



LEGAL BRIEFING

Birmingham City Council v Paddison Construction Ltd

[2008] EWHC 2254 (TCC), HHJ Frances Kirkham

The Facts

Birmingham City Council (“BCC”) engaged Paddison Construction Ltd (“Paddison”) to undertake construction work for a new community and training centre in Birmingham. The contract provided for a completion date of 24 February 2006 which was revised to 17 April 2006. Practical completion was certified as at 23 June 2006. Paddison alleged that BCC was responsible for the delay in completion and sought, amongst other matters, a full extension of time and loss and/or expense. Paddison referred the dispute regarding responsibility for delay and the financial consequences of such delay to adjudication. After agreeing to several requests for an extension of time, the adjudicator decided that Paddison was entitled to an extension of time for the full period and that BCC should repay the LADs which had been withheld in the sum of £27k and £25k in respect of variations.

In relation to the claims for loss and/or expense, the adjudicator said that these were “extravagant and exaggerated”. However, he did accept that some of the claim may be valid and went on to say that he “would grant the Contractor leave to pursue this claim via a further adjudication if they so wish”.

The adjudicator deemed that it was necessary to hold a “dedicated” adjudication to consider the loss and/or expense claim given the tight timescales associated with adjudication. He also considered that a third party quantity surveyor would need to be appointed in order for the claim to be analysed in detail.

Paddison said that this meant that no decision had been made in relation to their claim for loss and/or expense. Accordingly, they required BCC to assess their entitlement to loss and/or expense based upon the extension of time which had been awarded. BCC considered that the adjudicator had decided that Paddison was entitled to nothing further by way of loss and/or expense. Paddison then served a second notice of adjudication, seeking reimbursement of loss and expense or, alternatively, damages. BCC argued that the adjudicator should resign on the ground that the dispute referred to him was the same as that which the first adjudicator had decided. The adjudicator however refused to resign.

Accordingly, BCC commenced Part 8 proceedings seeking declarations to the effect that the dispute referred was the same, or substantially the same, as that which had been previously referred.

The Issues

- (i) Did the adjudicator make a decision with respect to Paddison’s loss and/or expense?
- (ii) Is the dispute referred to the second adjudicator the same, or substantially the same, as that referred in the first adjudication?

The Decision

HHJ Kirkham held that the first adjudicator did make a decision with respect to Paddison's claim for loss and/or expense. He had considered Paddison's claim and found it to be "extravagant and exaggerated", however, was not prepared to grant further monies as claimed. The judge said that "plainly, he had no jurisdiction or power to "grant" Paddison the right to pursue its claim in another adjudication."

HHJ Kirkham also held that the dispute referred in the second adjudication was substantially the same as that referred in the first adjudication. Having considered an expert report relied on by Paddison, she was not persuaded that the second adjudication was in relation to a separate dispute. The period in which the loss and/or expense was claimed was substantially the same. Equally, although different sums were claimed, the differences in the figures lay in the claims made for head office and overhead recovery. In the first adjudication, the calculations had been based on references to the Hudson or Emden formula, whereas in the second adjudication, they were based on invoices. Though Paddison had relied on different reports in the two adjudications, the back up and supporting information and documents behind the reports remained essentially the same. "There is no difference in the supporting material, only in the analysis of that material."

BCC was entitled to the declarations which it sought. Accordingly, the second adjudicator does not have jurisdiction to act as adjudicator and must resign and/or any decision reached will be a nullity and unenforceable.

Comment

As HHJ Kirkham stated, referring to the leading judgment of Dyson LJ in *Quietfield Ltd v Vascroft Construction Ltd* [2007] BLR 67, "This is a case where Paddison sought to make good in the second adjudication the shortcomings in their claim in the first adjudication." In other words, parties should get their claim right the first time round.

This case is also a reminder to adjudicators to take care when accepting a referral for a dispute which has been previously adjudicated. As per paragraphs 9 and 23 of the Scheme and section 108(3) of the 1996 Act, a party is debarred from referring the same matter to successive adjudications as the first decision is binding until finally determined by legal proceedings, by arbitration or by agreement. Accordingly, adjudicators should look carefully at the facts to determine whether or not the dispute referred is either the same, or substantially the same, as in the previous adjudication. Further, adjudicators should also be aware that the notion of granting leave is not a power which is available to them.

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