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Case No: CR-2021-BHM-000037

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

Birmingham Civil Justice Centre
33 Bull Street
Birmingham B4 6DS

Monday 16 May 2022

BEFORE:

HIS HONOUR JUDGE WILLIAMS
(Sitting as a Judge of the High Court)

BETWEEN:

MARPAUL SOUTHERN LIMITED

Applicant

- and -

BETTESHANGER SUSTAINABLE PARK LIMITED
(In Creditors' Voluntary Liquidation and acting by its Joint Liquidators Vincent John Green and Steven Edwards)

Respondent

MR T LAZUR appeared on behalf of the Applicant

MR S KERRY appeared on behalf of the Respondent

JUDGMENT

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(Official Shorthand Writers to the Court)

JUDGE WILLIAMS:

Introduction

1. This is my judgment following an appeal brought by Marpaul Southern Limited ("***Marpaul***") pursuant to rule 14.8(1) of the Insolvency (England and Wales) Rules 2016, against a decision made by the respondent, Betteshanger Sustainable Park Limited ("***the Company***") acting by its joint liquidators, Messrs Newman and Green, to reject Marpaul's proof of debt of nearly £1 million. The liquidators rejected the proof of debt since they were not satisfied by reference to the evidence then relied upon by Marpaul that it was a genuine creditor of the Company and/or entitled to the sums claimed.

Background

2. By way of background, I refer to and adopt the chronology prepared by counsel for Marpaul. However, in summary, Hadlow College is a specialist land-based college, which acquired the site of a former colliery for redevelopment as Betteshanger Country Park.

3. The Company, a wholly owned subsidiary of Hadlow College, was incorporated in 2009 as a special purpose vehicle to manage the project. Wilmott Dixon were appointed as main contractor for construction of a visitor centre and museum at the park and provided in April 2015 a guaranteed maximum price of £6.258 million plus VAT.

4. However, in June 2015, Wilmott Dixon sought substantially to increase the costs plan, following market testing, to £7.9 million plus VAT. As a result, Marpaul, whose offices are situated opposite the College and who had previously worked for the College on dozens of other projects going back over some 15 years, were approached to replace Wilmott Dixon as a management contractor.

5. By letter dated 2 September 2015, Mr Mark Lumsdon-Taylor, in his stated capacity as "Group Director Finance & Resources" of Hadlow College, wrote to Mr Rod Clark, director of Marpaul, in the following terms:

> "As agreed in line with College regulations, we have formally engaged with you for the project management and delivery of the Betteshanger Sustainable Park Centre. In line with our tender estimates, you have undertaken to ensure that the combined budget of the project does not exceed £6.6m (inclusive of all relevant costs and associated expenditure). The College retains control (**Inaudible**) key budgets as we previously agreed.
>
> This ensures that the project costs are globally not exceeded and the risk is mitigated to us as the client."

6. In January 2017, works on site were suspended due to a lack of funding. On 1 August 2017 Mr Lumsdon-Taylor was appointed a director of the Company. Mr Lumsdon-Taylor and Mr Clark signed a JCT contract. Their signatures were witnessed by Mr Daniel Boakes, an employee of Marpaul. The JCT contract is dated 19 August 2017. It names the Company as the Employer and Marpaul as the Management Contractor. In late 2017 works recommenced.

7. In January 2019 works were again suspended. On 26 February 2019 Mr Lumsdon-Taylor left Hadlow College and resigned as a director of the Company. Mr Graham Morley was appointed acting principal of the Hadlow Group and as a director of the Company.

8. On 1 April 2019 Marpaul served a statutory demand on Hadlow College in respect of works carried out by Marpaul to the order of the College in respect of three projects, including the Betteshanger visitor centre.

9. On 22 May 2019 Hadlow College was placed into administration.

10. On 30 May 2019 Marpaul served a statutory demand on the Company for works carried out under the JCT contract. By letter dated 25 July 2019 the Company's then solicitors, Womble Bond Dickinson, responded to the statutory demand and amongst other things stated as follows:

> "Our client's position is that the date of the purported JCT Contract (19 August 2017) is false and that the document purporting to be the JCT contract on which your client is seeking to base its claim against [the Company] was in fact created by your client in May 2019."

11. On 2 December 2019, the Company entered administration as part of a pre-pack administration, which involved the sale to a third party purchaser of land owned by the Company and which was the Company's primary asset comprising an 80-acre site forming part of the park, but not that part upon which the visitor centre was being built. The sale price was £1.465 million, but the land was subject to a fixed charge in favour of Kent County Council in the sum of £904,762.

12. On 9 November 2020, the Company entered into creditors' voluntary liquidation.

13. The amount claimed in Marpaul's proof of debt was £997,439.56 inclusive of VAT. The documents attached to the proof of debt included a schedule of outstanding invoices and the JCT contract.

14. By letter dated 12 January 2021, Mr Newman, joint liquidator, rejected Marpaul's proof of debt, stating as follows:

> "……After due consideration I have decided to reject your alleged whole claim for the following reasons.
>
> On the evidence presented I do not consider that Marpaul….is able to establish with sufficient merit that it has entered into a JCT contract with the Company.
>
> In addition, I'm not persuaded on the evidence submitted that [Marpaul] and the Company can be said to be bound by any contract of any kind……for the provision of goods or services.
>
> On that basis I do not consider that [Marpaul] would be successful in the claim against the company for any of the unpaid invoices given that it is not, in my opinion, any evidence with sufficient merit to support [Marpaul's] assertion that it contracted with the Company, whether pursuant to a JCT contract or otherwise. Therefore, [Marpaul] would not be able to sustain its claim because it would fail to establish any contractual nexus/ relationship with the Company. As such, the invoices presented (none of which are

addressed to the Company) cannot be said to be due and [Marpaul's] claim would therefore fail."

15. Marpaul's appeal against that decision is dated 2 February 2021. As a result of consent orders made during the course of these proceedings there have been no less than five rounds of evidence with the last order being dated 4 February 2022 and whereby it was directed that Marpaul file and serve a further witness statement including any documents upon which it intended to rely upon in support by 1 March 2022, with the liquidators to file and serve any evidence in response by 4.00 pm on 1 April 2022. Pursuant to that order, Marpaul served a fifth witness statement from Mr Clark dated 10 March 2022, which, with exhibits, runs to a total of 374 pages. In response, the liquidators made an application that there be a split trial, with quantum being left to another time. I dismissed the application with reasons to follow.

Application for split trial

16. In her witness statement dated 13 April 2022 in support of the application, Ms Clench, the liquidators' legal representative, stated as follows:

> "[Marpaul's] quantum claim as put forward in Mr Clark's fifth witness statement is entirely new. Prior to that statement [Marpaul] relied solely upon a relatively small number of invoices. The invoices that [Marpaul] provided are exhibited to Mr Newman's first witness statement dated 9 April 2021…..
>
> Those invoices were not satisfactory and did not set out any adequate information regarding the works in respect of which sums were claimed. By way of example, the invoice……dated 23 May 2017…includes a single line item ("Standing charge for March 2017") in the total sum of £249,156.00 (inclusive of VAT). No information or substantiation of that sum is provided.
>
> The liquidators have, since the outset of these proceedings, raised the issue that the information provided in [Marpaul's] invoices is insufficient. The first witness statement filed by the liquidators in these proceedings (that of Mark Newman, dated 9 April 2021) stated…
>
> > *The invoices that Marpaul purports to rely upon provide only minimal information regarding the works to which*

> *they relate, consisting of either 1 sentence descriptions or broad phrases such as "Standing charge". I do not consider that Marpaul has adequately demonstrated that the sums invoiced are properly recoverable under the JCT Contract.*

Despite this issue having been raised, [Marpaul] did not provide any significant further information to substantiate the sums set out in its invoices. [Marpaul] simply continued to exhibit and rely upon the same invoices up to and including Mr Clark's fourth witness statement……, which refers to 70 invoices in total of which 14 are said to be outstanding "either in part or in full." The first invoice referred to…….is the same invoice…..dated 23 May 2017……..

Furthermore, [Marpaul] did not at any stage provide or exhibit a complete copy of the document which (it asserts) is the JCT Contract between the parties. [Marpaul] provided only the signed "Agreement" pages, without the relevant terms (and without confirmation of whether or not those terms were amended). It did not explain the basis upon which it was entitled to payment by reference to any term of any contract.

Accordingly, as matters stood after the fourth witness statement, the quantum position was straightforward. [Marpaul] relied upon a series of invoices; the liquidators regarded those invoices as insufficient. The court faced the simple task (for which expert assistance was not required) of considering the 14 invoices [Marpaul] relied upon, and considering whether or not it was satisfied that they demonstrated an entitlement to payment of £1m.

In Mr Clark's fifth witness statement Marpaul's position substantially changed

(i) For the first time, [Marpaul] provided a copy of the JCT terms upon which it sought to rely.

(ii) For the first time, [Marpaul] asserted that the parties agreed that Marpaul "*would be paid the cost of any work we performed ourselves, plus an overhead and profit uplift on the cost of works, and a fee to cover our management services*." That was a wholly new basis of payment, which [Marpaul] had not previously suggested (Mr Clark's fourth witness statement, for example, refers to a "contract sum agreed"……

(iii) For the first time, [Marpaul] provided a "final valuation" prepared in March 2019, said to state "the total sum due to us and our subcontractors for all completed works as £9,933,831." That document alone is a spreadsheet over 70 pages long.

(iv) For the first time Marpaul provided copies of the summary pages of 16 valuations not previously relied upon.

(v) Marpaul provided, at paragraph 56, a summary of its claim that was for a different (and seemingly increased) figure to that contained in its proof.

In short, there was a very substantial volume of new material, that was different to (and in some respect inconsistent with) what had come before.

Much of the information (in particular the purported "final valuation") is in a format that it will be difficult for the Court to deal with practically, without the assistance of an expert. It is unclear how [Marpaul] expects the Court to be able to evaluate the detail of a 70 page spreadsheet, and determine whether or not [Marpaul] is entitled to all the sums claimed."

17. I dismissed the application for a split trial for the following primary reasons.

18. Firstly, the application was made very late and, if granted, would potentially result in further delay and further costs. The parties have to date incurred costs in connection with these proceedings between them of some £220,000. Those costs are already wholly disproportionate. Whilst the disputed debt is undoubtedly a significant sum, any recovery against that debt is likely to be a fraction of its value. The liquidators' annual progress report to 8 November 2021 estimates some £400,000 available for unsecured creditors and not taking into account any potential realisation from the overage agreement made in connection with any future development of the land sold. The unsecured creditors total some £2.5 million, being primarily Marpaul and Hadlow College. The estimated dividend payable to those unsecured creditors is 16p in the pound, which means that the maximum dividend Marpaul would receive would be some £160,000.

19. Secondly, there is currently no application before the court for permission for expert evidence. In any event, it is difficult to see why any such expert evidence would be reasonably required to resolve the proceedings in circumstances where it is Marpaul's case that the ongoing valuations relied upon were agreed by the Company during the course of the works and which were therefore binding. It is agreed between the parties that this is not an appeal in the true sense, and it is not my role to review the liquidators' decision and determine whether or not their decision was correct. Rather, I must determine on the evidence now before me, including the valuations, whether or not Marpaul has discharged the burden placed upon it to prove its debt on the balance of probabilities.

20. Thirdly, whilst there was no limit placed upon the length of the final round of evidence, the liquidators' solicitors set out their concerns in an email dated 31 January 2022 as follows:

> "…..the liquidators can in principle agree to your client filing further evidence by 4.00 pm on 1st March 2022, subject to the following points.
>
> First, the liquidators are concerned as to the scope of what is being proposed. We understand that it is Marpaul's intention to submit evidence relating to "construction-associated quantum evidence" but it is unclear what this is expected to entail, or how extensive such evidence is likely to be. The liquidators are concerned that the adjourned trial date would be derailed if Marpaul sought to exhibit extensive further evidence and/or exhibits (i.e. a witness statement exceeding 10 pages in length, or exhibits exceeding 50 pages). The liquidators do not propose formally to limit Marpaul's evidence, but fully reserve their position if faced with evidence that is disproportionately long, raises wholly new issues, or requires expert input in order to properly respond."

Whilst the final account was previously disclosed by way of inclusion as an exhibit to Mr Clark's fourth witness statement dated 25 November 2021, it is fair to say that it was only in his fifth witness statement that Mr Clark has sought to explain how that account was operated and the underlying valuations agreed during the course of the works. That all said, Mr Green in his third witness statement dated 11 April 2022 confirms that he was able to consider the new evidence and, having done so, remained

unsatisfied that Marpaul had demonstrated that it is owed a debt by the Company. Indeed, for the detailed reasons given over the following 13-and-a-half pages of that witness statement, Mr Green explained why Mr Clark's latest witness evidence gave rise to further concerns and additional reasons why he was not satisfied, and presumably why the Court cannot be satisfied, that Marpaul is a genuine creditor of the Company.

Evidence and argument on the substantive application

21. I now therefore turn to consider the substantive application. As already touched upon, this application has generated a very significant volume of written evidence extending over three lever arch files. I am unable in the course of this already overly long judgment to refer to all the evidence and argument relied upon by the parties, but I have taken it all into account in reaching my decisions.

22. It is submitted on behalf of the liquidators that they have no personal interest in the outcome of the application and, as such, are neutral. Through their evidence and at the hearing the liquidators merely seek to place before the court all relevant matters to assist the court in reaching its conclusion.

23. It is submitted on behalf of Marpaul that, despite their claims to the contrary, the liquidators' conduct cannot possibly be considered neutral when they have in particular alleged fraud in connection with the JCT contract and in the absence of any or any proper evidential basis for having done so.

Has the JCT contract been backdated?

Curious features

24. In my judgment there are undoubtedly a number of curious features arising in connection with the JCT contract.

    a. It was apparently signed in August 2017, some two years after work on a multi-million pound contract had commenced.

b. It gives as a date for completion of 20 February 2017, which is a date before the JCT contract was purportedly signed.

c. According to their written evidence, the liquidators conducted their own extensive search of the books and records of the Company available to them and have been unable to locate a copy of the JCT contract or any evidence of any discussions or negotiations leading up to the apparent date of its signature, nor indeed has Marpaul disclosed any such relevant contemporaneous documents such as emails or minutes of meetings.

d. The JCT contract names Hazle McCormack Young as the Architect/Contract Administrator. Under the terms of the JCT contract the appointed Architect/Contract Administrator is obliged to carry out extensive and important functions, for example, in extending the completion date and issuing completion or non-completion certificates. However, the liquidators have made enquiries with Hazle McCormack Young which confirmed that it was not appointed as Contract Administrator under the JCT contract but rather was appointed by Wilmott Dixon and then by Marpaul as architect only.

e. On 2 April 2019, Marpaul served a statutory demand on Hadlow College. On 21 May 2019, Mr Paul Talbot, Marpaul's quantity surveyor on the project, sent an email to Real Estate Advisory Services Limited, seeking to give clarification around the contractual basis of the claim. He there stated that another email of 16 September 2016 recorded the fact that Marpaul agreed to enter into a Management Contract with Hadlow and listed all the duties and responsibilities that Marpaul would be responsible for under that contract.

f. On 22 May 2019, Hadlow College entered administration. On 30 May 2019 Marpaul issued a new statutory demand to the Company in respect of the same debt and by reference to the JCT contract. That chronology likely formed the basis of the allegation contained in the letter of Womble Bond Dickinson that the JCT contract had been signed in May 2019.

25. Taking all those features in the round, I do not consider that the liquidators can be reasonably criticised for seeking permission to cross-examine Messrs Clark and Lumsdon-Taylor so that these concerns could be put to them, which concerns had been extensively particularised in advance of the hearing in the liquidators' written evidence. Whilst the liquidators' role may be neutral, it is not passive, having regard to the duties imposed upon them to investigate the proof. In *Nimat Halal Food Ltd & Anor v Patel & Anor* [2020] EWHC 734, Chief ICC Judge Briggs summarised the relevant legal duties imposed upon the liquidators as follows:

> "It has long been the law that an office holder is under a duty to examine every proof and consider the validity of the debt which is sought to be proved … He should require satisfactory evidence that the debt on which the proof is founded is a real debt … And the obligation is not negated even where the proof is based on a judgment …"

Inconsistent witness evidence

26. It is also fair to say that there were inconsistencies in the oral evidence I heard on this particular issue. For example, Mr Clark said it was only after Marpaul had found the JCT contract that they were advised that they had served the first statutory demand on the wrong debtor. When the first statutory demand had been served they had simply forgotten about the existence of the JCT contract. However, in his written evidence Mr Clark had stated as follows:

> "Due to the financial difficulties of both the college and [the Company], and given the large sums outstanding and owing to Marpaul, they attempted to protect their position by making a demand on both the College and [the Company]. This in no way should be interpreted as anything other than an attempt on Marpaul's part to protect its position as best it could in a situation where the Hadlow Group was facing multiple insolvencies. It is no way reflective of the true contractual position, which for the reasons explained lies between Marpaul and [the Company]."

27. Mr Lumsdon-Taylor said that there were a number of very important reasons why the JCT contract was required, including both legally and at the insistence of the various funders, which included the National Lottery as well as local and national government.

However, he was then unable to explain why, if the JCT contract was required, it had not been signed at the outset of the works rather than some two years later.

Conclusion

28. At my request, the letter from Womble Bond Dickinson, which specifically alleges that the JCT contract was signed in May 2019, was put to Mr Lumsdon-Taylor for his response. Mr Lumsdon-Taylor then said in his evidence that in early 2019 he had been excluded from Hadlow College and publicly challenged such that his position became untenable. The College had been his life, which began to disintegrate such that he attempted to take his own life in February 2019. He asked rhetorically why, at a time when all that was going on and at a time of public humiliation, he would have sought to prejudice his position by backdating a document.

29. I found Mr Lumsdon-Taylor's evidence credible and indeed utterly compelling. It was perhaps unsurprising, having heard that evidence for the first time, that in closing submissions it was conceded on behalf of the liquidators that there was insufficient evidence available for the court to find that the JCT contract was not genuinely signed.

Sham

30. However, even though I find on balance that the JCT contract was genuinely signed, it was further submitted on behalf of the liquidators that the evidence suggests that it may simply have been a paper exercise that the parties created for the purposes of providing it to the funders, but was not intended to govern the relationship between them. There is evidence to suggest that the parties were not operating in accordance with the JCT terms even after the contract had been signed:

    a. Not only did Hazle McCormack Young not carry out any of the functions as envisaged by the JCT contract, but Marpaul, even on its own evidence, was not submitting applications for payments and invoices in accordance with the JCT terms and in particular Section 4 of the Conditions.

b. Other documentation also appears more consistent with Hadlow College being the contracting party, such as the engagement letter dated 2 September 2015. Indeed, in the first instance Marpaul itself asserted by way of the first statutory demand that Hadlow College owed the relevant debt.

31. It was further submitted that the available evidence places the liquidators in a difficult position. It is not for them to press upon the court a positive case, still less one that involves making serious allegations against the individuals involved, in circumstances where the liquidators have no personal knowledge of the relevant matters. Nonetheless, in circumstances where the issue of sham is apparent on the documents put forward the liquidators consider it appropriate to raise the point, direct the court's attention to the relevant evidence and allow the court to decide the issue.

Legal framework

32. Turning to the applicable legal framework, Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802 held that to describe documents as sham is to find that they are documents:

> "executed by the parties…… which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create…….for….. documents to be a sham……all the parties thereto must have a common intention that the… documents are not to create the legal rights and obligations which they give the appearance of creating."

33. In *Hitch & Ors v Stone* [2001] EWCA Civ 63 Arden LJ explained the approach to documents alleged to be shams as follows:

> "[65] First, in the case of a document, the court is not restricted to examining the four corners of the document. It may examine external evidence. This will include the parties' explanations and circumstantial evidence, such as evidence of the subsequent conduct of the parties.

> [66] Second, as the passage from *Snook* makes clear, the test of intention is subjective. The parties must have intended to create different rights and obligations from those appearing from (say) the relevant document, and in addition they must have intended to give a false impression of those rights and obligations to third parties.
>
> [67] Third, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where the parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter situation, the agreement is not to bind their relationship.
>
> [68] Fourth, the fact that parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. The proper conclusion to draw may be that they agreed to vary their agreement and that they have become bound by the agreement as varied …
>
> [69] Fifth, the intention must be a common intention …"

However, reckless indifference will be taken to constitute a common intention. In *Midland Bank plc v Wyatt* [1997] 1 BCLC 242 it was held that a sham transaction will remain a sham transaction even if one of the parties merely went along with the shammer neither knowing about nor caring what they were signing.

34. It was submitted on behalf of the liquidators and relying further upon *Midland Bank plc v Wyatt* that it is not necessary to establish a fraudulent motive to prove that the document is a sham. However, in my judgment there is a distinction to be drawn between motive and intention. In *National Westminster Bank plc v Jones & Ors* [2002] BPIR 361 Neuberger J held that a degree of dishonesty is involved in a sham, which is by definition created with an intention to mislead.

35. Whilst an allegation of sham necessarily involves a finding of dishonesty, the civil standard of proof (balance of probabilities) does not vary with the gravity of the alleged misconduct. That said, as Males LJ said in *Bank St Petersburg PJSC & Anor v Arkhangelsky & Ors* [2020] EWCA Civ 408 (Ch):

> "In general, it is legitimate and conventional, and a fair starting point, that fraud and dishonesty are inherently improbable, such that cogent evidence is required for their proof. But that is because, other things being equal, people do not usually act dishonestly …"

Further, in *National Westminster Bank v Jones* Neuberger J said [59]:

> "…..Because a finding of sham carries with it a finding of dishonesty ….., and because the court places great weight on the existence and provisions of a formally signed document, there is a strong and natural presumption against holding a provision or a document a sham."

With that approach in mind, I must therefore take great care when assessing the evidence and whether facts have been proved or admitted that support the inference that the JCT contract was intended to mislead.

Marpaul's evidence

36. It was the written evidence of Mr Clark that:

> "…..we discussed taking the project over from Wilmott Dixon from around March 2015.
>
> …….
>
> ……we worked on a detailed forecast plan for the works, with a proposed contract sum of £6,500,000...That cost plan shows that this was a detailed forecast cost split according to the stage of the works…..
>
> It is important to explain that the agreed cost plan was not an agreement for a fixed price contract. We were appointed principally as a management contractor. We had a forecast cost which we attempted to achieve but would carry out some work ourselves and appoint subcontractors to perform other works under our supervision.
>
> We would be paid the cost of any work we performed ourselves, plus an overhead and profit uplift on the cost of works, and a fee to cover our management services. That is an entirely standard approach to management contracts throughout the industry.

During the course of the works we would update the cost plan as costs were incurred in order to provide an up-to-date forecast cost to completion, as well as provide the detail that was supportive of the sums claimed in our invoices.

In this initial period, the work went ahead without a formal contract in place. As far as we were concerned, the cost plan was all we needed for the works to go ahead as that document set out the work we were to carry out and what we would be paid for it, and it provided the basis upon which costs could be tracked throughout the works.

…….we had a long history of working with the Hadlow Group and were used to their way of working. They were not good at contract administration and relied on us to provide a professional level of organisation for the work. This approach of us providing a detailed cost estimate and reporting actual costs against it regularly throughout the work up to completion was out standard approach with them. It had worked well in the past, and subject to the payment difficulties we had from time to time, it worked well on this project too.

As to which Hadlow Group company we had an agreement with at that time, it was not something we had discussed and it was not something that concerned us given our long history of working with the Hadlow Group. From our position outside the group it appeared that the Hadlow Group had a fairly chaotic approach to organising these sorts of projects but, as long as we were ultimately paid, those details did not concern us. The way they managed and allocated work within and between their companies was a matter for them, and if they had wanted us to sign a contract with any particular group company at that time we would have done so.

After starting work, we issued our first valuation based on the latest cost plan on 1 November 2015…..from that valuation we were recording (1) Any variations to the cost plan that had been made. In this case there were four listed variations (2) The actual costs incurred against the cost plan to date (£288,218 in this first valuation).

As the invoice schedule….shows, we started invoicing for the works based on our valuations from 20 November 2015. We would split up our invoices by area of work so that we were more easily manage the flow of payments down to our subcontractors.

…….

Quite early on, however, a number of variations to the costs plan were required. As you can see in our February 2016 cost plan….., we had adjusted the Target Cost to over £7 million because of additional works that were needed to the foundations of the visitor centre.

……..We issued regular valuations throughout the works in that period which provided formal updates to the cost plan and the actual costs incurred against it.

…….

….., Hadlow instructed us to slow down and suspend the works from January 2017 whilst it worked through its funding issues.

During that period we were told that we had to maintain labour and plant on site to give the appearance that the site was still operating, although no work of significance was being performed. I was told by Mark Lumsdon-Taylor that this had to be done while he rebalanced the financial situation given the increase in the forecast costs to completion.

We did as we were instructed but considerable costs were incurred in this period because all the plant and materials were kept on site, including all temporary works, scaffolding, security and the full office support team.

……..

Th[e financial position] was eventually resolved, as indicated in Mark Lumsdon-Taylor's email dated 30 June 2017.

…….

As we remobilised, we then provided a detailed programme for the remainder of the works…… which programmed completion of the project by 24 October 2018.

During that period [of suspension] we had incurred substantial standing charges which we discussed with [the Company] throughout the period. As set out in our Valuation No. 15…. we were incurring an estimated £40,000 per week in standing charges. Following recommencement of the works, we put a final figure of £44,526 per week into our Valuation No. 16 dated 31 December 2017 which we have maintained throughout our applications up to the final account in March 2019.

All our valuations were provided to [the Company] at regular meetings throughout the works and discussed. At no point were our outstanding charges challenged.

It was also during this period that it seems like one of the funders of the project discovered that we did not have the formal written contract for the construction works, or had asked to see it and [the Company] decided to formalise the agreement. Mark Lumsdon-Taylor therefore asked us to execute a JCT contract to address that concern.

You can see in the completed contract……[that the] Contract Sum Document is a reference to our valuations…..

The administrators who dispute our debt seem to think it was strange to impose the JCT terms onto a project that had been ongoing since 2015, but that was the nature of doing business with the Hadlow Group. They needed a formal contract to carry on with the project and we were prepared to sign up to one. As Mr Lumsdon-Taylor confirms, we had nothing to do with the naming of [the Company] as the employer. That was entirely his decision. As I have said….. I had no reason before this to question who the employer was and had no objection to [the Company] being named as the employer. In fact, it made sense, given that we were building the Betteshanger visitor centre which [the Company] would be running when it's opened. As far as I was concerned, I had no reason to think that [the Company] was not the employer all the way through the project, but even if that was not the case, my understanding was that [the Company] formally took over responsibility for the project and our account from that point.

…….

As to payment terms, the situation was chaotic. Mr Lumsden-Taylor provided a series of cash flow analyses during this period which indicated when he expected to get funds from funders and how he intended to spend the money on the works……..

We spent time trying to understand this document, and other versions of it, against our valuations and projections for the total cost of the works…….

……..

There was no point in our making applications for payment based on our valuations as any invoice would attract a VAT liability with uncertainty as to when we would be paid. We therefore tried to

> match our payment applications with the cash flow forecasts provided to us by Mark Lumsden-Taylor.
>
> That shift in practice meant that we stopped issuing regular valuations of our completed works. After recommencing works, our next valuation was not issued until December 2017 but we recommenced regular monthly valuations from March 2018 through to November 2018. The November 2018 application was the last valuation we issued prior to the suspension in January 2019.
>
> …….However, after the suspension of the works in January 2019 we revisited the account and produced a final valuation in March 2019…..which stated the total sum due to us and our subcontractors for all completed works as £9,933,831.
>
> ……
>
> ….our valuations were discussed with [the Company] throughout the works and were not disputed. That is because the adjusted contract sum was agreed and we made sure that every variation added to the account reflected an agreement for a fixed sum."

37. In his oral evidence Mr Clark said that the requirement for the JCT contract was discussed at several site meetings during the period of the first suspension. A written contract needed to be completed as part of a new package of funding and restructuring the project, although he accepted that he had been unable to locate any contemporary emails referring to the JCT contract. Mr Clark denied that labour and plant was maintained on site during the first suspension in order to give a false impression that works were ongoing. He said that Marpaul was told to stop major works and finish what had started but not to close the gates because it was intended to recommence the works once the new funding package was agreed. The College was anxious to show in the meantime that the site had not shut down rather than give the impression that more work was being done than was actually the case.

38. In his written evidence Mr Lumsdon-Taylor stated:

> "Mr Newman makes reference in his statement to a letter dated 2 September 2015……

…. Mr Newman references a line in that letter " *we are formally engaged with you for the project management and delivery of the Betteshanger Sustainable Park Centre"* and the fact that the work commenced shortly thereafter in November 2015, as indicative that the letter was intended to be legally binding and that a contract had been formed. This was not the case, the letter was not intended to represent a binding agreement, but instead was a representation of initial opening instructions and it was only after subsequent discussion that the contract was agreed and later formalised in the terms of a JCT… Contract… dated 19 August 2017 between Marpaul and [the Company]….'

….. Mr Newman then seeks to show that Hadlow College was the relevant contracting party as opposed to [the Company]. As mentioned…. the letter was not intended to be legally binding, but in any event, the fact it was written on Hadlow College headed paper, includes Hadlow College's address and states it as being agreed in line with "College regulations" is not indicative of the parties' intentions. Hadlow College Group is a collective group of entities which [the Company] is part of and when that letter was written it was merely an expression of the instruction which….. it was never the intention of any of the parties to form any binding contractual relationship other than between Marpaul and [the Company]. References to college "regulations" and "control" are just standard wording and should not be taken to suggest Hadlow College was a party to any subsequent contract.

……

In any event, it is noted that the JCT Contract is clear in that it confirms in clause 1.3 that nothing contained in any other contract document…….. will override the JCT Contract or its terms, and therefore it is somewhat irrelevant as to the content of the communications sent prior to the date of the JCT Contract."

39. When it was put to Mr Lumsdon-Taylor by reference to Mr Clark's written evidence that the JCT contract was only signed to give the appearance to funders during the first suspension that the site was still operational, he explained that they were under significant public scrutiny and were experiencing significant delays and cash flow problems on the project, but they did not wish to shut down the site completely and so maintained a site presence whilst seeking to resolve the funding issues. Mr Lumsdon-Taylor confirmed, however, that the funders were fully aware of the delays and were supportive. A written binding contract was required because they were accountable as a public body. The delay in putting in place that contract was explained in that

mistakes were made and administratively they simply did not have the capacity sufficient to deal properly with the significant growth of the College.

Conclusion

40. On balance, I do not find that the JCT contract is a sham for the following primary reasons.

41. Firstly, I find that the College was engaged simultaneously in several multimillion pound capital spend projects and, being primarily an educational establishment, it was out of its depth and struggling to manage those projects all at the same time and with limited internal resource available to do so. The first suspension of works arose as a result of cost overrun and cash flow problems, which exposed the College to increased scrutiny from, in particular, the funders, and as evidenced by Mr Richard Morsley in his stated capacity as director of the Company when emailing the Big Lottery Fund on 30 January 2017 in the following terms:

> "Further to our conversation last Friday, please find attached the following as agreed.
>
> > Letter from Mark Lumsdon-Taylor confirming the project completion in line with agreed outputs - as discussed on Friday the cost overrun is being managed across the Group and the cash position is being managed accordingly. This is supported by the disposal of some Group assets, including the old Ashford College site, which has already taken effect.
> >
> > Revised bill programme - the programme has been revised in line with the cash flow position and the building will be handed over in December 2017 with Practical Completion in February 2018.
> >
> > Internal and external images of the build.
> >
> > Launch strategy. This was as prepared for a summer 2017 launch, but will be prepared for a spring 2018 launch.
>
> We are pulling together a claim for the retention sum, and this will be with you by close of play tomorrow."

42. The attached letter, also dated 30 January 2017, from Mr Lumsdon-Taylor in his capacity as Group Deputy Principal and CEO of Hadlow College states as follows:

> "I have had a conversation with Richard Morsley, Director of Betteshanger Sustainable Parks, and I appreciate the time you have taken in discussing the current status of our project. I would like to confirm that this project will be completed in 2017 in line with its original specifications, delivering all the outputs we have agreed with the Coastal Communities Fund. I'd also like to confirm that Hadlow, as parent organisation, will ensure any cost overruns are absorbed. Hadlow Group has never failed to deliver a capital project despite unforeseen costs, and I can give you my professional guarantee that this will not change on the Betteshanger Sustainable Park scheme."

43. Therefore I am satisfied that, at a time of heightened scrutiny, the intended purpose of the JCT contract was to record in writing and formalise the contractual relationship between Marpaul and the Company. No reason has ever been suggested for why it would have been considered necessary or even desirable to seek to mislead the funders as to the true identities of the contracting parties.

44. Secondly, Marpaul has produced a copy of the cost plan dated 18 September 2015, recording a proposed contract sum of £6.5 million. Marpaul has also produced a spreadsheet valuation which was a working electronic document created at the outset of the project and recording on an ongoing basis the cost of the works undertaken as against the forecast for that particular phase of the project, together with variations by way of additional items of work arising from time to time and not included in the original cost plan. From that spreadsheet Marpaul produced monthly valuations, copies of which have been disclosed. This spreadsheet was, I find, core to the contractual relationship. Section 4 of the standard conditions of the JCT contract is subject to any modifications set out in the Supplemental Particulars. Those Supplemental Particulars state that the amounts and calculation of the Prime Cost provided for under Section 4 of the Standard Conditions is adjusted by and as set out in the Contract Sum Document, which in my view was clearly intended to be a reference to the spreadsheet valuation. Indeed, the project cost plan total of £6.882 million stated earlier in the Supplemental Particulars is the same figure stated in valuation no. 13 as at 31 December 2016, being the then revised cost plan excluding variations immediately

prior to the first suspension of works and during which time the JCT contract was signed. The Supplemental Particulars further state that for the purpose of calculating adjustments pursuant to Section 4 of the Standard Conditions then, in place of Schedule 2, overheads and profit are charged at 12.5 per cent and the management fee is charged at 12.5 per cent, making a total of 25 per cent. Valuation No.s 3 to 10 expressly record OH&P at a rate of 25 per cent of the amount of the listed variations.

45. Therefore, there is evidence to suggest that the parties were indeed operating in accordance with the terms of the JCT contract after it had been signed.

46. Thirdly, whilst the liquidators refer to other evidence to suggest that the parties were not operating in accordance with the JCT terms even after the contract had been signed, the fact that the parties subsequently depart from an agreement does not necessarily mean that they never intended the agreement to be effective and binding. Rather, they may have simply intended subsequently to vary their agreement.

47. Fourthly, even accepting that Mr Clark was recklessly indifferent to what he was signing, a finding of sham either as to the identity of the contracting employer or as to the operative terms of the JCT contract would necessarily require a finding that Mr Lumsdon-Taylor signed the JCT contract with the intention of misleading third party funders.

48. In my judgment, it is an essential element of procedural fairness that a judge ought to be extremely cautious before making findings of dishonesty against a witness unless they have at least had the opportunity to rebut the allegation. This is not only required because of fairness to those affected but also to avoid the court falling into error. As Megarry J memorably said in *John v Rees* [1970] Ch 345:

> "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which somehow were not; of unanswerable charges which in the event were completely answered; of inexplicable conduct which was fully explained …"

49. Indeed, in the present case it was only after I insisted that the specific allegation of backdating the JCT contract made by the Company's former solicitors in

correspondence be put to Mr Lumsdon-Taylor and he be given a proper opportunity of dealing with the allegation that the liquidators rightly conceded that there was insufficient evidence available to make a finding that the JCT contract had been backdated. As a result of the liquidators' stance, no specific allegation of dishonesty was put to Mr Lumsdon-Taylor in the context of an alleged sham such that he was not given a proper opportunity of dealing with and defending himself against such a finding, if made.

Quantum

50. Turning to quantum, in his fifth witness statement Mr Clark explains that by reference to the final account as at March 2019 Marpaul was entitled to a total payment of £4,574,684 plus VAT. Marpaul has been paid £3,876,200 plus VAT, leaving a balance due of £698,484 plus VAT in respect of the works up to January 2019. Mr Clark confirmed in his evidence that he was not aware of any challenge that had been made to the underlying account upon which those figures are based in terms of the costs incurred and/or the ongoing valuations of the variations. He stated that this was not unusual given the extent to which Marpaul worked with the Company to develop the valuations throughout the works.

51. In his third witness statement Mr Green stated as follows:

> "…..Marpaul has not, at any stage in these proceedings, provided any underlying documents supporting any costs allegedly incurred by Marpaul in completing the works. It has (until Mr Clark's fifth witness statement) simply relied upon invoices issued by Marpaul itself. The further documents exhibited to Mr Clark's fifth witness statement appear to be summaries of the relevant costs and applications of payment, all produced by Marpaul itself. Mr Clark says in several places……that further evidence is available to support the alleged costs, but this is the first time that this has been mentioned. I do not see how I can be expected to take into account evidence or documents that Marpaul has not provided."

52. In my judgment, the liquidators cannot be criticised for initially rejecting Marpaul's proof of debt in circumstances where Marpaul was initially relying upon invoices for substantial sums but absent any or any proper breakdown. Mr Clark in his fourth

witness statement sought to provide greater detail as to the works to which the invoices related and how payments have been allocated against those invoices. However, in his second witness statement Mr Green responded by stating as follows:

> "……. Mr Clark's approach appears to be misconceived. In order to demonstrate that a sum is owed to Marpaul, Marpaul would need to demonstrate the value of all of the work completed and then show that there is a shortfall in the sums paid against the global figure. It cannot pick and choose which invoices it wishes to evidence/explain."

In my judgment, Mr Clark's fifth witness statement seeks to do just that, by giving a detailed history of the underlying account by reference to contemporary documents, including monthly valuations.

53. It is Mr Clark's evidence that the account was the subject of collaborative working and was agreed during the course of the works. However, Mr Green in his second witness statement responded as follows:

> "On Marpaul's case it would appear that costs submitted by Marpaul should be simply accepted in full. However, there is no evidence of any confirmation from a quantity surveyor that represents the Employer's interests. Based on advice I have received (privilege over which is not waived), I consider it is highly unusual for a client and contractor quantity surveyor to agree on every cost for every item every month and all variations in the manner stated in Mr Clark's witness statement. This is particularly the case on a project lasting over several years and valued at several million pounds."

54. There is, in my view, a sense of the liquidators seeking to move the goalposts. In any event, in my judgment, it is striking that on 30 March 2018 Darren Cowd, Head of Heritage and Visitor Experience at the Company, emailed Alan Parnham, Marpaul's contracts director, in the following terms:

> "We have heard back from the Heritage Lottery Fund about our current (and future) claim; we need to do some work…. With the current claim they have asked for greater clarity on the invoicing and will not draw down without it. They want to see ALL the invoices for a work/contractor package to date where museum

> work is included in it, with a signed Quantity Surveyor's assessment of the percentage/value of that package that is attributable to the museum space for each quarter/claim. They do not believe that our subcontractors are supplying invoicing for specific areas."

Mr Parnham responded:

> "I note your comments and will review them on Thursday with our QS Paul Torbett. As a general point; the project valuations have not been set up to support this approach and we are left with trying to justify the claims. We have valued the extent of works attributable as 23 per cent based on the floor area as the only realistic method. Are you saying that you require an external QS to audit the figures or can we do this as your appointed project managers?"

Mr Richard Morsley, Company director, who had been copied into those earlier email exchanges, then confirmed:

> "We do not require a further QS, and this can be assessed through the project QS. Darren is off for the rest of the week, but given the amount of money we're talking about, I think we may need to work through the Museum cost plan with you in order to work out how we are going to substantiate the overall Museum budget with the project figures. I hope that we can work to this position and look to include prelims etc where necessary to bolster the overall spend."

Those emails demonstrate, in my view, not only the close collaborative working relationship described and relied upon by Mr Clark in his written evidence but also that it was the Company's own decision not to engage a quantity surveyor to represent its interests, since it was clearly happy to rely upon Marpaul's own quantity surveyor, and no doubt reflecting the trust and confidence that had developed throughout a long working relationship stretching back many years.

55. Another practical example of that collaborative working relationship and the quite frankly chaotic approach of the Company to pricing is that on 19 May 2017 Mr Lumsdon-Taylor emailed Rod Clark, attaching a cash flow analysis with expected

fund receipts and how those funds were to be allocated. The covering email simply requested, "can you work with this and can you get chippies in monday?" In considering a later version of the cash flow analysis, Mr Parnham emailed Rod Clark in the following terms:

> "I've recreated the.. Cashflow spreadsheet in Excel and added figures as I know them. What I do not know are the relevant payments to Marpaul as these are not subject to certification…… What is most disconcerting is that the buffer I was building up to pay subcontractors when there was an apparent shortfall appears to have been reallocated and may cause some problems in the future. It would be most helpful if we could have a consistent set of figures that we can work to. We still have an overall shortfall of £653,757.80 that seems to be ignored."

56. Therefore any failure to comply with alleged industry-wide practices in the administration of the account, in my view, appears rooted in decisions taken by the Company and are a reflection of the confused and disorganised state of affairs existing within the Hadlow Group, in which case it seems particularly unfair to seek now to criticise Marpaul for any such failures.

57. On balance, therefore, I am satisfied that Marpaul has proved its final account and that the unpaid balance of that account as claimed by Marpaul is due from the Company under the JCT contract.

58. Mr Green raises in his second and third witness statements the issue of liquidated damages absent an extension of time, although for the reasons submitted on behalf of Marpaul, and on the evidence currently available, I am not satisfied that any entitlement to liquidated damages arises in circumstances where:

    a. There was suspension of works from January 2017 to August 2017, which was caused by the College's own funding difficulties. That suspension would entitle Marpaul to a significant extension of time.

    b. There was an agreed re-baselining of the programme on the recommencement of works with a new completion date of 24 October 2017.

c. There were significant variations issued throughout the works as evidenced by the detailed final count and there is evidence of a further adjustment to the completion date to March 2019.

d. Progress was in any event frustrated by the second suspension of work from January 2019 so could not be completed.

e. There is no evidence that a claim for liquidated damages has ever been raised by the Company in the past and no direct evidence to support an allegation that Marpaul was responsible for any delay in completion.

59. Marpaul also claims sums due under invoices arising in relation to works carried out post-suspension of the works in January 2019 in terms of securing the site, £17,516.25 plus VAT, and standard charges, £173,193.81 plus VAT. It was Mr Clark's evidence that Marpaul undertook those works in accordance with the instructions of Mr Graham Morley, who in January 2019 was appointed as interim group principal of Hadlow College as well as a director of the Company. It was submitted on behalf of the liquidators that I need to consider based on the emails exhibited to Mr Clark's fourth witness statement to which entity any instruction is attributable. It was Mr Clark's evidence that, as far as he was concerned, this was all additional work that was performed in relation to the project and was covered by the JCT contract that had been agreed.

60. I note that on 14 March 2019 Mr Morley emailed Rod Clark in the following terms:

> "As you're aware, the College is currently experiencing some financial difficulties and is being supported by central Government until such time as a sustainable, financially secure future can be established. Given this position, we cannot pay anyone until those currently supporting us are satisfied that the amounts are rightly due. This means that we have to provide evidence to demonstrate that the contracts were properly procured and contracted with invoices clearly matched against individual contracts. With regards to yourselves and the way in which you worked with the previous executive across multiple developments, this is proving more difficult than envisaged and as a result is taking more time than expected.

> With regards to the Betteshanger site, I want you to continue to maintain the current position of keeping the building, equipment and material safe and secure until such time as any alternative arrangements for that location have been put in place. Please liaise with Dave Hammond directly on this issue. With regards to this instruction, please provide detailed invoice/s to Hadlow College separately for the costs you have, and will, incur for this element of work from Friday 15th February 2019, the date of my appointment to the College and, providing the invoices are accurate and a reasonable reflection of the costs involved, I will seek to process these as quickly as possible and outside of the other more problematic invoices so payment to yourselves is not delayed."

In my judgment, it is clear from the contents of that email that the instruction being given was separate from and outside any existing contractual arrangements.

61. I am reinforced in that view by the fact that on 29 March 2019 Mr Morley sent a further email in the following terms:

> "….. I recognise that this is a difficult period but we are not able to process your historic invoices until we are able to demonstrate to central Government, in effect the Treasury, that each of those invoices is correctly allocated against an individual contract that has been properly procured and is rightfully payable. Unfortunately, the way your business undertook its business arrangements with the College and the way the transactions were recorded within the college makes this a particularly difficult task…….
>
> On another issue, please be aware that we're having to demonstrate good value for money to central government to ensure we continue to receive the financial support the colleges currently require. Questions have been asked concerning the costs related to the ongoing security of the Betteshanger visitor centre. I have therefore asked Dave Hammond to obtain three independent quotes, in accordance with our Financial Regulations procurement processes. The closing date for this process is…….. 3 April and decisions will be made by…… 5 April, with a view to entering into a new contract with the successful contractor……. I have asked Dave to include yourselves in the requests to tender should you wish to and if you are successful, you will be appointed under a new and separate contract that will ensure [you] will be paid in full for the work undertaken from 8 April onwards."

Those emails were signed off by Mr Morley in his stated capacity as Interim Group Principal of Hadlow.

62. In the circumstances I am not satisfied on the available evidence that Marpaul has established that those instructions in relation to post-January 2019 charges were given on behalf of the Company pursuant to the JCT contract or otherwise; more likely, the instructions were given on behalf of the college outside the JCT contract.

63. That concludes my judgment.

(After further submissions)

64. In relation to the issue of costs, each side seeks to argue that the other side has been guilty of unreasonable conduct in connection with these proceedings. In my view, that conduct has to be considered in the wider context of this case which is that:

a. It arose out of the liquidation of a higher educational establishment, which I was told during the course of submissions was in itself unusual being the first of its kind. In my substantive judgment I have already referred to emails from Mr Morley, who was the Interim Group Principal appointed to replace Mr Lumsdon-Taylor. In those emails he makes clear that the liquidation was subject to considerable scrutiny at government level and in particular at the Treasury.

b. Again dealt with in my substantive judgment, there is clear evidence of the chaotic and confused nature of the Company's internal administrative procedures and processes adopted during the course of the project, which ultimately on analysis raised more questions than they answered and as evidenced again by the emails from Mr Morley.

In that context, I am not persuaded that either party can be found to have been guilty of unreasonable litigation conduct such that it would justify a departure from the usual costs order that (i) Marpaul, having been the successful party overall on this appeal,

be entitled to its costs paid by the Company and (ii) the liquidators be entitled to an indemnity in respect of their costs. That is my decision on the issue of costs.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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