

THE "SAME OR SUBSTANTIALLY THE SAME" DISPUTE:

FURTHER COURT OF APPEAL GUIDANCE

A Court of Appeal decision issued earlier this year (January 2016) has given further consideration to the circumstances in which parties will be prevented from referring the "same or substantially the same" dispute to adjudication. The decision follows a Court of Appeal decision in December 2015 considering the same issue. It provides added support for a narrow approach in assessing similarity with previous adjudication proceedings.

Brown v Complete Building Solutions

The Browns employed Complete Building Solutions ("CBS") in 2011 to demolish a house in Surrey and build a new one. The form of contract was JCT Minor Works. This incorporated the adjudication provisions of the statutory Scheme for Construction Contracts. The initial contract price was £496,578. The works went ahead and practical completion was certified in April 2013. A certificate of making good defects was issued in October 2013. A final certificate followed. After that, CBS wrote to the Browns claiming a final sum of £115,450. When the Browns did not pay, CBS went to adjudication.

The adjudicator's decision found the final certificate was ineffective as it had not been issued in accordance with the contract. The adjudicator also found that CBS's letter (based on that final certificate) was not a valid payment notice. CBS immediately sent a fresh letter asking for the same sum of £115,450, this time with reference to the contract clauses applicable where there is no final certificate. When that was not paid by the Browns, CBS started a second adjudication. The Browns objected. They said this was the "same or

substantially the same" dispute as the first adjudication and so the second adjudicator had no jurisdiction. The second adjudicator disagreed and pressed on. The Browns did not serve a pay less notice and did not participate in the second adjudication. The second adjudicator ordered payment to CBS and the Browns refused to pay.

"Same or substantially the same"?

The Browns challenged the second adjudicator's decision in the Technology and Construction Court and before the Court of Appeal. The Browns relied on paragraph 9 of the Scheme, which states that:

"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 Browns argued that CBS's second payment notice was served simply to correct "shortcomings" in the first application, so the substance of the two disputes was the same.

THE "SAME OR SUBSTANTIALLY THE SAME" DISPUTE: FURTHER COURT OF APPEAL GUIDANCE CONT...

The Court of Appeal disagreed; the second adjudicator had not decided the same dispute as the first.

- In deciding whether or not a dispute is "the same or substantially the same" one does not look at the dispute referred to a second adjudicator in isolation. One must look at the actual decision of the first adjudicator. This determines how much or how little remains for consideration by the second adjudicator. (The literal meaning of paragraph 9 of the Scheme could suggest a broader approach. However the narrower view which focuses on the issues actually decided in the first adjudication, rather than the issues referred to it, was upheld by the Court of Appeal's earlier decision in *Harding v Paice* in late 2015.)

- The question is one of "fact and degree". The starting point will be the second adjudicator's view of whether the dispute referred to him is the same or substantially the same. The court will have "due respect" for the adjudicator's decision.

- The second adjudicator in the present case was asked to determine a different issue. Even though both adjudications involved the same sum of money being claimed and the same parties, the second adjudication involved matters which had not been put before the first adjudicator – namely the fresh letter which amounted to a payment notice. The court highlighted that CBS was not trying to correct the mistakes in its earlier notice, rather it was approaching its claim via a new and different route.

adjudication is sufficiently different from previous adjudications between the same parties. The Court of Appeal's suggestion that the subsequent adjudicator's view as to this issue is the starting point is notable.

(It is also ambiguous whether the court's reference to "the adjudicator's decision being accorded due respect" meant the previous adjudicator's award, or the subsequent adjudicator's view on whether to proceed.) The previous cases referred to by the court would not appear to go this far. They suggest that the previous adjudicator's award is the starting point for any analysis as to the matters decided in the previous adjudication.

Whichever is correct, this reference may be seized upon by parties in the future as supporting an even more limited approach in circumstances where a subsequent adjudicator has accepted jurisdiction, despite similar issues having been decided in a prior adjudication i.e. allowing more adjudications to proceed.

In summary:

- *It is vital to consider the actual decision of the previous adjudicator (not just the dispute referred to him or her). This determines how much or how little remains for consideration by the subsequent adjudicator.*

- *It may be the case that the court should take the subsequent adjudicator's view as to the question as a starting point and accord it "due respect".*

- *Getting certificates and payment notices right under construction contracts remains critical.*

- *Adjudication tactics are key.*

Conclusions and implications

This decision provides additional Court of Appeal authority for a narrow approach to determining whether a dispute referred to

THE "SAME OR SUBSTANTIALLY THE SAME" DISPUTE:
FURTHER COURT OF APPEAL GUIDANCE
CONT...

- *Questions around starting fresh proceedings, reliance on notices and non-participation all need careful consideration.*

References:

Brown v Complete Building Solutions Limited [2016] EWCA Civ 1

This article first appeared in Law-Now, CMS Cameron McKenna's free online information service, and has been reproduced with their permission. For more information about Law-Now, please go to www.law-now.com

Kennedy-Grant and Weatherall on Construction Law

For lawyers, contractors, construction professionals and local authorities

Kennedy-Grant and Weatherall on Construction Law is a new online and digital subscription commentary publication, for practical use by contractors, construction professionals and lawyers, continuously updated to meet the needs of those dealing with this fast changing field of law.

The content covers statutory controls, the impacts of tort and contract, construction contracts, subcontracts, supply contracts and dispute resolution.



Kennedy-Grant and Weatherall on Construction Law is part of the Research Suite of LexisNexis SmartOffice®, giving you back more time to do what matters most.

www.lexisnexis.co.nz/construction

beEXCEPTIONAL
content • solutions • productivity



LexisNexis®