



LEGAL BRIEFING

Benfield Construction Ltd v Trudson (Hatton) Ltd [2008] EWHC 2333 (TCC), Mr Justice Coulson

The Facts

The defendant, Trudson (Hatton) Ltd (“Trudson”), engaged the claimant, Benfield Construction Ltd (“Benfield”) to carry out the design and construction of two houses and external works near Hatton in Warwickshire. The works became seriously delayed and the date for completion of 29 September 2006 passed. Subsequently, on 17 August 2007, a document titled “Handover Form” was signed by both the defendant’s agent and a representative of the claimant. The document confirmed that “on the final inspection of this property the works were accepted as complete, subject only to the following outstanding items being dealt with in a reasonable time...” and a list of defects was then set out. On 3 September 2007 the defendant’s agent wrote to the claimant stating that they were unable to certify practical completion due to a defect in the floor screed. The claimant pointed out that this was not on the defects list and therefore practical completion was effective as of 17 August 2007.

A series of adjudications were then commenced. The first dispute referred to adjudication by the defendant arose out of its contention that practical completion had not yet occurred whilst the claimant was saying that it had occurred on 17 August 2007 as a result of the contents of the handover form. The adjudicator concluded that practical completion had not occurred on 17 August 2007 and had still not occurred at the date of the adjudication notice.

The second adjudication was commenced by the defendant on the same date as the first adjudication. It was concerned with the liquidated damages due to the defendant if it was right and no extension of time was due, so that practical completion had still not been achieved. The same adjudicator concluded that the defendant was entitled to liquidated damages.

The claimant then initiated a third adjudication. It sought declarations to the effect that the defendant was not entitled to liquidated damages for the period after 17 August 2007. The defendant objected to the notice and participated in the third adjudication without prejudice to its primary contention that the adjudicator in the third adjudication had no jurisdiction to address this issue. The adjudicator rejected the defendant’s case and considered that practical completion did take place on 17 August 2007.

The Issues

Was the dispute in the third adjudication the same or substantially the same as those that had been decided in the first and second adjudications and accordingly, did the adjudicator have the necessary jurisdiction to consider and decide the dispute in the third adjudication?

The Decision

Mr Justice Coulson held that as there were no different material facts presented in the third adjudication which had not already been considered and dealt with by the first adjudicator, the dispute in the third adjudication was the same or substantially the same as that dealt with in the first and second adjudications. In his view, the relevant principles when considering the “same

dispute” issue are:

- (i) The parties are bound by the decision of an adjudicator on a dispute until it is finally determined;
- (ii) The parties cannot seek a further decision by an adjudicator on a dispute or difference if that dispute or difference has already been subject of a decision by an adjudicator;
- (iii) The extent to which a decision or a dispute is binding will depend on an analysis of the terms, scope and extent of the dispute or difference referred to adjudication... In order to do this the approach has to be to ask whether the dispute or difference is the same or substantially the same as the relevant dispute or difference and whether the adjudicator has decided a dispute or difference which is the same or fundamentally the same as the relevant dispute or difference;
- (iv) The approach must involve not only the same but also substantially the same dispute or difference; and
- (v) Whether one dispute is the same or substantially the same as another is a question of fact and degree.

As the first adjudication decided that practical completion had not occurred on 17 August 2007 and the third adjudication decided that it had, Mr Justice Coulson held that

“it was difficult to imagine a more obvious case of overlap and, indeed, a starker case of fundamentally contrary decisions.”

Accordingly, the claimant’s application for enforcement of the adjudicator’s decision failed as the third adjudicator did not have jurisdiction.

Comment

Following on from the recent case of *Birmingham City Council v Paddison Construction Ltd*, this is yet another case illustrating the potential difficulties of what has come to be called “serial adjudication”. As Mr Justice Coulson stated:

“Adjudication is supposed to be a quick one-off event; it should not be allowed to become a process by which a series of decisions by different people can be sought every time a new issue or a new way of putting a case occurs to one or other of the contracting parties... If, as it obviously was, the Claimant was unhappy with the results in adjudications 1 and 2, then the claimant should have gone either to an arbitrator or to the court in order to challenge those decisions.”

This is again a reminder from the Court that if a party is unhappy with an adjudicator’s decision, the appropriate procedure is to then proceed to either arbitration or the court. Taking the same, or substantially the same, dispute to a second adjudication is clearly not an available option.

Stacy Sinclair
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