



LEGAL BRIEFING

Matthew Harding (trading as M J Harding Contractors) v (1) Gary George Leslie Paice (2) Kim Springall

[2015] EWCA Civ 1231, Lord Justice Jackson, Lady Justice Rafferty and Lady Justice Gloster

The Facts

During March 2013, Mr Paice and Ms Springall ('the Employers') engaged Mr Harding, trading as M J Harding Contractors, ('Harding') to complete works on two residential houses at Purley in Surrey. The contract incorporated the adjudication provisions of the Scheme for Construction Contracts ('the Scheme').

Paragraph 9(2) of the Scheme provides that an adjudicator must resign where the dispute is the same or substantially the same as one which has previously been referred to adjudication and a decision has been taken in that adjudication.

Harding commenced work on 8 April 2013 but relations with the Employers soon deteriorated and on 18 September 2013 the Employers issued a notice of termination.

During October 2013, Harding commenced two adjudications against the Employers and was successful in both, recovering some £285,022.00.

On 8 August 2014, Harding issued an account claiming a further payment of £397,912.00, and on 1 September 2014 commenced adjudication seeking recovery of this sum. The Employers served a purported pay-less notice on 2 September 2014.

In this third adjudication, in a Decision dated 6 October 2014 the Adjudicator found that:

- (i) the pay-less notice of 2 September was invalid having failed to specify the bases of the Employers' contentions so that the Employers were required to pay the notified sum of £397,912.00; and
- (ii) that it was not necessary to decide whether or not the £397,912.00 amounted to a correct valuation of the works.

In paragraph 185 of his Decision the Adjudicator stated:

"... I have not decided on the merits of Harding's valuation and have not decided that £397,912.48 represents a correct valuation of the works. The parties made submissions in this adjudication about the proper valuation but these did not fall to be considered by me because of the rule relating to a notified sum becoming automatically due in the absence of a valid pay-less notice."

On 14 October 2014, the Employers commenced a fourth adjudication seeking declarations as to the valuation of the contract works.

On 21 October 2014, Harding commenced proceedings in the TCC seeking an injunction to restrain the fourth adjudication on the basis that all of the valuation issues raised by the Employers had already been decided in the third adjudication so that the Adjudicator in the fourth adjudication lacked jurisdiction.

On 21 November 2014, the TCC refused the injunction including on the grounds that:

- (i) the failure to serve a compliant pay-less notice could not permanently deprive the Employers of the right to challenge the contractor's account; and,
- (ii) that paragraph 9(2) of the Scheme applied where a dispute previously referred to adjudication had actually been decided.

Harding then commenced an appeal. On 15 December 2014, the Adjudicator in the fourth adjudication issued his Decision requiring Harding to pay the Employers some £325,484.00. However, that Decision was not enforced on grounds of apparent bias. Whether or not the Employers could commence what would be a fifth adjudication depended upon the outcome of Harding's appeal.

The issues

Harding appealed on two grounds that in refusing the injunction the Judge had:

- (i) misinterpreted paragraph 9(2) in the Scheme; and
- (ii) had incorrectly analysed the scope and effect of the Adjudicator's Decision in the third adjudication.

The Decision

The Court of Appeal found that the Judge had not erred in his interpretation of the Scheme as in paragraph 9(2) the word "decision" meant a decision in relation to the dispute now being referred to adjudication. The Court therefore rejected Harding's submission that if a similar dispute had been referred to adjudication without having been decided, that was sufficient to trigger paragraph 9(2).

The Court of Appeal also dismissed the second ground on the basis that in the third adjudication the Adjudicator had made it clear in paragraph 185 of his Decision that he had not dealt with the valuation issue nor carried out a valuation exercise. Accordingly, the Judge had been correct to find that there had been no previous decision by an Adjudicator on the valuation dispute referred by the Employers in the (abortive) fourth adjudication. Hence paragraph 9(2) would not prevent the Employers from referring this dispute to (a fifth) adjudication.

Commentary

The Court of Appeal joined the Judge in adopting a common sense approach to paragraph 9(2) of the Scheme. As Jackson LJ observed, if a claimant refers twenty disputes or issues to adjudication but an adjudicator only decides one of those disputes or issues, it could not be right that the Scheme would prohibit future adjudications about the other matters. This approach will require incoming adjudicators to scrutinise previous decisions to see what disputes/issues have and have not been decided, but as Jackson LJ pointed out, this should not create any particular difficulties, (at least in most cases).

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