Harding v Paice in the Court of Appeal – serial adjudications to reverse effect of lack of valid Pay Less notices

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The decision of the Court of Appeal in Harding v Paice & Springall (1 December 2015) contains important guidance for adjudicators and party representatives about the extent to which there can be subsequent adjudications covering similar ground to that covered in earlier adjudications. This guidance is particularly important in current adjudication practice, where these three connected factors are very common: (a) adjudications which are concerned with payment applications where the payer has not given a proper Payment Notice or Pay Less notice, (b) serial adjudications, the first by the contractor and the second by the employer, and (c) assertions by party representatives that adjudicators should resign because the dispute in a later adjudication had already been decided in an earlier one.

The important provision under consideration was paragraph 9(2) of the Scheme for Construction Contracts which reads:

> *"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".*

The issue in Harding v Paice was whether, in the light of Para 9(2), the employer could start a new adjudication to challenge the valuation of the contractor's final account when in an earlier adjudication, the employer had been ordered to pay the full amount of the contractor's claimed final account because the employer had issued a defective Pay Less notice. This valuation followed a disputed termination of the contract. The conclusion of the Court of Appeal was that, in the particular circumstances of the case, the employer could do so, because the adjudicator in the earlier adjudication had not decided the question of the valuation of the final account. He had only considered the implications of the lack of a Pay Less notice. So the dispute in the second adjudication was not "the same or substantially the same as one which has previously been referred to adjudication...". This apparently simple and uncontroversial conclusion was arrived at near the end of a very long and troublesome saga, as described below.

Background, and how it got to the Court of Appeal

In March 2013, Mr Paice and Ms Springall (as employer) engaged Mr Harding (as contractor) to build two houses in Purley, Surrey. The contract was the JCT Intermediate Form 2011. The project did not go at all well. Each party purported to terminate the contract with the other. In autumn 2013, the contractor commenced and won two adjudications claiming the amount of interim payment applications. The adjudicator in the 1st and 2nd adjudications was Robert Sliwinski. The employer paid up, but only after enforcement proceedings.

In August 2014, after termination of the contract, the contractor sent his termination final account, claiming £397,912. It was rejected by the employer. On 1 September 2014, the contractor commenced a third adjudication for the amount of his final account. On 2 September 2014, the employer purported to send a Pay Less notice. The contractor put his claim on two alternative bases: (a) that the employer was obliged to pay the amount claimed because no effective Pay Less Notice had been served, and (b) that the amount claimed was the sum properly due. On 6 October 2014, the adjudicator (Christopher Linnett) issued his decision. His conclusion was that the employer was required to pay the amount claimed because the Pay Less notice was invalid. He expressly said that he had not decided the merits of the contractor's valuation, because this did not have to be considered by him in the light of the defective Pay Less Notice. The contractor had to commence a new set of enforcement proceedings to secure payment of the amount of the 3rd adjudication.

By this time, the employer had paid the contractor a total £655,935 in respect of adjudication decisions (the original contract value is not stated in any of the numerous court judgments). Mr Paice and Ms Springall were not happy. They believed they had overpaid the contractor. So they began a fourth adjudication, in which they claimed that the proper valuation of the contract works was around £340,000. On 17 October 2014, the RICS appointed the same adjudicator who had decided the first two adjudications, Robert Sliwinski.

The contractor immediately commenced court proceedings claiming an injunction to restrain the employer from proceeding with the 4th adjudication. On 21 November 2014, Mr Justice Edwards-Stuart issued his judgment, rejecting the injunction application. He said the failure to serve a compliant Pay Less notice could not forever deprive the employer of the right to challenge the contractor's account.

The 4th adjudication therefore proceeded. On 14 December 2014, the adjudicator issued his decision which was that the contractor owed the employer £325,484. This was a material success for the employer. However, that decision proved to be unenforceable owing to an unfortunate finding of apparent bias on the part of Mr Sliwinski which will be touched on briefly below. So the contractor did not pay the amount of the 4th adjudication decision.

In the meantime, however, the contractor had appealed against the decision of Mr Justice Edwards-Stuart. Permission to appeal was granted by the Court of Appeal on 14 December 2014. It then took nearly a whole year for the appeal to be heard. The Court of Appeal issued its judgment on 1 December 2015, Lord Justice Jackson giving the leading judgment.

Jackson LJ quickly endorsed what Edwards-Stuart J had said at first instance. Harding's appeal had two grounds – the first was that the fourth adjudication could not proceed because of para 9(2) of the Scheme - the dispute in the 4th adjudication was the same or substantially the same as the one in the 3rd adjudication and a decision had been taken in that adjudication. On a literal reading of para 9(2), that was a fair argument. It was however rejected by Jackson LJ, in the light of what had been decided in an earlier Court of Appeal decision on the same paragraph of the

Scheme, Quietfield v Vascroft (2006). There, Lord Justice May interpreted para 9(2) to mean that "[m]ore than one adjudication is permissible, provided a second adjudicator is not asked to decide again that which the first adjudicator has decided." This meant that it was necessary to look at what the adjudicator in the earlier adjudication had actually decided. It was not enough just to say that the adjudicator had issued a decision, and that was an end to the matter.

The second ground of appeal was that Edwards-Stuart J had misinterpreted Mr Linnett's decision in the 3rd adjudication. The argument (so far as it is spelled out in the Court of Appeal judgment) was that Mr Linnett's decision was a determination of the amount properly due in respect of the [final] account, and that could not be re-opened in adjudication. Jackson LJ swiftly rejected this argument. He pointed out that Mr Linnett had expressly not decided the correct valuation of the works. He had taken the "short route" to his decision (basing it on the lack of a valid Pay Less notice), meaning he did not have to, and did not, take the "long route" of determining the value.

So where does that leave us? The answer to that is that where the dispute is concerned with a final account, the employer can very likely go back and argue the proper value of a final account in a second adjudication when he has lost a first adjudication through lack of a valid Pay Less notice.

What is not cleared up by the Court of Appeal judgment is what the situation is with regard to interim applications. Between the hearing of the argument in the Court of Appeal in Harding v Paice and the issue of its judgment, Coulson J said this in the case of Severfield v Duro Felguera:

> *"In essence, these three cases are authority for the proposition that, if there is a valid payment notice from the contractor, and no employer's payment notice and/or payless notice, then the employer is liable to the contractor for the amount notified and the employer is not entitled to start a second adjudication to deal with the interim valuation itself. "*

The "three cases" he was referring to were three recent judgments on Edwards-Stuart J – his first instance decision in Harding v Paice, ISG Construction v Seevic College and Galliford Try v Estura. The Court of Appeal on Harding v Paice also looked at these cases, but expressly did not come to a conclusion on whether they were right or not, in the context of interim applications. Another case considered by Jackson LJ was the Court of Appeal decision in Rupert Morgan v Jervis (2003). There Jacobs LJ said this, in the context of a case where the employer had failed to issue a proper withholding notice (under the old unamended Housing Grants Act) in relation to an interim payment application:

> *"It does not preclude the client who has paid from subsequently showing he has overpaid. If he has overpaid on an interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or if necessary arbitration or legal proceedings."*

To the extent that what Coulson J said in Severfield would appear to contradict what Jacobs LJ said in Rupert Morgan, the latter would obviously prevail. But on analysis, there is probably no conflict. The valuation and payment provisions of most construction contracts proceed on the basis that at each interim payment date, the then prevailing cumulative value of the works is assessed, and the interim certificate is for the difference between the current cumulative value and its value at the previous valuation date. What both courts are saying is that a disgruntled employer who has not served a valid Payment or Pay Less notice cannot start a second adjudication to argue that the valuation at the last valuation date was wrong. But there is nothing to stop him arguing about what the proper gross valuation should be at the next interim valuation date, and taking that next valuation to adjudication if he is not satisfied with it (taking care of course to issue the necessary notice). However, the employer has the tactical disadvantage that he has to pay the amount of the previous interim valuation, and a second adjudication will not prevent that.

All this of course depends on the precise wording of the contract in question, which was part of the reason why Jackson LJ declined to express a general view on the cases about interim applications.

Implications for the parties

The effect of Edwards-Stuart's judgment of 21 November 2014 was that the employer could proceed with the 4th adjudication, and of course they did, even though the appeal to the Court of Appeal was pending. There would have been a quandary had the 4th adjudication led to an enforceable decision, and the Court of Appeal then decided that the contractor ought to have had an injunction to stop it a year earlier. As things turned out, it was the employer who had the quandary, because the 4th adjudication decision proved unenforceable because of apparent bias. When an adjudication decision is set aside for bias or other breach of natural justice, can either party start another adjudication to try to put matters right? In Harding v Paice, counsel for the employer told the court that they intended to launch a fifth adjudication, and the Court of Appeal said they were entitled to do so.

Lessons to be learned

For party representatives, perhaps the most important lesson (not a new one, admittedly) is to make sure that Payment and Pay Less notices are competently drafted and served within the time limits. If Paice and Springall had served a proper Pay Less notice in respect of Harding's final account claim, it is logical to assume that the outcome of the 3rd adjudication would have a decision requiring payment of around £73,000 by the employer to the contractor (being the £397,912 in favour of the contractor outcome of the 3rd adjudication, less the £325,000 due by the contractor to the employer outcome of the 4th adjudication). That might have been an end to the dispute.

For adjudicators faced with arguments they should resign in a subsequent adjudication, the lesson is to obtain the previous adjudication decision and carefully compare what was decided in that decision with what is being claimed in the Notice of Adjudication and Referral Notice in the subsequent adjudication. The adjudicator should only resign if he is being asked to decide again what the first adjudicator has already decided (which does not include claims or arguments that were raised, but the first adjudicator did not decide). The Court of Appeal has recently endorsed this approach in Brown v Complete Buildings (13 January 2016).

In cases where (as is common), the claims are put on alternative bases, and the adjudicator finds for the referring party by a "short route" (e.g. lack of a Pay Less notice), should the adjudicator nevertheless go on to decide the alternative basis (probably a longer route) as well? Judges of course do this, in case of successful appeal. But it is unlikely to be realistic to expect adjudicators to do this under the very strict statutory time frames. Adjudicators are better off deciding what they have to decide in order to reach a binding and enforceable decision, and not dealing with anything else.

What adjudicators plainly should do is make absolutely clear what they are and are not deciding (as Chris Linnett did so clearly in the 3rd adjudication).

Space does not permit a full account of why it was that the 4th adjudication was not enforceable. It is sufficient to say that this was because after the 1st and 2nd adjudications, but before he was appointed in the 4th adjudication, Mr Sliwinski's office manager and wife had a phone conversation with Mr Paice and Ms Springall concerning matters that became relevant in the 4th adjudication. However, Mr Sliwinski neglected to make proper disclosure of this when appointed. It is well known that adjudicators should not have unilateral phone conversations with one of the parties during an adjudication. This case shows that adjudicators and their staff should be careful about such conversations even after an adjudication is over, and should such a conversation occur, to disclose it before accepting a subsequent adjudicator appointment.

A lesson for us all is to try to avoid getting involved in adjudication and litigation which results in legal bills that are greater than the sum in dispute, which must surely be the case in Harding v Paice. As Coulson J said in his March 2015 judgment, mediation would have been a better route to decide cases like this.

RMP Construction Limited v Chalcroft Limited

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Since adjudicators derive their jurisdiction from the construction contract between the parties, does it matter if the precise terms of the contract – or even the contract itself – cannot be identified by the referring party? The recent case of *RMP Construction Limited v Chalcroft Limited* [2015] EWHC 3737 (TCC) shows that responding parties cannot always resist enforcement on the basis that the contract cannot be identified with certainty.

Establishing the precise terms of the contract is an all too familiar problem in the construction industry, where work is frequently performed with no "formal" contract ever concluded. Parties often dispute the terms, or even the existence, of the contract. This problem is more significant now there is no requirement for a construction contract to be in writing under the amended Housing Grants, Construction and Regeneration Act 1996.

A dispute about the terms of the contract raises two main issues for adjudicators. The first, which is the focus of this article, is one of jurisdiction (the second is how the terms affect the substantive decision that has to be made). Where the terms of the underlying contract are unclear, a common tactic for responding parties is to attack the adjudicator's jurisdiction by questioning whether the dispute has been referred under the "correct" contract. The logic is easy to follow: if the referring party is unable to show conclusively what the "correct" contract is, how can a dispute properly be referred to an adjudicator under the contract?

RMP Construction was a summary judgment application to enforce an adjudicator's decision in favour of RMP. There was no dispute that RMP had carried out works for Chalcroft, nor that Chalcroft had withheld payment. The parties did not agree as to when the contract had been formed between them, nor the precise terms but, importantly, it was agreed that – whichever of the three possible contractual analyses put forward by Chalcroft was "correct" – the Scheme for Construction Contracts would apply to any adjudication.

The precise terms of the contract mattered to Chalcroft because, on their interpretation of the position, their pay-less notice was served in time. They said that had the adjudicator proceeded on the basis of the "correct" contract he might have reached a different decision to the one that he did. Chalcroft argued that this possibility of a different substantive outcome, which arose because RMP might not have correctly described the contract under which the referral was made, was sufficient to oust the adjudicator's jurisdiction.

To support this proposition, Chalcroft relied on the judgment of May LJ in *Pegram Shopfitters Ltd v Tally Weijl (UK) Ltd* [2004] 1 WLR 2082 (CA). In that case the parties disputed whether the adjudication should have proceeded under the Scheme or under the contractual mechanism in the JCT Prime Cost Contract. May LJ decided that this issue was fatal to the adjudicator's decision because "the only circumstance in which the adjudicator would clearly have had jurisdiction was if the claimant's contentions as to the contractual terms were correct" and it was reasonably arguable that they were not. May LJ went on:

> *"The fact that an adjudication under the Scheme and adjudication under a JCT Prime Cost Contract would be similar procedures does not overcome the twin difficulties that [the adjudicator] was appointed under the Scheme, and that a sufficiently secure identification of the contractual terms was intrinsically necessary to the proper performance of his adjudication task."*

Chalcroft's argument was rejected by the judge. In his view, it took May LJ's words too far to say that the "secure identification of the contractual terms" meant the terms as to the applicable payment provisions; May LJ was referring to the need to be sure of the terms that gave the adjudicator jurisdiction. Stuart-Smith J said:

> *"The distinction between jurisdictional challenges to enforcement and challenges alleging substantive error suggests that the issue in this case should be approached in two stages. The first question is whether the Adjudicator had jurisdiction. The answer to that question is that he did, on any contractual route being proposed by either party. … It may be linguistically and even technically correct to describe Chalcroft's various alternative formulations as different contracts from the contract alleged by RMP. But that difference should not … be determinative … Where it is agreed that each of the alternatives was sufficient to found jurisdiction under the identical route of the Scheme, it seems to me to rule RMP out of court because it may have misidentified the contractual provisions that would give the Adjudicator jurisdiction under the Scheme is once again to return to the formalistic obstacle course against which I protested…"*