

## Construction Law Update

### Can an Employer Pay a Sub-Contractor Direct and Recover the Payment from the Contractor?

In the recent arbitration appeal case of *Nobiskrug GMBH (“Nobiskrug”) v Valla Yachts Limited (“Valla”)*, two interesting issues were remitted to the tribunal for further consideration relating to the recovery of sums via damages and undue enrichment.

#### Background

Nobiskrug was engaged by Valla to plan, execute, organise and project manage the building of a superyacht (the “Works”) under a contract dated 29 March 2012 (the “Contract”). Part of the Contract was that Nobiskrug would engage sub-contractors, under sub-contracts approved by Valla, for certain aspects of the Works.

In December 2014, ISMOTEC GmbH (“Ismotec”), the sub-contractor responsible for electrical engineering and cabling, made a claim against Nobiskrug for around €3,000,000 and threatened to suspend work unless payment was made. This was followed by a string of claims from various sub-contractors which, due to fear of disruption, Valla settled.

Valla’s payments to the sub-contractors were made under various conditions, including agreements between Nobiskrug and Valla that liability would be decided in later proceedings and Valla expressly reserved its rights to recover the same in this way.

#### The Arbitration

Valla sought to recover the sums it had paid to the sub-contractors, via arbitration, on various grounds including: under the Contract, on the basis of restitution (that Nobiskrug had benefited from Valla’s payment as it had discharged its obligations under the Contract) and as damages for breach of Nobiskrug’s obligations as project manager. Nobiskrug argued that the sums were never due to the sub-contractors by it

in the first instance meaning Valla had made the payments voluntarily and could not recover the same.

The tribunal appeared to find that if payments were made on the express basis that liability for those sums would be resolved by some form of dispute mechanism and under a reservation of rights – Valla was entitled to recover them.

#### This Appeal

Nobiskrug appealed the decision by a section 69 application and permission was granted on the basis of the following question of law:

In relation to payments made by an Employer to a Sub-Contractor, where the Employer fails to establish that the Contractor was under a liability to make payment to the Sub-Contractor, is the Employer entitled to recover those sums from the Contractor in restitution, solely on the basis that it reserved its rights to do so?

The answer was no. The judge held that a right could not be created merely because it had been reserved, and, to recover the sums paid, Valla would have had to prove that Nobiskrug was obliged to make payment in the first instance or that the effective cause of the claims was the project management failures of Nobiskrug – issues that had not been decided by the tribunal.

#### Remission of the Award

Due to the conclusions made by the tribunal in relation to the reservation of rights, no substantive analysis/award was made upon whether (a) Nobiskrug benefitted from undue enrichment or (b) the project management failures of Nobiskrug were an effective cause of any of the sums claimed by the sub-contractors and paid by Valla. The court, however, felt there was ‘considerable force’ in these submissions

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and as such remitted these issues back to the tribunal for further consideration.

### Analysis

It will be a relief to many that the record was put straight in this appeal so that it no longer appears that a reservation of rights can itself create rights. What will now be interesting is how the tribunal decides upon Valla's entitlements to the sums it paid by virtue of restitution and breach of obligations.

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