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Construction Law Update

Every Word Holds Weight: Second Adjudication Not Prevented By Wording of Settlement Agreement

High Court rules on the scope of a Tomlin order and subsequent adjudication rights

In *Dawnvale Cafe Components Ltd v Hylgar Properties Ltd* [2024], the Technology and Construction Court (TCC) considered the meaning and effect of a Tomlin order which settled earlier adjudication enforcement proceedings concerning a repudiatory breach of contract.

The main issue was whether the employer could refer to a second adjudication a new claim for additional losses arising from the same breach of contract or whether the terms of the Tomlin order precluded such action. Alternatively, whether the new claim was impermissible as it constituted the same or substantially the same dispute as that previously adjudicated.

Key takeaways:

- **As a matter of language, the Tomlin order did not bar a second adjudication.**
- **The Court held that the new claim was not 'the same or substantially the same' dispute as that heard by the first adjudicator, and so could be re-adjudicated.**
- **Businesses should be alert to the risks of not using precise language in settlement agreements. If it is not clear regarding exactly what has been settled, there remains a risk of future claims for the same breach.**

Background

In February 2020, property developer Hylgar Properties Limited ("**Hylgar**") engaged fit-out company Dawnvale Cafe Components Ltd ("**Dawnvale**") for the design, supply and installation of mechanical works at The Beacon, Hoylake, Wirral for the sum of £631,435 plus VAT ("the **Contract**").

The relationship between the parties broke down and the Contract was terminated in November 2020. Each party alleged the other had committed the relevant repudiation.

On 8 June 2021, Hyglar referred the dispute to adjudication. By a decision dated 19 July 2021, the adjudicator found that Dawnvale had committed the repudiatory breach and must therefore repay Hylgar the sum of £180,322.92 plus VAT, interest and fees ("the **Award**").

Tomlin Order

Dawnvale failed to pay the Award and Hylgar issued enforcement proceedings in the TCC (the "**Enforcement Proceedings**").

On 24 August 2021, the Enforcement Proceedings were settled by way of a Tomlin order in which Hylgar agreed to pay the settlement sum – essentially, the Award plus accrued interest and costs - in instalments ("the **Settlement Agreement**"). While seemingly comprehensive, the Settlement Agreement included a clause that would later become a source of dispute. Paragraph 4 of the Schedule stated:

"*(4) …The payment of the Settlement Sum is in full and final settlement of any and all claims the Claimant may have against the Defendant* ***arising from or in connection with these proceedings****.*" (emphasis added)

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The New Claim

Two years later, by a letter of claim dated 31 August 2023, Hylgar sought to recover £641,594.76 in further losses arising from Dawnvale's breach of contract (“the **New Claim**”) and stated its intention to refer the New Claim to adjudication.

Dawnvale responded with Part 8 proceedings, seeking:

1. A declaration that paragraph 4 barred further claims by Hylgar.
2. A declaration that the New Claim was ‘the same or substantially the same’ as the previous dispute.
3. An order preventing Hylgar from initiating the proposed further adjudication.

The short-form procedure in Part 8 of the Civil Procedure Rules may be followed where the issues to be determined are unlikely to involve a substantial dispute of fact. As readers of our recent bulletins will be aware, the attempted use of Part 8 can itself prove contentious, but in this case the Judge, Neil Moody KC, considered the issues were “eminently suitable” for determination under Part 8.

Dawnvale contended that the Settlement Agreement ought to be interpreted expansively to cover any conceivable claims arising under the Contract. Hylgar argued that, on a proper construction of the Settlement Agreement, the New Claim amounted to a fresh dispute and could be referred to adjudication.

Held

The Judge declined to make the declarations sought by Dawnvale. The proceedings were dismissed for the following reasons:

- The words "*these proceedings*" in paragraph 4 of the schedule to the Settlement Agreement referred specifically to the Enforcement Proceedings relating to the first adjudication. They should not be construed to include the wider contractual dealings between the parties.

- While the New Claim arose from the same Contract, it could not be said to arise from or be in connection with the Enforcement Proceedings.

- The New Claim was not ‘the same or substantially the same’ as the dispute heard by the first adjudicator as it concerned different issues. The first adjudicator established Dawnvale's breach and determined the true value of the works to that point in time. The second adjudicator was being asked to decide further heads of loss arising from that breach. There was no overlap.

- The judge commented that if the position were otherwise, a referring party would be required to quantify all heads of loss prior to bringing a claim. This would delay proceedings and obstruct cash flow, which was inconsistent with the pay now, argue later principle.

- Both parties had received legal advice. If they intended to settle any and all future claims, they could easily have said so by referring to all claims arising from or in connection with “the Contract”, “the Works” or “the Dispute(s)”, rather than use the more specific wording “*these proceedings*.”

For these reasons, the Settlement Agreement only covered payment of the first adjudication Award, not other potential claims. Hylgar remained entitled to refer the New Claim to adjudication.

Analysis

This case is a useful reminder that precise language matters in settlement agreements. If the parties intend to bar any and all claims related to the works, they must say so unequivocally—otherwise they could face significant future claims arising out of the same breach of contract.

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