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## LEGAL BRIEFING

### *Taking sides*

### *L Brown & Sons Limited v Crosby Homes (North West) Limited*

TCC, Mr Justice Ramsey [2005] EWHC 3503

#### ***The Facts***

The parties entered into a JCT with Contractor's Design contract for the construction of 114 residential apartments in Manchester. This case concerns the enforcement of an Adjudicator's Decision. During the adjudication, Crosby Homes raised three jurisdictional challenges:

1. There was no jurisdiction under the "side agreements";
2. If there was an agreement it was not in writing; and
3. If there was a written agreement then it was not a construction contract.

#### ***The Issues***

Two main issues arose at trial. First, under the main contract, does the adjudicator have jurisdiction in respect of disputes arising "under the contract", or does his jurisdiction extend to disputes "under, out of or in connection with the contract"? Second, were the disputes referred to the adjudicator arising "under" and/or "out of or in connection with" the contract?

#### ***The Decision***

The contract had been amended. Article 5 provided that "if any dispute or difference arises under this Contract" then either party could refer that matter to adjudication in accordance with clause 39A. Amended clause 39A.1 provided that either party may refer any dispute or difference "arising under out of or in connection with this Contract to adjudication [emphasis added]".

The scope of clause 39A.1 was therefore potentially wider than Article 5.

The defendant argued that Article 5 prevailed but Mr Justice Ramsey held that the contract needed to be read as a whole and that particular emphasis should be given to the bespoke amendments to the standard form that had been agreed between the parties. The adjudicator therefore had jurisdiction to consider disputes arising under, out of or in connection with the main contract.

In October 2004 the parties had reached two agreements. The second October agreement was alleged to have waived liquidated damages and introduced a bonus scheme. Crosby argued that the disputes arose under the alleged side agreement, which was not in writing or was not a construction contract.

Mr Justice Ramsay considered that the key issue was whether the side agreement was a separate settlement agreement or was a variation to the original contract. He held that unlike *Shepherd Construction v Mecright* the second October agreement in this case was not a full and final settlement agreement.

The true effect of the side agreement was to introduce a bonus system and

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relief to liquidated damages, which was a variation to the contract. While the parties, in the side agreement, did not specifically refer to the terms of the contract, it was clear that the effect of the side agreement was to amend provisions of the contract. As the side agreement amended the contract, and the contract contained a wide dispute resolution clause, then an officious bystander would conclude that the dispute resolution procedure under the contract applied to the side agreement. At paragraph 52 he stated:

In this case, I consider that the side agreements fell into this category of agreements. It was necessary to have regard to the underlying Contract, in particular to see what liquidated damages had been waived. As a result, because, in my judgment, the side agreements were variations to the contract, I consider that the disputes under those side agreements would be properly categorised as disputes under the contract.

He went on to hold that the phrase “out of or in connection with” was wider than “under” the contract, and so even if the side agreements were separate obligations, then they arose out of or in connection with the contract such that the adjudicator had jurisdiction in any event. Brown was therefore entitled to summary judgment.

#### ***Comment***

This is another decision relating to adjudication. It is interesting for two reasons. First, the dispute resolution clause in the main contract had been amended in order to include disputes arising “out of or in connection with” the contract. The defendants tried to argue that there was a conflict between the narrowly drafted Article 5 and the wider bespoke amendment to the contract. The judge came to the conclusion that there was no conflict between these provisions, and that one simply needed to read the contract as a whole to conclude that the wider interpretation was the correct one.

Second, side agreements can fall into two categories. First, a settlement agreement is an entirely separate contract, albeit that it may settle disputes arising under the main contract. However, the second category of side agreements is one that merely varies the original contract. A side agreement does not need to specifically refer to the clauses in the main contract. If the side agreement has the effect of varying the terms of the original contract then that is sufficient. A side agreement that simply varied a contract would be caught by the dispute resolution provisions in the original contract. If the side agreement were truly a separate settlement agreement, then an adjudicator may still have jurisdiction if the dispute resolution clause under the main contract was widely drafted. In other words, if the dispute resolution clause covered any disputes arising under or “out of or in connection with” the original contract.

***Nicholas Gould***  
***March 2007***

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