IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION
COURT (QBD)

No. HT-2018-000337

[2019] EWHC 234 (TCC)

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 30 January 2019

Before:

MR JUSTICE FRASER

B E T W E E N :

AMEY LG LIMITED — Claimant

- and -

AMEY BIRMINGHAM HIGHWAYS LIMITED — Defendant

MR A. HICKEY QC (instructed by CMS Cameron McKenna Nabarro Olswang LLP) appeared on behalf of the Claimant.

MR. M. LIXENBERG (instructed by Herbert Smith Freehills) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE FRASER:

1 The action currently before the court concerns a claim brought by Amey LG Ltd (“ALG”) against Amey Birmingham or ABHL, to whom I will refer as "Amey Birmingham", in proceedings brought under CPR Part 8. It concerns the effect of two different adjudication decisions, both of which were issued by Mr. Molloy.

2 The issue before the court today is whether these proceedings should be struck out as an abuse of process. There are two components to that; one is the fact of existing proceedings between the same parties, on the same contract, and the second is the conduct of ALG in seeking to get the case listed as soon as possible and how it approached that in November 2018.

3 The two decisions by Mr. Molloy are as follows. The first decision is called "Molloy 1", dated 8 June 2018, in which ALG was the referring party and sought some £2.9 million from Amey Birmingham. Mr. Molloy awarded them zero, although there were other declarations made in that decision. The second decision is called "Molloy 2", dated 17 October 2018 and again, ALG was the referring party. In this adjudication ALG sought an interim payment of £3.2 million and they were awarded zero. There is however a tortuous history to these proceedings which I need to go through in a little bit of detail for explanatory reasons.

4 Amey Birmingham is a PFI contractor engaged by Birmingham City Council on a long-term basis in respect of the roads and highways of Birmingham. I will refer to that as the "PFI contract". ALG is its subcontractor. A dispute arose between Birmingham City Council (“Birmingham CC”) and Amey Birmingham in respect of the PFI contract. That led to an adjudication and a set of proceedings which were given action number HT-2015-306. The adjudicator found in favour of Birmingham City Council in most respects, this being set out at [34] of the Court of Appeal judgment to which I refer below.

5 After a judgment by HHJ Raeside QC in Leeds in 2016, he came to the opposite conclusion and issued a declaration that the adjudicator was wrong. This therefore meant that the Amey Birmingham CC became the successful party. Birmingham CC appealed to the Court of Appeal, who decided in its favour. This is set out in a judgment handed down on 22 February 2018 which is at [2018] EWCA Civ 264, the leading judgment being given by Jackson LJ. In that judgment, Birmingham succeeded on the issues, and the parties agreed an order setting out the material effect of the judgment, which effectively reinstated what the adjudicator had decided (although it is more complicated than that, and recourse should be had to the judgment for its full effect and decisions). Birmingham CC took the view that the effect of the decision was to require Amy Birmingham to repay a very sizeable amount of money, approximately £62 million, to Birmingham CC. Amey Birmingham had been paid this as part of the PFI payments, and it was this that had led to the dispute that had been referred to the adjudicator.

6 Amey Birmingham disagreed about that. The grounds of this disagreement are a little difficult to follow, but for reasons which will become clear (given what happened before Stuart-Smith J in October, as to which further below) it is not necessary to go into details. Principally it was said that the actual order of the Court of Appeal did not include a paragraph ordering repayment. Birmingham therefore adjudicated on the repayment issue and succeeded, and issued proceedings against Amey Birmingham in 2018 with action number HT-2018-219. In those proceedings, Birmingham CC sought summary judgment on

the decision in respect of enforcement that ordered repayment, and also summary judgment on the questions of interpretation decided by the adjudicator. In other words, final resolution of those underlying issues of interpretation, but by way of summary judgment rather than enforcement.

7 In those proceedings, in which Amey Birmingham was the defendant, Amey Birmingham then issued Part 20 proceedings against ALG. It is those Part 20 proceedings that have led to the existing situation between Amey Birmingham and ALG, in yet further proceedings. The Part 20 proceedings were issued on 24 August 2018. The full relevance of those proceedings will become clear. O'Farrell J ordered a hearing for directions to take place on 20 September 2018 in both the main proceedings and the Part 20 proceedings in action HT-2018-219, in other words, between Birmingham CC, Amey Birmingham, and the Part 20 claim against ALG. ALG challenged the jurisdiction of the court in the Part 20 proceedings but took part in the directions hearing on that date without prejudice to its contention that the court had no jurisdiction.

8 That hearing was before me. Mr. Hickey QCl appeared for AGL and argued very forcefully that the Part 20 proceedings should, unusually, be case managed and heard separately from the main proceedings. He maintained that the Part 20 proceedings were essentially separate and distinct. This was because the PFI contract and the contract between ALG and Amey Birmingham were not on what are called "back to back" terms, and that the issues between Birmingham CC and Amey Birmingham in the main action were different from the issues between Amey Birmingham and ALG. I agreed with him about that. It also appeared to me that the Part 20 proceedings had been issued as a device by Amey Birmingham in order (potentially) to give further time prior to proper resolution of the issues in that action regarding the enforcement of the adjudicator's decision in particular. I ordered that the Part 20 proceedings should be dealt with and case managed separately. I also ordered that a hearing should take place on 15 November 2018 to determine the jurisdiction point that was being taken by ALG in the Part 20 proceedings.

9 I made separate and more expedited directions in the main action. This led to the summary judgment application in the main proceedings in HT-2018-219 being heard on 4 October 2018 by Stuart-Smith J, in which Birmingham CC were successful. The Judge granted summary judgment on 4 October 2018 in an *ex tempore* judgment in respect of the adjudicator's decision, thus giving effect to the approach of the TCC to resolving issues on enforcement of an adjudicator's decision swiftly and in accordance with the legislative purpose of adjudication. On some of the more complicated issues that were being resolved finally, although on a summary judgment basis, he reserved judgment and handed that down on 2 November 2018. That judgment is at [2018] EWHC 2875 (TCC). Birmingham CC therefore acquired an order of the court in its favour in respect of the payment of approximately £62 million.

10 Meanwhile, there had been other adjudications going on between ALG and Amey Birmingham. These are the ones to which I have referred, leading to Molloy 1 and Molloy 2. Molloy 2 was issued on 17 October 2018, as I have said, and ALG was unsuccessful in recovering any sums.

11 On 31 October 2018, ALG issued separate proceedings against Amey Birmingham, this time with action number HT-2018-337. These were issued under CPR Part 8. At this time, there were still live Part 20 proceedings between the same parties on the same contract including, as I have identified, the jurisdictional challenged raised by ALG concerning the construction

of clause 70 of the contract between the parties. These proceedings were not immediately served, nor was notice of them given to Amey Birmingham.

12 However, those Part 20 proceedings in action HT-2018-219 were then made subject to a consent order. This was sent to the court in a signed version on 9 November 2018 by the parties and was signed by Herbert Smith Freehills (or HSF) the solicitors acting for Amey Birmingham and Freshfields Bruckhaus Deringer LLP for ALG. That is a different firm of solicitors that is acting for ALG in the new proceedings HT-2018-337 which were issued on 31 October 2018. This consent order was approved by Jefford J, its terms are notable because all it does is stay the Part 20 proceedings until 9 May 2019, or sooner if either party serves notice on the other lifting the stay. The hearing of 15 November 2018 set down to determine the jurisdictional objection by ALG was vacated, again by consent.

13 However, although as of this date ALG had issued the Part 8 proceedings, they still did not serve them upon Amey Birmingham, nor inform Amey Birmingham about them, nor were they known about (so far as I can tell) by Amey Birmingham when the consent order was agreed. Although on 30 November 2018 I ordered evidence to be served for today's hearing by ALG about this, requiring the parties to explain the position and, in particular, requiring ALG to explain the position, there is only extremely limited evidence before me dealing with this. The only evidence before the court which could explain what occurred is that for some reason, there are two different firms of solicitors, both acting for ALG, one in respect of action HT-2018-219 and the other in respect of HT-2018-337. Whether one firm did not know what the other one was doing or, potentially, whether there are other unexplained matters in the background (in terms of complicated or intricate tactics) I do not know, and there is no need to speculate.

14 Whatever the reason, in action HT-2018-337, without having served the Part 8 proceedings, ALG applied for its Part 8 directions from the court as though the Part 8 proceedings were an adjudication enforcement, including seeking an abridgement of time. Given ALG had lost Molloy 2, this proved something of a puzzle. Whatever the Part 8 proceedings do, they are not seeking enforcement of a money payment in either Molloy 1 or Molloy 2. The listing officer of the TCC therefore referred the matter to me as the Judge in Charge. They also, at my direction, enquired of ALG's solicitors whether any of the conditions in [14]-[17] set out in the judgment of Coulson J (as he then was) in *Hutton Construction Ltd v Wilson Properties (London)* [2017] EWHC 517 (TCC) applied. That enquiry was sent to ALG's solicitors but expressly asked for the views of the parties (in the plural).

15 In that decision, issued when Coulson J (as he then was) was the Judge in Charge, it is explained that the TCC guide in respect of Part 8 proceedings and adjudication is to be read subject to his comments in those paragraphs. That judgment makes it clear that a consensual approach is to be adopted in matters concerning Part 8 and adjudication enforcement. A letter of reply was sent back to the listing officer from ALG's solicitors dated 9 November 2018. An astute reader of this judgment will note that that is exactly the same day as the consent order was being agreed and signed between Freshfields acting for ALG and Amey Birmingham.

16 I have to say, with hindsight and having looked at all the evidence in this case and heard extensive submissions from counsel, that there are three issues with the terms of that letter in reply. Firstly, the letter rather misses the point. It states the Part 8 proceedings are not subject to the comments in *Hutton v Wilson*. Given ALG's whole approach is that its Part 8 proceedings are to do with adjudication, and that is the subject which *Hutton v Wilson* deals

with, I cannot understand that stance. Secondly, although it did at least identify what is now known to be the case, that the proceedings had not been served, it did not make clear that the defendant did not even know about them at all. The letter does not actually deal with the inquiry from the listing officer, whose inquiry was expressly and obviously directed at what both parties' views are. It can be said that that point is rather completely ducked, and what Mr Lixenberg correctly describes as an "ex parte" approach is disguised. It also that the Part 8 proceedings were adjudication enforcement and therefore an expedited procedure was not only justified, but was specifically required. In my judgment, it is seriously arguable that they are not, at least not in the terms that phrase is ordinarily understood. ALG is challenging the decision in Molloy 2 and wants it declared a nullity, which can only be because it wishes to adjudicate again on the same point. Whether it is entitled to do that or not is to be decided, but that cannot be said to be enforcement. Further, ALG lost their attempt in Molloy 1 to obtain any money. I also consider that letter is not full and open with the court, and attempts to obtain an early listing rather by the back door. It also entirely ignores the existence of the Part 20 proceedings.

17 I therefore listed the matter for a directions hearing on 30 November 2018 and because the factual position was so unclear, I ordered evidence to be served by both parties about the events of late October and early November together with an explanation. Even when I did that, the Part 8 proceedings, in a matter which ALG argued was so very urgent, had still not been served on Amey Birmingham.

18 Following that, it was just a few days before the hearing on 30 November 2018 that the Part 8 proceedings were in fact served. It was also on a few days before that hearing that Amey Birmingham were even told about them at all. No acknowledgment of service had been provided as at that hearing. Following that, Amey Birmingham has now acknowledged service of the Part 8 proceedings, and added what is called a rider to its acknowledgement of service which seeks four other declarations. Mr. Hickey in his written skeleton for today has referred to this as a counterclaim and makes it clear there are disputes of fact involved in at least one of the four elements of the rider. Mr. Lixenberg, counsel for Amey Birmingham in his skeleton also refers to a counterclaim. Part 8 only provision for resolution of counterclaims with permission, and is, in any event, for disputes that do not involve significant disputes of fact.

19 The principles which apply to this rather complicated situation are as follows:-

1. Adjudication enforcement is subject to its own particular procedure in this court which is conducted under CPR Part 7. Although in some cases both Part 8 claims for declarations and Part 7 enforcement proceedings are both issued, it should be a consensual process and [14]-[17] in *Hutton Construction v Wilson* are to be followed. This is not optional. It is directly contrary to the consensual approach which is identified in that authority to embark on Part 8 proceedings without even giving notice of this to the other party, particularly where drastic abridgment of time periods are sought, as they were here and, in particular, where there are already existing legal proceedings between the parties.
2. This Part 8 claim does concern adjudication, but just because an action concerns adjudication or the terms of the contract dealing with adjudication, does not automatically qualify it as adjudication enforcement, nor does it automatically qualify for abridged time and expedited directions.
3. The court should not be misled by a party seeking to circumvent the usual time limits set out in the CPR generally.

4. CPR 3.4(2)(b) gives the court the power to strike out a statement of case if it an abuse of the court's process or is otherwise likely to obstruct the fair disposal of the proceedings.

20 It is clear, however, from the notes in *The White Book* and in particular CPR 3.4.3 that there are several alternatives to striking out of proceedings under CPR Part 3.4. *Biguzzi v Rank Leisure Plc* [1999] 1 WLR 1926 makes it clear that striking out of a valid claim should be a last option. If the abuse could be addressed by a less draconian course, it should be.

21 An important point and one which I seem to be, at least as far as today is concerned, the only party concerned, is an important principle that multiplicity of proceedings is to be avoided. When the Part 8 claim was issued, there were already proceedings under way between these parties on the very same contract, and including some of the same clauses. Mr Hickey has explained that the issues in this case could not, as he sees it, be dealt with in the Part 20 proceedings because to do would require him to concede that the court had jurisdiction in those proceedings. That is a mere tactical consideration, it seems to me. Section 49.2 of the Senior Courts Act, 1981 provides in part that, subject to the provisions of that Act itself or any other enactment, every court shall so exercise its jurisdiction in every cause or matter before it so as to secure that –
(a) - as far as possible, all matters in dispute between the parties are completely and finally determined, and
(b) as far as possible, all multiplicity of legal proceedings with respect to any of those matters is avoided.

22 There are extensive notes at p.20 of *The White Book* against CPR 1.4.15 which explains that principle in slightly more fulsome terms. It is clear, in my judgment, that it is wholly contrary to avoiding multiplicity of proceedings to have two sets of live proceedings on foot at the same time, in the same court, on the same contract terms, in the way that has occurred in this case. Finally, however, that rule states that "The court will take a cooperative and constructive approach to matters consistent with the overriding objective in CPR Part 1."

23 I would add that in some long-term projects in particular, it may be necessary to issue more than one set of legal proceedings depending on the progress of the project, the emergence of disputes along the way and, peculiarly in the field of Technology and Construction, enforcement of decisions of adjudicators along the way. However, that does not mean the parties were entirely free to ignore the requirements of s.49.2 of the Senior Courts Act which is primary legislation, and embark on as many different sets of proceedings between them as they wish, at the same time or overlapping, concerning the same contract terms and the same project to suit their own advantage, as they perceive it to be.

24 Here, there are two points which seem to me to be important –

1. The subject matter of the Part 20 proceedings, actionHT-2018- 219 may in the future become completely redundant, partly due to the judgment of Stuart-Smith J on 4 November 2018 in the main claim, and partly due to the consent order. That is not currently reflected in the terms of the consent order agreed by the parties which simply imposes a stay of six months being the maximum, and potentially shorter if either party serves notice on the other. That action will therefore come back to life in May 2019.
2. Although there has, as far as I am concerned, been a failure to comply with the rules by ALG's solicitors, not least in what happened in the very early days of November in terms of its communications with the court in its attempt to seek abridged directions, Mr. Hickey has explained that there was no ulterior motive in that respect and he has apologised insofar as

the rules have been broken. He also makes a sensible point that the striking out of the claim would be a draconian step. It has to be said that it has taken some time, in extended debate with Mr Hickey on 30 November 2018 and today, for him finally to reach that position, but eventually he did reach it. His starting position on 30 November 2018 was that ALG were entirely entitled, and justified, in behaving as they did in early November 2018. I disagree with him about that.

25 I do however agree that it would be disproportionate to strike out the action, and I conclude that the most proportionate way of dealing with this matter is as follows. Firstly, I am going to impose a non-consensual stay on the existing Part 20 proceedings in HT-2018-219. This will have the effect that even if a party were to give notice under the order of 9 November 2009, an order of the court will still be required to reactivate those proceedings. They will remain dormant unless or until the court makes a further order.

26 For the avoidance of doubt, the stay in action 219 is not to be lifted until further order of the court. That removes the risk of two sets of proceedings being on foot at the same time.

27 It follows therefore, that I am not going to strike out the Part 8 in action HT-2018-337, although it is somewhat unusual to have one set of solicitors agreeing a six-month stay with Amey Birmingham's solicitors at the same time as another firm acting for the same party on the same project and son the same contract issues Part 8 proceedings that overlaps the issues then live. I have, in all the circumstances, considered it would be disproportionate to strike it out. I will, however, be dealing with costs somewhat differently than Mr Hickey might expect, in order to reflect my views on the merits of the situation.

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CERTIFICATE

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