the contract but was, at best, a dispute arising out of the separate capping agreement which had no adjudication clause incorporated into it. This argument relied heavily on the *Shepherd* case.

The adjudicator had decided that the capping agreement constituted a variation to the original contract but was not effective because it was not supported by consideration. He found that certified sums were due under the original contract.

In *Shepherd*, the settlement agreement stood alone, it compromised all disputes then in existence including the substantive dispute referred to the adjudicator. Here, the capping agreement did not stand alone and it was not a settlement agreement settling all disputes. It was an agreement varying the terms of the underlying contract, to be read with and as part of the underlying contract. It did not settle all disputes, it merely provided a new contract sum or cap.

In the adjudication, Mr Beckingham contended that the sums claimed were not due because of the capping agreement. Westminster Building claimed and the adjudicator found that the cappling agreement was not valid. The question whether the capping agreement was valid was a question within the adjudicator's jurisdiction, because the capping agreement was part of the underlying agreement. Mr Beckingham was accordingly bound by the adjudicator's decision, as it had been made (rightly or wrongly) within the adjudicator's jurisdiction.

***L Brown & Sons v Crosby Homes***

In *L Brown & Sons v Crosby Homes*,[5] the parties entered into a JCT building contract and later side agreements. The background to the side agreements was that issues as to the

[4] *Westminster Building Company Ltd v Beckingham* [2004] EWHC 138 (TCC).
[5] *L Brown & Sons v Crosby Homes (North West) Ltd* [2005] EWHC 3503 (TCC).



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performance of the building contract had arisen; the side agreements introduced a bonus system and a system of relief from liquidated damages with a view to obtaining as early completion as possible. The side agreements were accordingly further agreements between the parties, but they were not agreements which compromised disputes between the parties.

Brown succeeded in claiming payment of certain monies in adjudication; Crosby resisted enforcement as well as seeking declarations that the adjudicator lacked jurisdiction.

The JCT standard form provision concerning adjudication had been amended, with the effect that disputes arising "under, out of or in connection with the contract" could be referred to adjudication, rather than just those arising under the contract.

An issue was whether the adjudicator had jurisdiction over disputes which, it was argued by Crosby, arose not in relation to the terms of the original building contract but in relation to the side agreements.

It was held by Ramsey J that the side agreements varied the building contract. He stated:

> "Whilst I accept that the terms relied on did not in express language refer to particular clauses in the contract as being varied, I consider that the introduction of a bonus system and the waiver of liquidated damages did vary the contract. Whilst the parties did not expressly add a clause to the contract to provide for bonus, the bonus payment evidently had the effect of adding a provision which led to additional payment and changed or varied the payment required under the contract. In addition, the waiver of liquidated damages did not expressly refer to the original obligation in clause 24.1 of the contract, nor to the dates nor to the rates of liquidated damages...However, the side agreements were changing or varying the entitlement under the contract." [6]

It followed from Ramsey J's finding that the side agreement varied the building contract, rather than being separate and independent contracts, that the disputes referred to adjudication were disputes *under* the building contract and the adjudicator accordingly had had jurisdiction. Further, Ramsey J held that if he were wrong on that and the side agreements were separate, stand-alone contracts and not variations to the building contract, then the disputes arose out of or in connection with the building contract, so on the wording of this contract the adjudicator had jurisdiction in any event.

### *McConnell Dowell*

McConnell contracted to carry out the construction of a gas pipeline for National Grid Gas (NGG). Disputes arose over additional payments and extension of time. These disputes were settled by a supplemental agreement. The supplemental agreement referred back to the construction contract, which was stated to continue in full force and effect except as modified by the supplemental agreement.

McConnell made claims for payment in an adjudication. NGG resisted in the adjudication on the basis that most of the claims had been settled by the supplemental agreement. NGG said that the adjudicator had no jurisdiction to decide on the meaning and effect of the supplemental agreement, which did not contain an adjudication clause. The adjudicator

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[6] *L Brown*, above, at [50].



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considered that he did have jurisdiction and found for McConnell on its claims. McConnell then sought to enforce the adjudicator's decision in court, whereupon NGG again raised its jurisdictional objection.

The judge found that the supplemental agreement was a variation of the terms of the construction contract, not a stand-alone agreement. Both the construction contract and the supplemental agreement were therefore subject to the adjudication clause in the construction contract. The supplemental agreement resolved some disputes but not others. As the supplemental agreement was part of the construction contract, it was for the adjudicator to decide what claims had been settled by the supplemental agreement; that was a matter within his jurisdiction. The adjudicator's decision was accordingly enforced.

### *GPS Marine v Ringway*

Ringway engaged GPS to carry out dredging work at a berth on the Thames by a contract in May 2008.

GPS made a claim for payment against Ringway in adjudication; GPS sought £318,613.59; Ringway had paid £101,385. GPS was successful in the adjudication, Ringway failed to pay the sum ordered by the adjudicator to be paid and GPS sought to enforce in summary proceedings.

One of the grounds on which Ringway sought to resist enforcement was that it alleged that the matters said to give rise to a dispute had been compromised by the parties at a meeting on 30 July 2008. Whether this was so was not a matter that could be decided without oral evidence. The summary judgment application accordingly failed (Ringway having made in the adjudication an effective reservation of its right to make the jurisdictional challenge in the event of enforcement proceedings).

If there was a compromise of the claims, then there was no dispute under the original agreement for the adjudicator to determine at the date of the notice of adjudication; so the adjudicator would not have had jurisdiction.

### *Lee v Chartered Properties (Building) Ltd*[7]

A contractor obtained an adjudicator's decision in its favour and the building owner brought proceedings in court to challenge the validity of the decision; the contractor sought to enforce the adjudicator's decision with a summary judgment application. One of the grounds on which the enforcement application failed was that there was a triable issue as to whether there was a settlement in respect of the sums awarded by the adjudicator. If there was such a settlement, there was no dispute and the adjudicator had not had jurisdiction to make the decision he made.

This case, like the *Shepherd* and *GPS* cases, is an illustration of the principle that there can be no dispute, and therefore an adjudicator can have no jurisdiction, in respect of a claim that has been settled. As the judge, Akenhead J put it in this case:

[7] *Lee v Chartered Properties (Building) Ltd* [2010] EWHC 1540 (TCC).





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> "There can not be a referable dispute in relation to issues or claims in respect of which the parties have settled or compromised as they are no longer capable of being properly disputed."[8]

The courts have tended to treat this point as self-evident; no authorities are cited in relation to it in either *GPS* or *Lee* and there is no discussion in either case of the earlier cases set out in this article. It is clearly correct, it is respectfully submitted.

## Conclusions

1. Once a claim pursuant to a construction contract is settled by a compromise agreement, there is no dispute properly referable to adjudication in respect of that claim.[9]

2. If a settlement agreement settles all disputes under the construction contract, then clearly there is no dispute which may properly be adjudicated.[10]

3. If a compromise agreement settles all disputes (not just some disputes) under the construction contract, it is more likely that the compromise agreement will be a stand-alone agreement, independent of the construction contract.[11]

4. Whether a compromise agreement is a stand-alone agreement depends on the terms of both the construction contract and the compromise agreement.[12]

5. If a compromise agreement settles some but not all disputes arising under a construction contract, then it is necessary to analyse the compromise agreement and the nature of the dispute to ascertain whether there is a surviving dispute which may be adjudicated pursuant to the construction contract.[13]

6. If a claim is made pursuant to a construction contract and is resisted on the basis that the claim has been settled by a compromise agreement, the adjudicator may and should investigate whether that is so.[14] If the claim has in fact been compromised, the adjudicator has no jurisdiction and should so decide. If the claim has not in fact been compromised, the claim may be pursued in adjudication under the construction contract; there is no valid jurisdictional objection. Unless the adjudicator (exceptionally) has jurisdiction to decide his/her own jurisdiction, this question may ultimately be decided by the court.[15]

7. Where there is a construction contract and a second compromise or other agreement, if a claim is made pursuant to the second agreement, an adjudicator will not (subject to the exception mentioned in the next paragraph) have jurisdiction if the second agreement is a separate, independent or "stand-alone" agreement not containing an adjudication clause.[16]

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[8] *Lee*, above, at [22].
[9] See *Shepherd*, *GPS* and *Lee*, above.
[10] The *Shepherd* case is an example of this situation.
[11] See *Shepherd*, above.
[12] See *Shepherd*, *L Brown*, above.
[13] The *Quarmby* case is an example of this situation.
[14] See *Beckingham*, *McConnell*, above.
[15] See *Quarmby*, *McConnell*, above.
[16] The *Shepherd* case is an example of this situation.



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8. The exception referred to in the preceding paragraph is that if the wording of the adjudication provision in the construction contract is in wider terms than usual, so that not only disputes arising under the construction contract may be referred to adjudication, but also disputes "arising out of or in connection with" it, for example, then it may be that a claim which could be made pursuant to the second agreement may also be made pursuant to the construction contract.[17]

9. Where there is a construction contract and a second compromise or other agreement and a claim is made pursuant to the second agreement, an adjudicator will have jurisdiction if the second agreement is a variation of the terms of the construction contract and not a separate, independent or "stand-alone" agreement. In that case the second agreement is read with and as part of the construction contract and is subject to the express or implied agreement to adjudicate in the construction contract.[18]

10. If a second agreement is a compromise agreement but it is not a stand-alone agreement, then it is a matter within the jurisdiction of an adjudicator to determine what claims have and have not been settled by the compromise agreement.[19]

11. A second agreement may vary the terms of the construction contract without expressly referring to the construction contract.[20]

***By Peter Sheridan***

[17] See *Shepherd*, *Beckingham*, *L Brown*, above.
[18] See *Beckinghami, L Brown*, *McConnell*, above.
[19] *McConnell*, above.
[20] See *L Brown*, Beckingham above.



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