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Legal Briefing

In what circumstances can a Part 8 application be used to oppose enforcement of an adjudicator's decision?

Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC)

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Before: The Hon Mr Justice Coulson in the Technology and Construction Court. Judgment delivered 16 March 2017.

The facts

Under a contract dated 12 November 2014 Wilson engaged Hutton to carry out residential conversion works at a property in Chelmsford, Essex. A dispute arose in relation to Hutton's application for payment no. 24 issued on 17 August 2016 and Hutton commenced adjudication in October 2016. In a decision dated 15 November 2016 the adjudicator found in favour of Hutton, primarily on the grounds that Wilson had failed to serve a valid payless notice.

Wilson did not pay the £491,944.73 awarded by the adjudicator and in December 2016 Hutton commenced enforcement proceedings. In its solicitors' correspondence Wilson indicated that it would resist enforcement but without stating why. Wilson did not serve a defence and counterclaim but provided a witness statement that included references to interim applications nos. 22 and 23 and other factual matters that had not been raised in the adjudication.

On 3 February 2017, less than three weeks before the hearing date, Wilson issued a draft Part 8 application contending that the adjudicator was wrong to find there had been no valid payless notice. The Part 8 claim form did not include any specific declarations.

The issue

Should the adjudicator's decision be enforced?

The decision

The judge set out the conditions that must be satisfied by a defendant who seeks to resist enforcement proceedings via a Part 8 application: there must be a short and self-contained issue which arose in the adjudication that the defendant continues to contest; the issue must require no oral evidence or any other elaboration beyond that which is capable of being provided during the time allowed for the enforcement hearing (usually about 2-3 hours); and, the issue must be one which on a summary judgment application it would be unconscionable for the court to ignore. In addition, the onus will be on the defendant to promptly issue a Part 8 application that clarifies exactly what relief/declarations it seeks.

The judge observed that taken together, Wilson's solicitors' correspondence, witness statement and belated draft Part 8 application did not make clear why enforcement was being resisted but represented an attempt to re-run all of the issues raised in the adjudication together with some matters not previously raised.

The judge said that it could not be right that a defendant should be allowed to shoehorn into the limited time available at an enforcement hearing the entirety of an adjudication dispute: this would make adjudication the first part of a two stage process. That would run completely contrary to the founding principles of adjudication enforcement established by *Macob v Morrison* and *Bouygues v Dahl-Jensen*.

The judge therefore found that Hutton was entitled to summary judgment for £491,944.73 to be paid within 7 days.

Commentary

This case is significant because of the judge's clear warning against disgruntled parties in adjudication seeking to oppose enforcement through the mis-use of Part 8.

The judge was concerned that when read with paragraph 9.4.3 of the TCC Guide, the decisions in *Caledonian Modular v Mar City* and *Geoffrey Osborne v Atkins Rail* had encouraged losing parties in adjudication to make Part 8 applications seeking declarations as to errors made by the adjudicator.
In the *Geoffrey Osborne* case the defendant brought a separate Part 8 claim raising an error that was admitted by all parties including the adjudicator and which in the absence of an arbitration clause, could be the subject of a final decision by the court.

In the *Caledonian Modular* case the issue was self-contained, required no oral evidence and could be dealt with at a short interlocutory hearing. The judge re-iterated that these decisions comprise narrow exceptions to the general rule - applicable in 99 out of 100 cases - that adjudicators' awards

will be enforced even though there is an error.

The judge went further stating that any defendant who seeks to re-run significant elements of the adjudication at a disputed enforcement hearing will be committing an abuse of the court process and should accordingly expect to be penalised with indemnity costs.

As in *Geoffrey Osborne* the position will be different if there is consensus between the parties that the enforcement proceedings ought to address the adjudicator's error. However, unless the error is such an obvious point that it would be commercially sensible to resolve promptly, it must be unlikely that the successful party in an adjudication will consent to hazard being deprived of its victory.

The judge noted that this judgment should now be regarded as superseding the guidance given in paragraph 9.4.3 of the TCC Guide.