In *Hitachi Zosen Inova AG v John Sisk & Son Ltd* [2019] EWHC 495 (TCC), Stuart-Smith J decided that even if an earlier adjudication had concluded that a variation was valid and its value was '£nil' for the purposes of a payment application (due to lack of evidence), the decision made in a subsequent adjudication relating to the actual value of that variation would still be enforced.

The court made a distinction between what was decided in the first adjudication and the dispute that had been referred in the second one, deciding that the two issues were not the same or substantially the same dispute and so the eighth adjudicator did have the requisite jurisdiction to decide the value of the variation.

**Background**

Contractor John Sisk & Son (‘Sisk’) was carrying out work for Hitachi Zosen Inova (‘Hitachi’) on the construction of a new power plant in Yorkshire. The piece of work under dispute (known as ‘Event 1176’) was valued by Sisk at just over £1m, but Hitachi said it would not pay for it, claiming that Sisk had been overpaid.

In 2015, during the second adjudication between the parties, Sisk issued payment application six which included a valuation for Event 1176. The adjudicator concluded in Sisk’s favour that Event 1176 was a variation and therefore Event 1176 required a valuation but that there was insufficient evidence to value it. Accordingly he put the value at ‘£nil’ but had expressly made no valuation assessment.

In a later eighth adjudication as to the value of Event 1176 as a variation, the adjudicator decided that Sisk had substantiated a claim for around £825,000. He ordered Hitachi to pay that amount, plus interest, which Hitachi disputed in the TCC. Hitachi claimed that the earlier adjudication decided the value of Event 1176 and the fact that Sisk did not refer the case to court quickly enough made this valuation binding.

**Decision**

Stuart-Smith J concluded that the eighth adjudicator did have jurisdiction to decide the dispute. In reaching the conclusion that the eighth adjudicator’s decision should be enforced, the judge relied on the Court of Appeal’s judgment in *Quietfield Ltd v Vascroft Construction Ltd* [2006] EWCA Civ 1737 where May LJ had emphasised the importance of the first adjudicator’s decision and Dyson LJ had highlighted that it will be a question of fact and degree whether one dispute is the same or substantially the same as another.

Applying the principle from *Harding v Paice* [2015] EWCA Civ 1231, Stuart-Smith J found that the adjudicator in the second adjudication determined that Event 1176 was a variation that required valuation and that £nil should be payable in respect of Event 1176 in payment application six due to the lack of evidence available.

However by the eighth adjudication, Sisk’s efforts to find evidence meant the variation could be valued properly. Since the earlier decision in the second adjudication did not determine the valuation of Event 1176, it was open to Sisk to bring the eighth adjudication to determine that question. The two adjudications did not decide the same or substantially the same question. It followed that the adjudicator in the eighth adjudication had jurisdiction to determine the value of Event 1176.
The same or substantially the same dispute?

Commentary

The ruling provides some clarity on para 9(2) of Part I of the Scheme for Construction Contract (England and Wales) Regulations 1998 (SI 1998/649) which requires an adjudicator to resign if a dispute is referred that is the ‘same or substantially the same’ as one previously referred to adjudication and a decision has been taken. Although the ruling does not establish a new principle, but emphasises that the starting point for considering whether two disputes are the same or substantially the same is a comparison of what was actually decided by the first adjudicator, with what was referred to the second. The ruling is also a reminder that there are cases where new evidence means that a second dispute is not the same as the first.

This ruling might encourage referring parties dissatisfied with some aspect of an adjudicator’s decision to refer issues to a second adjudicator if it is arguable that the first adjudicator left some part of the claim undecided or new evidence for the referring party’s position becomes available.

It also gives comfort to adjudicating parties to refer a dispute again if what was actually decided by the first adjudicator was unrelated to the dispute referred – the referring party is not prevented from getting the dispute referred eventually decided due to the first adjudicator’s error.

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