FENWICK ELLIOTT

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Legal Briefing

Ted Lowery considers a decision on serial disputes

Hitachi Zosen Inova AG v John Sisk and Son Ltd

Before Mr Justice Stuart-Smith

In the Technology and Construction Court

Judgement delivered 8 March 2019

The facts

During March 2012 Hitachi engaged Sisk to provide design and construction services at a power station in Yorkshire. Clause 30 in the contract entitled Sisk to claim additional payments for certain "Events" subject to the provision of detailed evidence sufficient to enable Hitachi to ascertain the validity and value of the claim. The contract provided for adjudication pursuant to the TeCSA rules and that an adjudicator's decision would become final and binding if not referred to the court within 10 business days.

During October 2015 Sisk issued an application for additional payment seeking a further £4.5m including some £1,092,497.45 for Event 1176 i.e. acceleration works to the boiler house. In its payment notice Hitachi certified a negative valuation and rejected the claim for Event 1176. During early 2016 Sisk commenced adjudication in respect of the additional payment application and in that adjudication both parties offered submissions and evidence concerning Event 1176.

In a decision dated 14 April 2016 the adjudicator noted that in many cases the material provided by Sisk did not meet the requirements of clause 30 so that for certain items he had been unable to arrive at a valuation. The decision recorded that the "correct valuation" of the items claimed by Sisk was set out in Appendix 1. Appendix 1 included the adjudicator's findings that Event 1176 was a variation that required valuing, that the information provided did not satisfy the requirements of clause 30 so that there was insufficient detail to value the works and hence that the figure was "£nil".

During November 2017 Sisk submitted another payment application for Event 1176 accompanied by new supporting material and in June 2018 Sisk commenced adjudication in respect of this application. Sisk relied upon the 2016 decision that Event 1176 was a variation and claimed some £994,572.19 additional costs. Hitachi responded that the claim was substantially the same as that advanced in the 2016 adjudication, namely a claim for additional payment in respect of Event 1176 and that this had already been decided. In a decision dated 31 August 2018 the adjudicator rejected Hitachi's jurisdictional objections, confirmed that the 2016 decision on liability would not be reconsidered and decided that Event 1176 could be valued on the basis of the new material put forward by Sisk and was worth some £825,703.17.

The issue

Did the 2018 adjudication determine the same or substantially the same dispute that had been decided in 2016?

The decision

The judge reviewed the relevant authorities, in particular Quietfield Limited v Vascroft Construction Limited [2007] BLR 67, and noted the guiding principle that the court's enquiry should focus upon what was decided in the earlier decision rather than what had been referred. Here, although the body of the 2016 decision included the words "my valuation", and "the correct valuation of each of the items" the adjudicator's overall finding had been that there was an absence of substantiation and he had not therefore determined a valuation of Event 1176 for the purposes of Sisk's additional payment application. Where Appendix 1 indicated "£nil" for Event 1176 this was merely the consequence of the lack of substantiation and was not intended to express any view about or decide whether Sisk had incurred additional costs for which they should be reimbursed.

Thus this was not a case in which a later adjudication was called upon to consider a dispute that was the same or substantially the same as a dispute previously decided. In the 2018 adjudication Sisk were claiming a valuation of Event 1176 and this was precisely what the adjudicator had declined to decide in 2016.

The judge said that the authorities did not establish a hard-edged rule that overlapping evidence was indicative of a dispute being the same or substantially the same as an earlier dispute. He observed that comparing the evidence submitted could highlight a misleading similarity between what was referred when the focus should be on what was decided.

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Commentary

The judge observed that on Hitachi's case, if any variation payment application failed for want of evidence, Sisk would be prevented from pursuing a money claim for that variation until the final account. The judge characterised that outcome as a contractual tripwire which would require clear language to be enforceable, given the objective of adjudication to maintain cash flow.

This judgment may encourage arguments that a claim dismissed for want of proof by an adjudicator has not been decided and can be re-adjudicate. Whilst each case will turn on its own facts, the court will continue to sanction serial adjudications that it regards as oppressive.

Ted Lowery
April 2019