

Bungalow Brouhaha—an object lesson in residential construction disputes (Kang v Pattar)

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Construction analysis: This case concerned a typical construction dispute between dissatisfied homeowners and an unpaid builder. The homeowners argued that the building work was defective, while the builder argued that the work was merely incomplete. The dispute encompassed a range of legal issues which commonly arise in such disputes. The judgment therefore provides helpful insight into the ways in which the courts approach such matters as contract formation, agency and undisclosed principals, misrepresentation, ascertainment of contract terms, variation, repudiation and the quantification of damages, all in the challenging context of an informal, largely oral and multiply varied agreement between the parties. In summary, Her Honour Judge Sarah Watson, sitting in the Technology and Construction Court in Birmingham, held that the defendant builder, Mr Pattar, was not in breach and that the claimant homeowners had repudiated the agreement by failing to—(i) make payment to the defendant, and (ii) invite the defendant to resume his building work. The claim was dismissed and the defendant was awarded judgment on his counterclaim in the sum of £18,642. Written by Callum Monro Morrison, barrister, at Keating Chambers.

Kang and another v Pattar [\[2021\] EWHC 1101 \(TCC\)](#)

What are the practical implications of this case?

The case largely turned on its facts and, in particular, on the judge's recurrent preference of the defendant's evidence and consequent findings as to the terms of the agreement. However, the case does provide a number of salutary lessons for parties who agree and operate their building contracts orally and only subsequently reduce such contracts to writing:

- where instructions are habitually given to a builder orally and those instructions are inconsistent with subsequent written terms or construction drawings, the builder will not necessarily be in breach of contract for complying with his oral instructions but not with the subsequent contractual documents. If such documents are intended to require a builder to strip out and redo existing work with which they are inconsistent, the parties should expressly say so
- whether disputed terms of an oral building contract were agreed will be tested against good sense in construction practice. For example, in this case the claimants alleged that the defendant agreed to relocate the drainage runs beneath the property. However, the claimants laid a concrete floor slab over the ground floor before the defendant had made the necessary drainage connections. Although the claimants contended that the defendant had agreed to drill through the slab to make the said connections, the judge found (at paras [117]–[120]) that '[i]t would make no sense at all for work to be carried out in that way', supporting the defendant's contention that he agreed only to connect to the existing drainage run and to relocate a manhole
- where a party seeks to construe its opponent's conduct as evincing an intention no longer to be bound by the terms of an agreement, the court will scrutinise the context in which that conduct occurs in order to determine whether such an intention can indeed be imputed to the opponent. In this case, the claimants argued that the defendant ignored requests to return to site. However, the only request which the claimants could specifically identify was

one to board up the site and remove rubbish. The judge held (at para [65]) that '[f]ar from being a request to continue with the works, that appears to be a request to ready the site for a period when work would not be continuing'

What was the background?

The claimants, Mrs Kang and her husband's uncle Mr Avtar Singh, entered into an oral 'Initial Contract' with the defendant for the extension and improvement of a bungalow property in Aldridge. However, the formation of the contract was not entirely straightforward—it was in fact Mr Avtar Singh's brother, Mr Rajinder Singh (Mr Singh), who approached the defendant for a quote for the building work and later gave instructions to the defendant during the course of the project.

The claimants argued that they were undisclosed principals and Mr Singh their agent, that the defendant's work was defective, and that the defendant had abandoned the project to undertake work elsewhere, thereby repudiating the building contract. The claimants claimed damages in respect of the defects and delay, seeking to establish certain defects by reference to construction drawings produced after the works had commenced. The drawings were said to have been incorporated into a 'Varied Contract'.

The defendant argued that Mr Singh was the true and only principal, that the claimants could not rely on a written record of the Varied Contract because they had misrepresented its purpose, and that the claimants had repudiated the Varied Contract by failing to—(i) make interim payments, and (ii) invite the defendant to resume his work. The defendant claimed damages for his lost profit on the remainder of the contract resulting from the claimants' repudiation.

What did the court decide?

As regards the issue of undisclosed principalship, counsel for both parties agreed that the applicable law was as set out in *Siu Yin Kwan v Eastern Insurance* [\[1994\] 2 AC 199](#). The judge noted (at para [12]) that '[a]n undisclosed principal may sue on a contract made by an agent for the principal acting within the scope of his actual authority, provided the agent intended to act on the principal's behalf', unless the contract or the circumstances which surround it show that the agent is the true and only principal. While the judge accepted the defendant's evidence that he had initially understood Mr Singh to own the bungalow rather than the claimants (at para [14]), the consistent involvement of Mrs Kang and her husband in the project and the appearance of their names on planning and Building Regulation documents indicated that they were undisclosed principals. Further, following *Smith v Wheatcroft* [\(1878\) 9 Ch D 223](#), the judge held (at paras [19]–[21]) that since the defendant would have been equally willing to contract with the claimants, his consent was not vitiated.

As regards misrepresentation, the defendant's argument did not succeed either. The judge held (at para [19]) that:

'even if there was misrepresentation as to the purposes for which the Defendant was being asked to produce the written document, I am not satisfied...that, but for that misrepresentation, he would not have agreed to name the Claimants in the document in place of Mr Singh.'

As regards repudiation, the judge found that Mr Singh had instructed the defendant to suspend the works, so that the defendant was not in repudiatory breach by abandoning the site. The judge remarked trenchantly (at para [46]) that Mr Singh:

‘complains that the Property was left like a building site from the first week of July. I find that complaint odd, since the Property was in fact a building site and, if the Claimants were expecting work to continue, they would be expecting the Property to be a building site.’

Ultimately, in the light of numerous inconsistencies in Mr Singh’s evidence, the judge preferred the defendant’s case theory—Mr Singh and/or the claimants had run out of money to fund the building work. As a result, they had stopped paying the defendant, failed to invite him to resume the work and then concocted a claim against him to recoup funds. The judge even found (at para [70]) that the claimants deliberately misled the defendant into producing a written record of the Varied Contract in the belief that the record would enable continuation of the work. In reality, the record was sought for the purpose of prospective litigation. The claimants then unilaterally altered the terms of the agreement in their own version of the record, seeking to place more onerous requirements on the defendant retrospectively. The claimants’ record was found not to reflect what had in fact been agreed between the defendant and Mr Singh.

Overall, the case serves as a stark reminder that, in spite of the best efforts of lawyers, it is the cogency of witness evidence that so often proves determinative.

Case details:

- Court: Technology and Construction Court (Birmingham District Registry)
- Judge: Her Honour Judge Sarah Watson
- Date of judgment: 28 April 2021

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