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Construction Act Review

The Overlap between Substance and Jurisdiction

By Peter Sheridan

There have been some judicial statements in the Technology and Construction Court to the effect that there is an overlap between matters of substance to be decided by an adjudicator and matters of jurisdiction. The distinction between substance and jurisdiction is then prayed in aid of the notion that where an adjudicator is deciding a matter of substance, then he must have jurisdiction to deal with any issue involved in deciding the matter of substance.

The question has arisen in this way in cases where there are two contracts, or at least where it is being alleged by a party seeking to resist enforcement that there are two contracts.

The purpose of this article is to examine three examples of this line of reasoning and to consider if the line of reasoning is sound. It is assumed throughout this article that the normal position on jurisdiction applies, *i.e.* that an adjudicator may not determine his own jurisdiction, but may give a non-binding view so as to decide whether to proceed with the adjudication or not; the court determines the adjudicator's jurisdiction (and the parties have not conferred on the adjudicator the power to determine his own jurisdiction).

The *Beckingham* case[1]

There was a contract between Mr Beckingham and a construction company, Westminster, which contract was not subject to the HGCR Act but contained contractual adjudication provisions; there was then a further agreement known as the capping agreement (which did not contain such provisions). The capping agreement placed a cap of £300,000 on sums payable to Westminster. A dispute arose which Westminster referred to adjudication; Westminster's claims exceeded the cap. Mr Beckingham claimed that the capping agreement settled Westminster's claims so that there was no dispute or that at best the claims Westminster sought to bring were claims under the capping agreement (which did not provide for adjudication) and not under the construction contract. Either of Mr Beckingham's points, if good, would mean that the adjudicator did not have jurisdiction.

The adjudicator considered that the claims were under the original contract and that the capping agreement was invalid because there was no consideration for it; the adjudicator therefore had jurisdiction in respect of the claims.

Judge Thornton found that the capping agreement was a variation agreement and not a separate contract; Westminster's claims were not made under a contract with no adjudication provisions, but under the original contract. The judge found further that the capping agreement did not settle all Westminster's claims; it merely provided for a cap on the amount payable. The implied further analysis is that where there is a cap on the amount

[1] *Westminster Building Co Ltd v Andrew Beckingham* [2004] B.L.R. 163.

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claimable and a claim is made in excess of the cap, the existence of the cap is a defence and not a jurisdictional objection (on the basis of no dispute). That analysis is, it is respectfully submitted, correct.

Judge Thornton further stated that a dispute as to whether the capping agreement was enforceable was one arising under the Contract and was accordingly a matter the adjudicator could decide within his jurisdiction.[2] While the result of the case is correct, given the judge's findings outlined above, this statement needs to be treated with some care.

It is important, it is submitted, not to take from the *Beckingham* case the principle that because the subsequent agreement was (if valid) a variation of the original contract, and because an adjudicator may normally decide issues as to the terms of the contract (as varied, where applicable), the adjudicator would always necessarily have been able to decide on the validity of the capping agreement. That analysis, it is submitted, only held good because of the judge's further finding that the capping agreement did not settle all disputes.

The position would have been different, it is submitted, if the capping agreement *had* (subject to its being valid) settled the claims which Westminster sought to adjudicate. The validity of the capping agreement would not then have been something the adjudicator could validly determine, it is submitted. If the claims had been settled, as Mr Beckingham contended, he would have had a good "no dispute" argument and the adjudicator would not have had jurisdiction. The adjudicator's view that the capping agreement was not valid would then have been non-binding and it would have fallen to the court to decide whether the capping agreement was valid or not.

The reason why the adjudicator could not have decided on the validity of the capping agreement if its effect had been to settle all disputes is, it is submitted, that jurisdiction is a threshold question. If the correct position were that the capping agreement settled all disputes and was valid, the adjudicator would have had no jurisdiction at any time. It would be irrelevant that the original agreement was merely varied and that in the event of a dispute the adjudicator could determine the terms of the contract. On the facts, there would have been no dispute at the time of the appointment of the adjudicator and no jurisdiction.

There was no express mention of an overlap between substance and jurisdiction in this case and it is not suggested that the result was not correct. However, there are *dicta* in the *Beckingham* case which could be understood as indicating that there is an overlap between substance and jurisdiction.

The *McConnell Dowell*[3] case

McConnell contracted to carry out the construction of a gas pipeline for National Grid Gas (NGG). Disputes arose which 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 considered that he did have jurisdiction and found for McConnell on its claims. McConnell

[2] See the *Beckingham* case at [25].
[3] *McConnell Dowell Constructors (Aust) Pty Ltd v National Grid Gas Ltd* [2006] EWHC 2551 (TCC); [2007] B.L.R. 92.

then sought to enforce the adjudicator's decision in court, whereupon NGG again raised its jurisdictional objections, again without success.

The case is of interest here because although the judge does not refer explicitly to an overlap between substance and jurisdiction, he seems to adopt the principle in the following passages:

> "Let me now stand back and review those three authorities.[4] It seems to me that in each case the relationship between the first and second agreement was crucial. The reason why the adjudicator had jurisdiction in *Beckingham* was that the second agreement operated as a variation of the first agreement. The second agreement was not a stand-alone agreement. Both agreements were subject to the same adjudication provisions, and, therefore, the adjudicator had jurisdiction to determine the effect of the second agreement.[5]
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> This dispute had a number of elements. First, it had to be determined which heads of claim were included in the adjusted contract sum and therefore shut out by the Supplemental Agreement. Secondly, the heads of claim, which were not shut out, had to be assessed and valued. It seems to me that all of these matters constituted a dispute or disputes falling within the adjudicator's jurisdiction...[6]
>
> I am quite satisfied that it was a task for the adjudicator, not for this court (in enforcement proceedings), to determine which claims had been settled by the Supplemental Agreement. The adjudicator may have been wrong in his decision, but that is for determination in subsequent proceedings. The adjudicator reached a decision which was within his jurisdiction. That decision is, for the time being, binding upon the parties, and it must be enforced by this court."[7]

The first passage quoted here states that the reason the adjudicator had jurisdiction in *Beckingham* was that the second agreement operated as a variation of the first agreement. It comes after quoting the following passage from the *Beckingham* case:

> "That case [*Shepherd*, in which it was held that an adjudicator lacked jurisdiction because of an agreement settling all disputes[8]] is, however, not relevant to this one. First and foremost, the [capping agreement] was not a settlement agreement settling all disputes or a stand alone agreement. It was clearly intended to be a variation agreement varying the terms of the underlying agreement. It is to be read with and as part of the underlying agreement. Furthermore, it does not settle all disputes, it merely provides a new contract sum or cap, albeit that the cap is subject to unspecified deductions. Thus, a dispute as to whether it is enforceable is one arising under the contract since its terms form part of and are to be read with the underlying contract."[9]

Two issues were identified by the judge in *Beckingham*: the one identified by the judge in *McConnell Dowell*, which is that the second agreement was a variation agreement and not a

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[4] *Shepherd Construction v Mecright Ltd* [2000] B.L.R. 489, *Quarmby Construction Co. Ltd v Larraby Land Ltd* (Leeds Technology and Construction Court, 14 April 2003) (unreported) and the *Beckingham* case were reviewed by the judge. These are authorities on the jurisdictional position where there is a compromise agreement. *Shepherd* and *Quarmby* are not reviewed here but are fully explained by the writer in *Compromise, Supplemental and Side Agreements* at (2011) 27 Const. L.J. Issue 5 p.410.
[5] *McConnell Dowell* at [42].
[6] *McConnell Dowell* at [45].
[7] *McConnell Dowell* at [47].
[8] See the analysis in the writer's article *Compromise, Supplemental and Side Agreements* at (2011) 27 Const. L.J. Issue 5 p.410.
[9] *Beckingham*, above; quoted in *McConnell Dowell* at [41].

separate contract, and the additional point that the second agreement did not settle all disputes. This latter point, it is submitted, was an important consideration in deciding that the adjudicator had jurisdiction. The point that the second agreement was a variation agreement was not enough on its own and the judge in Beckingham was not deciding that it was. If the writer is wrong on that, then it is submitted that in so far as *Beckingham* was deciding that the adjudicator had jurisdiction purely because the second agreement was a variation of the first, it is not correctly decided.

On the judge's analysis in *McConnell Dowell*, an adjudicator appointed to decide an alleged dispute arising under a construction contract which has been varied, has jurisdiction to determine the effect of the varying agreement. This means that even if the issue between the parties is whether the effect of the varying agreement is to settle the alleged dispute, the adjudicator has jurisdiction to decide that issue, rightly or wrongly. This principle is contrary to the usual rule on jurisdiction, which is that the adjudicator's view on this issue is not decisive, so that if it is in fact wrong, it is overturned by the court on an enforcement application.

This principle, which, if correct, operates as an exception to the rule on jurisdiction, is, it is submitted, incorrect and is analysed further below, after the following outline of the *Air Design* case.

The *Air Design* case[10]

In *Air Design v Deerglen*, the claimant brought various claims in adjudication. It was common ground that there was a construction contract between the parties (referred to as "the Basebuild contract" in the judgment). A dispute under the Basebuild contract would, if referred to adjudication, be one over which the adjudicator had jurisdiction.

Deerglen's position was that the claimant's claims were made pursuant to four separate contracts: the Basebuild contract and three further contracts referred to as "the BMS arrangement", "the CPA arrangement" and "the Supplementary Agreement"; and that these three further contracts did not contain adjudication provisions. Deerglen argued that the adjudicator did not have jurisdiction to adjudicate upon the claims made pursuant to these other contracts.

Air Design's position was that there was only one contract, the Basebuild contract, which was subsequently varied by the BMS arrangement, the CPA arrangement and the Supplementary Agreement; accordingly the adjudicator did have jurisdiction.

Akenhead J made a number of findings, some of which have previously been considered by the writer in Construction Act Review;[11] what is of particular interest here is the judge's analysis that there was an overlap between substance and jurisdiction. After a discussion of whether there was a single contract or a series of contracts, Akenhead J said:

> "However, there are two further factors which effectively override considerations as to whether or not there were one, two, three or four contracts between the parties which establish that the adjudicator was acting within his proper jurisdiction:
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> (a) The substantive decision-making process upon which the Adjudicator had to embark in relation to the disputed claim put before him necessarily involved a consideration of whether there was more than one contract. It was thus within his jurisdiction to decide in effect that there was one contract, albeit one that may have been varied by agreement.

[10] *Air Design (Kent) Ltd v Deerglen (Jersey) Ltd* [2008] EWHC 3047 (TCC); [2009] C.I.L.L 2657.
[11] See *Compromise, Supplemental and Side Agreements* (2011) 27 Const. L.J. Issue 5 p.410.

(b) It was thus a part of his jurisdiction to decide whether or not and if so to what extent the Basebuild Contract had been varied by the CPA and BMS arrangements and indeed whether there were yet further variations ordered to the Basebuild Contract. There may be cases, and this is clearly one, where substance and jurisdiction overlap so that it is within the adjudicator's jurisdiction to decide as matters within his or her substantive jurisdiction whether there have been in effect variations to the contract pursuant to which he or she has properly been appointed adjudicator. It cannot then in those circumstances be a valid challenge to his or her jurisdiction that upon analysis he or she may be wrong as a matter of fact or law in determining that such variations were made to the originating contract as opposed to a series of later legally unconnected contracts...

I have therefore formed the view that the adjudicator did have jurisdiction to rule on all the matters which he did in his decision. Whether he was right or wrong to find or make the assumption that there was effectively one contract which was varied and whether he was wrong as a matter of fact or law in any other part of his decision is immaterial. Any such errors do not mean that he does not have jurisdiction."[12]

This case accordingly squarely takes in terms the point that there is an overlap between substance and jurisdiction, which may have been part of the reasoning in *Beckingham* and was also the reasoning in the *McConnell Dowell* case. It follows from this, as both the judges in *McConnell Dowell* and *Air Design* stated in terms, that an adjudicator's incorrect finding that he has jurisdiction, will be upheld by the court on enforcement, contrary to the usual rule. This curious exception to the rule arises only where there are successive agreements.

The overlap fallacy

The writer's view is that the theory that there is in the type of circumstances in the cases described above an overlap between substance and jurisdiction, is not correct. There is, on a proper analysis, never any such overlap, nor is there any exception to the usual rule on jurisdiction. The fact that there are successive agreements is irrelevant to the *kompetenz-kompetenz* principle that the adjudicator may not determine his own jurisdiction.

There is a straightforward flaw in the reasoning that there is an overlap between substance and jurisdiction, which logicians refer to as the fallacy of *petition principii* or circularity of reasoning. This is a type of fallacious or illogical and therefore invalid argument, the flaw being that the premise on which the argument is based assumes the conclusion argued for. When simply expressed, these arguments are obviously invalid, but in more complex formulations they are not so simply recognised.

The fallacy in the "overlap" cases is the assumption that the adjudicator is dealing with a matter of "substance", which assumption carries with it the assumption that the adjudicator has jurisdiction in respect of that matter of substance. This assumption seems to arise from the fact in the successive agreement cases that there is clearly an initial construction contract between the parties, under which an adjudicator will properly have jurisdiction over a dispute which arises under the contract and is effectively referred to him.

But in the successive agreement cases, whether the dispute does arise under the construction contract or another separate contract, or the matter alleged to be in dispute is in fact not in dispute, is the very issue which has first to be determined. It cannot, therefore, be

[12] *Air Design*, above, at [22-23].

assumed as the starting point of the determination of that issue. There is on a proper and logical analysis, no issue of "substance" unless and until that jurisdictional issue is determined in favour of the claimant. If that issue is properly determined in favour of the respondent, then the adjudicator never had any jurisdiction and no issue of "substance" ever arose.

There is no policy reason and certainly no justice-driven reason why an adjudicator's decision made without jurisdiction should be enforced in successive agreement but not in other cases.

In all cases, it is submitted, only if the issue of jurisdiction is correctly determined in favour of the claimant is the adjudicator's decision valid. Where a jurisdictional objection is made to the adjudicator, that is the subject of a non-binding ruling by the adjudicator and if the adjudicator wrongly decides he has jurisdiction, the decision is not enforceable. There is, therefore, on a proper analysis never any overlap between "substance" and jurisdiction. The concept of "substance" may only confuse the issue and, it is suggested, is not useful terminology. There are simply cases where adjudicators have jurisdiction to determine a dispute and cases where they do not.