Devonshires

CONSTRUCTION LAW UPDATE:

Proliferation of "Smash & Grab" adjudication cases

In his recent decision, 16 March 2017, in Hutton Construction Limited and Wilson Properties (London) Limited [2017] EWHC 517 (TCC), Mr Justice Coulson expounded his views on the proliferation of the "smash & grab" cases and the courts' robust and consistent approach vis-a-vis the increasing number of challenges brought by unhappy defendants in the Technology and Construction Court. In this update, Suryen Nullatamby looks at the guidance on the procedure to be followed, in the limited circumstances, in which a defendant may seek to challenge the enforcement of an adjudicator's decision, not on grounds that the adjudicator lacked jurisdiction or had breached the rules of natural justice, but on the ground that the adjudicator had got the decision wrong.

Facts and Adjudication

Hutton Construction Limited ("Hutton") and Wilson Properties (London) Limited ("WPL") had entered into a contract for the conversion of Danbury Palace in Chelmsford into 13 apartments and associated outbuildings under the JCT Standard Building Contract, Without Quantities 2011.

Hutton submitted its Application for Payment no. 24 on 17 August 2016. In the adjudication, the issue had been whether the contractor had issued a valid interim certificate and pay less notice and WPL had argued that a pay less notice served on 23 August 2016 was actually an interim certificate or that, if it was a pay less notice, it was valid both as to its timing and its contents. These submissions were rejected by the Adjudicator.

Enforcement Proceedings and CPR Part 8 Application

Hutton brought proceedings in the Technology and Construction Court by way of a summary judgment application to enforce the adjudicator's decision and WPL resisted the enforcement and issued a claim under Part 8 of the Civil Procedure Rules.

In its defence to the enforcement, WPL neither challenged the adjudicator's jurisdiction nor alleged any breach of the rules of natural justice. WPL simply argued that the adjudicator's decision was incorrect. Furthermore, no specific declarations were sought in the Part 8 claim but instead WPL asked the court to find that it had issued a valid interim certificate and pay less notice.

The General Principles

Mr Justice Coulson pointed out that the courts have seen an increase in challenges to enforcement and Part 8 applications from those who are dissatisfied with an adjudicator's decision. These challenges raise fundamental points of principle and practice concerning the enforcement of adjudicators decision. In his judgment, Coulson J summarised the general principles to be applied in these as follows:

1. if an adjudicator had decided the issue referred to him and had acted broadly in accordance with the rules of natural justice, his decision would be enforced even if he had made an error (**Macob Civil Engineering Ltd v Morrison Construction Ltd** [1999] BLR 93 applied and **Bouygues UK Ltd v Dahl-Jensen UK Ltd** [2001] BLR 522 followed) for the principal reason that "the need to have the right answer has been subordinated to the need to have answer quickly (**Carillion Construction Ltd v Devonport Royal Dockyard Ltd** [2005] EWCA Civ 1358).

2. A defendant could not seek to avoid payment of a sum found due by an adjudicator by seeking to re-argue the points on which it had lost in the adjudication. There are two narrow exceptions to this rule. Firstly, if there is an error, such as a calculation error, which is admitted by all the parties and there is no arbitration clause in the contract, then the court would have the power to correct that admitted error.

3. The second exception concerns the timing or validity of a payment notice, pay less notice or an application for payment. The defendant may, exceptionally, be entitled to have a short, self-contained point decided on a separate claim for a declaration, **Caledonian Modular Ltd v Mar City Developments Ltd** [2015] EWHC 1855 (TCC) followed.

The court observed that a practise had grown up around challenges such that a defendant would issue Part 8 proceedings challenging the adjudicator's decision and seeking a declaration to that effect, and that either the claimant would issue an enforcement claim or the parties would agree that if the defendant lost its Part 8 claim, it would pay the sum awarded by the adjudicator. In the Judge's view, that practice has worked relatively well, but only if there has been a large measure of agreement between the parties from the outset. However, where there was no such agreement, the following approach had to be adopted. The defendant must issue a Part 8 claim setting out the declarations it seeks, or at the very least, set out in detail in a defence and counterclaim to the enforcement claim detailing what it sought by way of final declarations.

The court held that the above guidance supersedes any support that might be found in the TCC Guide for a more informal approach. Thus, in order to resist enforcement as part of Part 8 claim, a defendant must demonstrate that:

1. there was a short, self-contained issue which had arisen in the adjudication and which it continued to contest;

2. that there was no need for oral evidence or any other elaboration beyond that which was capable of being provided during the enforcement hearing; and

3. the issue was one which it would be unconscionable for the court to ignore on a summary judgment application.

In practice, that means an assertion that the adjudicator's interpretation of a contract clause was beyond rational justification, or that his calculation of the relevant time periods or his categorisation of documents was obviously wrong. Moreover, the consequences of the issue had to be clear-cut, and any arguable inter-leafing of issues would almost certainly be fatal. The question of whether the issue should be dealt with on the enforcement application would have to be dealt with at the enforcement hearing itself, and time constraints meant that it would be rare for the court to allow it to be raised as a defence.

The court held that many of the applications that are currently being made by disgruntled defendants, which are not the subject of the consensual process, amount to an abuse of process and gave a stark warning that defendants who are unsuccessful in this sort of challenges will almost certainly have to pay the claimant's costs on an indemnity basis.

The court found that WPL's challenge was wholly inappropriate for consideration on the summary judgment application and that, at the outset, it should have been the subject of a separate Part 8 claim. As it was, Hutton and the court had been given no inkling of WPL's stance until the very late issue of the incomplete Part 8 claim. The court held WPL was seeking to re-run all the issues in the adjudication and to raise fresh factual matters which Hutton had not had time to consider and therefore WPL could not be permitted to attempt to re-run it in the short time set down for the enforcement hearing. Coulson J said "it cannot be right, absent any consent from the claimant, to let the defendant shoehorn in to the time available at the enforcement hearing the entirety of that adjudication dispute" and that such an approach would mean that, "instead of being the de facto dispute resolution regime in the construction industry, adjudication would become the first part of a two-stage process, with everything coming back to the court for review prior to enforcement."

"Smash & Grab"

Coulson J is of the view that there has been a proliferation of the so-called "smash and grab" adjudication cases where one party has failed to serve proper or timeous applications for payment or payment or pay less notices thereby automatically entitling the other party to the sums claimed. Such proliferation, in the his opinion, is due to the ill-considered amendments to the Housing Grant Construction and Regeneration Act 1996 (the "1996 Act") and the over-prescription of payment terms in standard forms of contract.

ISG v Seevic

The court acknowledged that there the widely-held view that the increasing number of "smash and grab" adjudications has been inadvertently compounded by the run of authorities starting with **ISG Construction Ltd v Seevic College** [2014] EWHC 4007 (TCC), which prohibit a second adjudication dealing with the detailed valuation of an interim payment already awarded by an adjudicator. In **ISG v Seevic** Edwards-Stuart J considered the amendments to the 1996 Act in relation to payment provisions and held that the lack of a pay less notice meant the employer had agreed the value of the works claimed in the interim certificate and the adjudicator had decided the question of the value of those works such that the second adjudicator lacked jurisdiction as he was asked to decide the same dispute.

Amendment to Standard Forms of Contract

Unsurprisingly, this judgment resounds Coulson J's speech at the Society of Construction Law Conference in Leeds, on 3 March 2017, where he argued that the so-called "smash and grab" adjudication claims and the question of payment mechanism in construction contracts has become a "racket" due to the amendments to the 1996 Act and the "insanely convoluted" payment provisions in standard forms of contract. The Judge considers that having four to five pages of typed provisions for interim valuation regime and the payment mechanism within some of the standard forms of contract, such as the JCT, are overly complex, "prolix", "convoluted" and are so difficult to operate in practice that they become the source of disputes between parties to construction contracts.

Coulson J suggested that institutions like the Joint Contracts Tribunal should go back to the drawing board and have a

complete rethink of how to simplify provisions on interim valuation and payments and perhaps the industry needs to look again at the amendments to the 1996 Act.

Contract Administration

As such, it is of the utmost importance that employers, and their agents, record the dates for the service of payment and pay less notices and ensure that if they are challenging a contractor's valuation they must serve the notices in time. Also, parties can, at the outset, work out a time-line for interim valuations and relevant payment and pay less notices.

If you are an employer:

- check the contract for the relevant "due date", the "final date for payment" and the "deadline for issuing a pay less notice";
- submit notices not later than 5 days after the "due date" and pay less notices on or before the contractual deadline; and
- ensure that payment notices/pay less notices state the sum considered to be due and the basis of the calculation.

If you are a contractor:

- check the contract for dates to submit payment applications and submit payment applications on time;
- value the works at the date stipulated in the contract;
- ensure that all payment applications state the sum considered to be due and the basis of the calculation
- clearly identify a document as a "payment application
- ensure that all payment applications are free from ambiguity

If you would like further advice on the service of payment notices or pay less notices, and would like to discuss suitable amendments to standard forms of contract please contact Devonshires' Construction and Engineering Team.

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