



LEGAL BRIEFING

Third time unlucky

HG Construction Limited v Ashwell Homes (East Anglia) Limited

TCC Mr Justice Ramsey [2007] EWHC 144

The Facts

HG Construction Limited was engaged as contractor by Ashwell Homes (East Anglia) Limited for the development of new housing in Cambridgeshire. The contract was based upon the JCT Standard Form of Building Contract With Contractor's Design (1998 Edition). The contract provided for sectional completion. Disputes arose and there were four adjudications. In this judgment, Mr Justice Ramsey had to consider the enforceability of the third Adjudicator's Decision. Ashwell argued that the third Decision dealt with issues that had already been determined in respect of the first Decision.

In the first Notice of Adjudication, Ashwell asked the adjudicator to determine "the validity and/or enforceability of the provisions within the contract for the deduction of liquidated and ascertained damages". The adjudicator decided that, as a matter of the objective construction of the terms of the contract, it was possible to determine the works that were included within each section and therefore the provisions in the contract for the deduction of liquidated and ascertained damages were valid and enforceable.

The third adjudication then involved a dispute about the proportionate relief in respect of liquidated and ascertained damages as a result of partial possession of the sections. As part of the decision, the adjudicator decided that the liquidated and ascertained damages of the contract were "inoperable and therefore void for want of certainty".

The Issue

The issue, therefore, was whether a subsequent adjudicator is bound by the decision of an earlier adjudicator.

The Decision

Mr Justice Ramsey considered that the starting point was clause 39A.7.1 of the contract which provided that an adjudicator's decision "shall be binding on the parties until the dispute or difference is finally determined by arbitration or by legal proceedings" He noted that it was possible, as a result of *Quietfield Limited v Vascoft Construction Limited* [2006] EWCA Civ 1737, to have successive adjudications in respect of extension of time issues, providing that new facts had arisen requiring a re-consideration of the extension of time.

In this case the first adjudicator had decided that the liquidated and ascertained damages provisions of the contract were enforceable. Therefore a subsequent adjudicator was bound by that decision and could not decide that the liquidated and ascertained damages provisions were void.

Further, and as a matter of practice an Adjudicator should consider (based on an objection raised by one of the parties or on his own volition) whether he is

being asked to decide a matter on which there is already a binding decision by another Adjudicator. If so he should decline to decide that matter or, if that is the only matter which he is asked to decide, he should resign. [Para. 38(3), emphasis added].

This was not a case where a new factual position had arisen giving rise to a new argument. Decision 3 was, therefore, not enforceable nor binding upon the parties. As a result the summary judgment application for Decision 3 was dismissed.

Comment

Serial adjudications are more common now. In other words, one project being subject to sequential adjudication dealing with discrete issues. A contractor might seek, for example, a declaration that they are entitled to an extension of time, then in the next adjudication the amount of that time and finally in the third adjudication the prolongation costs. But, if you ask for an extension and do not get one, then can you ask for an extension of time in a second adjudication? Yes, if you rely on new facts; no, if the dispute is the same as the first.

Nicholas Gould
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