MC MS Blog

TCC provides reminder of the meaning of paragraph 9(2) of the Scheme

AUGUST 17, 2022

I appreciate that some of you might be reading this blog on your summer holidays, so you may well have far better things to be doing with your time (ordering another piña colada perhaps?). I will therefore keep the blog short – what might be termed a "blogette".

As one would expect over the summer break, there haven't been many reported TCC cases recently and so the case I want to discuss today is from June, namely *ML Hart Builders Ltd (in liquidation) v Swiss Cottage Properties Ltd*, which is a judgment of Mr Roger Ter Haar QC sitting as a deputy High Court judge.

ML Hart Builders Ltd v Swiss Cottage Properties Ltd

The key facts are as follows:

- In January 2013, Hart and Swiss Cottage entered into a contract to demolish a pub and design and build 14 flats and a commercial shell for the sum of £3.325 million.
- In March 2013, Hart, Swiss Cottage and Aviva Insurance Ltd entered into a *guarantee bond*. Aviva agreed as guarantor that, in the event of Hart's breach or insolvency, it would satisfy and discharge damages up to a maximum aggregate liability of £332,500 (being 10% of the contract sum).
- In February 2015, Hart entered into a *creditors' voluntary liquidation* (CVL). Under the contract's termination provisions various obligations were triggered, including under clause 8.7.4, which required a calculation of Swiss Cottage's costs to complete the works.
- In September 2016, Swiss Cottage contended that it was owed circa £435,000 by Hart, whereas Hart submitted that Swiss Cottage owed it circa £200,000.
- In April 2017, Aviva and Swiss Cottage entered into an Acceptance Agreement whereby Swiss Cottage agreed to accept £235,000 in full and final settlement of Aviva's obligations under the bond.
- In May 2019, Hart commenced an adjudication and asked the adjudicator to undertake the *calculation envisaged by clause 8.7.4*. Swiss Cottage argued that Hart was bound by the Acceptance Agreement because the agreed amount Aviva paid arose from the assessment of the clause 8.7.4 account. The adjudicator agreed.
- Hart sought a *Part 8 declaration* from the TCC that the clause 8.7.4 accounting exercise had not been determined by the Acceptance Agreement, and that it was entitled to launch a fresh

adjudication to have that accounting exercise determined.

Was the adjudicator right?

After considering the authorities, the judge concluded the adjudicator was wrong to decide that the Acceptance Agreement prevented an assessment of the termination account under clause 8.7.4. He made the point that a bond is an instrument of secondary liability, and any liability for damages when there is a default or insolvency arises by reference to the code of the contract. Here that was an assessment under clause 8.7.4. The Acceptance Agreement could not be viewed as that assessment, nor did it contain such an assessment:

"… clause 8. 7. 4 contemplates a statement having primary efficacy as between the parties to the construction contract. An agreement between the Employer and the Surety settling liability under the Bond is not an agreement on its face having efficacy between the parties to the construction contract."

The employer and surety could agree it was unnecessary to carry out an assessment before paying out under the bond. However, Hart (the insolvent contractor) was not a party to the Acceptance Agreement and was not bound by it. The liquidators may have known about the discussions regarding the bond but, on the facts, no estoppel by conduct arose.

Could the dispute be referred to a second adjudicator?

Personally, I think that this is a more interesting part of the judgment because the clause 8.7.4 issue does rather turn on its facts, and the question of whether the dispute could be referred to a second adjudicator is a useful reminder of the true meaning and effect of *paragraph 9(2)* of Part I of the Scheme for Construction Contracts 1998.

As a reminder, paragraph 9(2) states:

"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."

Applying the principles derived from *Harding (t/a M J Harding Contractors) v Paice* and *Hitachi Zosen Inova AG v John Sisk & Son Ltd*, the judge concluded that another adjudicator could be asked to carry out a clause 8.7.4 assessment. He reached this conclusion because, in determining whether it was the same or substantially the same dispute, one should not look at the dispute referred to the first adjudicator in isolation but should also consider what they actually decided. The judge was clear that the first adjudicator did not make a decision on the clause 8.7.4 assessment and, as such, the matter could be referred to another adjudicator.

I have to confess that I find it somewhat difficult to understand why the meaning of paragraph 9(2) has had to be addressed so many times by the courts. To my mind, the meaning is unambiguous. In particular, paragraph 9(2) is clearly referring to the situation where the same dispute has previously been referred to adjudication, and the previous adjudicator has made a decision on that dispute. As Jackson LJ stating in his typically forthright style in *Harding v Paice* (agreeing with the submissions of the much missed David Sears QC):

"In my view Mr Sears' argument is correct. The word 'decision' in paragraph 9(2) means a decision in relation to the dispute now being referred to adjudication. I arrive at this interpretation as a matter of construction rather than implication. It is what the paragraph obviously means. Parliament cannot have intended that if a claimant refers twenty disputes or issues to adjudication but the adjudicator only decides one of those disputes or issues, further adjudication about the other matters is prohibited."

That’s not to say that issues arising from paragraph 9(2) are always simple. For example, if following a jurisdictional challenge the second adjudicator concludes that some (but not all) of the issues referred to them were the same as decided by the first adjudicator, can the second adjudicator continue to decide the remaining issues, or do they have to resign pursuant to paragraph 9(2)?

I will leave you to ponder that over your next piña colada.

JONATHAN COPE