Neutral Citation Number: [2020] EWHC 1120 (TCC)

Case No: HT-2020-000070

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 7th May 2020

Before :

MR ROGER TER HAAR QC

Sitting as a Deputy High Court Judge

- -

Between:

ISG CONSTRUCTION LIMITED
Claimant

- and –

PLATFORM INTERIOR SOLUTIONS LIMITED

Defendant

- -
- -

Patrick Clarke (instructed by **Brodies LLP**) for the **Claimant**

Rupert Choat (instructed through the **Licensed Access Scheme**) for the **Defendant**

Hearing date: 24 April 2020

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment will handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on Thursday 7th May 2020.

Mr Roger ter Haar QC :

1. On the 21st April 2020 under the Covid-19 Protocol I handed down judgment in Case No. HT-2020-000038. In that case the Claimant is Platform Interior Solutions Limited ("Platform") and the Defendant is ISG Construction Limited ("ISG"). In that action Platform sought to enforce an adjudicator's decision issued by Ms Lisa Cattanach on 11 December 2019. I granted summary judgment as sought by Platform.

2. That judgment can be found on Bailii: Neutral Citation Number [2020] EWHC 945 (TCC). I do not intend to burden this judgment by a recital of matters contained in that judgment save to the minimum extent necessary for the purposes of this judgment.

3. In this action ISG is the Claimant and Platform is the Defendant.

4. The present action is brought under CPR Part 8. ISG seeks declarations as follows:

> "(a) The decision of the adjudicator is wrong and beyond rational justification in that the adjudicator's assessment of sums due to Platform was inconsistent with the terms of the Sub-Contract;
>
> "(b) Platform is not entitled to the sums awarded by the adjudicator; and/or
>
> "(c) Insofar as this claim is determined prior to or at the same time as Platform's application for summary judgement to enforce the Decision in claim HT-2020-000038, that Platform is not entitled to judgment enforcing the Decision."

5. The terms of those declarations make it clear that the purpose of this action is to prevent enforcement of the Adjudicator's Decision.

6. Case HT-2020-000038 was commenced on 31 January 2020. This case was commenced on 27 February 2020.

7. On 10 March 2020 this Court directed as follows:

> "There is insufficient time to timetable this Part 8 Claim for hearing with the Part 7 enforcement hearing, which raises different issues for determination. Please could you obtain a time estimate from both parties for the Part 8 hearing so that a date can be fixed."

8. ISG attempted to persuade this Court to change its mind, but on 13 March O'Farrell J. refused that application and directed that this Part 8 claim should be listed for a separate hearing. In accordance with this direction, Platform's Part 7 claim was heard by me on 24 March, and this Part 8 claim on 24 April 2020.

9. On both occasions because of the present public health crisis, the hearings were by telephone with the consent of the parties. I would like to thank the parties for the co-operation of both counsel and solicitors which made both hearings possible.

ISG's position on the substantive issues arising out of the Adjudication

10. In the contract between the parties, Clause 27 of the Sub-Contractor Conditions was headed "Termination of Sub-Contractor's Employment" and provided:

> "(1) ISG may without prejudice to any other of its rights or remedies immediately terminate the Sub-Contactor's employment under this Sub-Contract in respect of the whole or any part of the Works if the Sub-Contractor:
>
> "….
>
> "(h) is in material or persistent breach of this Sub-Contract.

> "….
>
> "(4) The Sub-Contractor shall within 14 days of being so notified, submit an application for payment for works executed by him up to the date of termination. Such application shall be treated in all respects as if it was a final account submitted by the Sub-Contractor pursuant to clause 2(12) and the procedures set out in clause 2 shall apply in respect of such an application.
>
> "(5) ISG shall be entitled to recover from the Sub-Contractor all losses, expenses, costs and damages suffered or which may be suffered by ISG by reason of such termination."

11. In the Details of Claim on the Claim Form in this action ISG sets out its case as to the approach adopted by the Adjudicator as follows:

> "20. As set out above, on the termination of the Contract under Clause 27(1) of the Sub-Contract Conditions, Clauses 27(4) and 27(5) govern the parties' entitlements to payment. However, Clauses 27(4) and 27(5) were not applied by the adjudicator.
>
> "21. ISG's position in the adjudication was that Clauses 27(4) and 27(5) govern payment following termination as set out in paragraphs 11.1 and 11.2 of the Adjudicator's decision. Further ISG's losses under Clause 27(5) could be calculated by taking the difference between what ISG would have had to have paid Platform to complete the works but for the termination and the actual cost of completion.
>
> "22. As to the approach to the valuation of sums due, at paragraph 11.28 of the Decision the Adjudicator decided that:
>
> > "*I concur with [ISG] that the termination valuation should be based upon the value of the works it would have paid to [Platform] less the costs it has actually incurred in completing the works within the Scope of the Referring Party's Sub-Contract.*"
>
> "23. Contrary to that determination ISG had not submitted that the 'termination valuation' of any sum due to Platform should be calculated on that basis. ISG had maintained that ISG's losses, and any sum due to ISG in respect of those losses, could be calculated by taking the total cost of completing the works and deducting the value of the works that ISG would have paid to Platform.
>
> "24. The Adjudicator went on to determine that:

> "a. If the works had been completed by Platform, the value of the works carried out by Platform would have been £2,506,096.38 (paragraph 11.30 of the Decision).
>
> "b. The actual cost to ISG of completing the works, including sums paid to Platform was £2,088,555.05 (paragraph 11.31 of the Decision).
>
> "c. ISG was therefore liable to make payment to Platform in the sum of £417,541.33, being the amount of the saving that ISG had made as a result of the termination, being the difference between the actual cost of completion of the works and the sums that would have been payable to Platform but for the lawful termination of the Sub-Contract. (paragraph 13.1 of the Decision)
>
> "25. The Adjudicator's calculation of the sum due to Platform was not in accordance with the parties entitlements pursuant to Clauses 27(4) and 27(5) of the Sub-Contract Conditions or any clauses of the Sub-Contract or any claim before the Adjudicator.
>
> "26. The Adjudicator did not value the works carried out by Platform in accordance with Clause 27(4) of the Sub-Contract Conditions or at all.
>
> "27. In the premises the Adjudicator's decision that ISG was liable to pay any sum to Platform and/or that ISG was liable to pay the sum of £417,541.33 was incorrect and made in error.
>
> "28. The Adjudicator's error is fundamental to the decision and Platform is not entitled to the sums that it has been determined ISG should pay."

12. These points were developed further in the skeleton argument of Mr. Clarke, counsel for ISG.

13. Those arguments raise serious issues as to whether the approach adopted by the Adjudicator was correct as a matter of construction of the contract between the parties.

14. For his part, Mr. Choat, who appears for Platform, sidesteps the arguments as to the true construction of the contract for the reasons set out below.

15. In the event, I have not heard full argument on the proper approach to the contract. Nothing I say in this judgment should be taken as determining that ISG's submissions as to the correct application of the contract. There is a separate point which I must consider as to the submissions made by ISG to the Adjudicator and the extent to which they reflect the position taken by ISG in the Adjudication.

Hutton Construction Ltd v Wilson Properties Ltd

16. Both parties drew my attention to the decision of Coulson J (as he then was). in *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC); [2017] BLR 344. That was a case in which in response to a claim form seeking to enforce an adjudication decision the party held by the adjudicator to be the paying party commenced Part 8 proceedings contending that the adjudicator's decision was incorrect. On the summary judgment application to enforce the decision, the defendant sought to defend the application on the grounds that the adjudicator was wrong to reach the conclusion that he did and that, in consequence, there should be no judgment in favour of the claimant.

17. As the learned judge pointed out, the defendant's stance was one which was increasingly common amongst those dissatisfied with an adjudicator's decision. As a result of the guidance in *Hutton*, the circumstances in which such an approach will be successful have been significantly restricted.

18. At paragraphs [3] to [5] of his judgment Coulson J. set out the relevant principles as follows:

> "3. The starting point, of course, is that, if the adjudicator has decided the issue that was referred to him, and he has broadly

acted in accordance with the rules of natural justice, his decision will be enforced: see Macob Civil Engineering Limited v Morrison Construction Limited [1999] BLR 93. Adjudication decisions have been upheld on that basis, even where the adjudicator has been shown to have made an error: see Bouygues (UK) Limited v Dahl-Jensen (UK) Limited [2000] BLR 522. Chadwick LJ summarised the principal reason for this in Carillion Construction Limited v Devonport Royal Dockyard Limited [2006] BLR 15: "the need to have the 'right' answer has been subordinated to the need to have an answer quickly."

"4. There are two narrow exceptions to this rule. The first, exemplified by Geoffrey Osborne v Atkins Rail Limited [2010] BLR 363, involves an admitted error. In that case the calculation error was raised by the defendant in a separate Part 8 claim. Because the error was admitted by everyone, including the adjudicator, and because there was no arbitration clause, which meant that the court had the jurisdiction to make a final decision on the point, there were no reasons why, in that case, the error could not be corrected. If there had been an arbitration clause, the court would not have had the power to determine the issue and the decision would have been enforced: see Pilon Limited v Beyer Group PLC [2010] BLR 452.

"5. The second exception concerns the proper timing, categorisation or description of the relevant application for payment, payment notice or payless notice, and could be said to date from Caledonian Modular Limited v Mar City Developments Limited [2015] EWHC 1855 (TCC); [2015] BLR 694; 160 Con LR 42. In that case, the defendant had raised one simple issue, in a detailed defence and counterclaim served at the outset, to the effect that a small group of documents could not have constituted a claim for or notice of a sum due for payment. If that argument was right, it was agreed that the claimant was not entitled to summary judgment. At paragraph 11 of my judgment in that case, I reiterated the general principle that it was not open to a defendant to seek to avoid payment of a sum found due by an adjudicator by raising the very issue on which the adjudicator ruled against the defendant in the adjudication. I went on:

> "12. That is, of course, the general rule and it will apply in 99 cases out of 100. But there is an exception. If the issue is a short and self-contained point, which requires no oral evidence or any other elaboration than that which is capable of being provided during a relatively short interlocutory hearing, then the defendant may be entitled to have the point decided by way of a claim for a declaration. That is what happened, for example, in Geoffrey Osborne Ltd v Atkins Rail Ltd [2010] BLR 363. It is envisaged at paragraph 9.4.3

> of the TCC Guide that separate Part 8 proceedings will not always be required in order for such an issue to be decided at the enforcement hearing.
>
> "13. It needs to be emphasized that this procedure will rarely be used ….."

19. Coulson J. then concentrated upon the second exception referred to in paragraph [5] of his judgment and said at paragraphs [8] and [9]:

> "8. The authorities since Caledonian Modular demonstrate that, very often, the point taken by the defendant is a straightforward argument to the effect that the adjudicator was wrong and that, either with regard to its timing, or its content, the relevant payment notice was invalid and/or that the payless notice was valid and prevented payment. In those circumstances, the defendant has issued Part 8 proceedings seeking a declaration to that effect. The claimant may issue its own enforcement claim or, as the cases show, the parties may agree that, if the defendant loses its Part 8 claim, it will pay the sums awarded by the adjudicator in any event.
>
> "9. This broadly consensual approach can be seen in a number of the cases, including: …"

He then referred to five cases since the decision in *Caledonian Modular* and went on to say:

> "10. These cases all involved a significant degree of agreement between the parties. In particular, they all involved CPR Part 8 claims issued by the defendant challenging the decision of the adjudicator, and seeking a final determination by way of court declarations. They all involved a tacit understanding that the parties' rights and liabilities turned on the decision as to whether or not the particular notice had been served in time and/or was a valid application for payment or payment/pay less notice.
>
> "11. Furthermore, the issue of a separate Part 8 claim in those circumstances was not simply a matter of form. It was important in two respects. First, it provided a vehicle whereby the defendant could set out in detail its challenge to the adjudicator's decision. This meant that the claimant could see and understand the precise basis of the challenge and the consequential declarations sought.

> "12. Secondly, the existence of a separate Part 8 claim meant that the TCC knew from the outset what was going to be involved at any subsequent hearing…
>
> "13. In my view, the practice which has grown up around challenges of this sort has worked relatively well, but only where there has been a large measure of consent between the parties from the outset. The problems in the present case, and in many other recent cases, have arisen because there has been no such consent.
>
> "14. Many defendants consider that the adjudicator got it wrong. As I said in Caledonian Modular, in 99 cases out of 100, that will be irrelevant to any enforcement application. If the decision was within the adjudicator's jurisdiction, and the adjudicator broadly acted in accordance with the rules of natural justice, such defendants must pay now and argue later. If the degree of consent noted in the authorities set out in Section 3 above is not forthcoming, then the following approach must be adopted."

20. At paragraphs [15] to [21] the learned judge set out the practice to be followed where there is a Part 8 claim challenging an adjudicator's decision and there is no agreement by the enforcing party to the Part 8 Claim impacting upon the enforcement of the adjudicator's decision:

> "15. The first requirement is that the defendant must issue a CPR Part 8 claim setting out the declarations it seeks or, at the very least, indicate in a detailed defence and counterclaim to the enforcement claim what it seeks by way of final declarations. For the reasons already explained, I believe a prompt Part 8 claim is the best option.
>
> "16. It might be fairly said that there is some support in paragraph 9.4.3 of the TCC Guide for a more informal approach. That provides as follows:
>
> > "It sometimes happens that one party to an adjudication commences enforcement proceedings, whilst the other commences proceedings under Part 8, in order to challenge the validity of the adjudicator's award. This duplication of effort is unnecessary and it involves the parties in extra costs, especially if the two actions are commenced at different court centres. Accordingly there should be sensible discussions between the parties or their lawyers, in order to agree the appropriate venue and also to agree who shall be claimant and who defendant. All the issues raised by each party can and

> should be raised in a single action. However, in cases where an adjudicator has made a clear error (but has acted within his jurisdiction), it may on occasions be appropriate to bring proceedings under Part 8 for a declaration as a pre-emptive response to an anticipated application to enforce the decision."

"This paragraph must now be taken to have been superseded by the guidance given in this Judgment.

"17. On this hypothesis, there is a dispute between the parties as to whether or not the defendant is entitled to resist summary judgment on the basis of its Part 8 claim. In those circumstances, the defendant must be able to demonstrate that:

> (a) there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest;
>
> (b) that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing set aside for the enforcement;
>
> (c) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore.

"18. What that means in practice is, for example, that the adjudicator's construction of a contract clause is beyond any rational justification, or that the adjudicator's calculation of the relevant time periods is obviously wrong, or that the adjudicator's categorisation of a document as, say, a payment notice when, on any view, it was not capable of being described as such a document. In a disputed case, anything less would be contrary to the principles in Macob, Bouygues and Carillion.

"19. It is axiomatic that such an issue could still only be considered by the court on enforcement if the consequences of the issue raised by the defendant were clear-cut. In Caledonian Modular, it was agreed that, if the document was not a payment notice – and it plainly was not – then the claimant's case failed. If the effect of the issue that the defendant wishes to raise is disputed, it will be most unlikely for the court to take it into account on enforcement. Any arguable inter-leafing of issues would almost certainly be fatal to a suggestion by the defendant that their challenge falls within this limited exception.

"20. The dispute between the parties as to whether or not the issue should be dealt with on enforcement would have to be dealt with shortly at the enforcement hearing itself. The inevitable time constraints of such a hearing will mean that it will be rare for the court to decide that, although the issue and its effect is

> disputed, it can be raised as a defence to the enforcement application.
>
> "21. In my view, many of the applications which are currently being made on this basis by disgruntled defendants (and which are not the subject of the consensual process noted above) are an abuse of the court process. The TCC works hard to ensure that there is an enforcement hearing within about 28 days of commencement of proceedings. The court does not have the resources to allow defendants to re-run large parts of an adjudication at a disputed enforcement hearing particularly in circumstances where the adjudication may have taken 28 days or 42 days, whilst the judge might have available no more than two hours pre-reading and a two-hour hearing in which to dispose of the dispute."

21. It is to be noted that in paragraph [17(a)] the learned judge refers to a "short and self-contained issue which arose in the adjudication and which the defendant continues to contest" (emphasis added), and that in paragraph [18] he refers to a "construction of a contract clause [which] is beyond any rational justification" (again emphasis added). It will be noted that the expression "beyond any rational justification" is echoed in declaration (a) sought by ISG (see paragraph 4 above).

22. The principles set out by Coulson J. were applied by Jefford J. in *Seadown Developments Ltd v SMCC Construction Ltd* (unreported, 3 November 2017). At paragraph [25] she said:

> "It does not simply follow from the fact that the adjudicator's decision is wrong that it will not be enforced, save in the sort of particular or exceptional circumstances identified by Coulson J. in Hutton for the very reason that normally the fact that the adjudicator may be wrong does not render his decision unenforceable."

What issues arose in the adjudication?

23. As noted at paragraph 21 above, Coulson J. had in mind Part 8 proceedings considering a "short and self-contained issue which arose in the adjudication".

24. In paragraphs [61] and [62] of my judgment in action 000038 I held:

> "61 In this case the parties were agreed on the way in which the Adjudicator should approach valuation in the event that she determined that it was ISG, not Platform, that validly terminated the sub-contract. The problem appears to me to be that the result of that approach produced a result which I suspect neither party had expected and which gives rise to the legal issues raised in the Part 8 proceedings as to the proper approach on her conclusions as to valuation.
>
> "62 That problem, if, after the parties have made their submissions in the Part 8 proceedings, it continues to be perceived as a problem, arises out of the Adjudicator applying the approach which both parties had suggested should be applied. It may well be that ISG now wishes that it had caveated that approach as to what should happen if it resulted in a flow of money from ISG to Platform, but that is not a ground for holding that there was a breach of natural justice."

25. Based upon those findings, Mr Choat contends that the point raised by ISG in action 000070 was not raised in the adjudication. He contends, in consequence, that the Part 8 claim should be dismissed because it is based upon incorrect premises which the Court has found to be wrong.

26. I agree with those submissions: as I found in those paragraphs the Adjudicator applied the approach which both parties had suggested should be applied.

Does ISG's Part 8 Claim fall within either of the two exceptions in Hutton?

27. As set out above, the first exception referred to by Coulson J. in paragraph [4] of *Hutton* is where there is an admitted error.

28. That is not this case.

29. The second exception is that discussed at greater length in paragraph [17] of his judgment. I have already held that ISG's claim does not fall within sub-paragraph (a) of paragraph [17] of that judgment because the issue was not

raised in the adjudication. However it also falls outside that sub-paragraph for a second reason: in paragraph 42(a) of his skeleton argument Mr Clarke argues that the Adjudicator fell into error in that she did not determine the question of what sum was due to Platform by reference to or in accordance with the provisions of Clause 27(4) of the contract, and, in particular, did not assess Platform's entitlement, if any, on the value of the works up to the date of termination.

30. I make no determination in this judgment as to whether that contention is correct or not: I accept that it is arguable, even though not what ISG asked the adjudicator to decide, that that is the correct approach. However in my view ISG needs to go further than establishing what the correct approach is under the contract: it needs to go on to show what figure would have been produced by an assessment of Platform's entitlement and that that would have produced a different result. I am willing to accept that it is likely that it would, but that goes beyond a short point of construction and requires valuation evidence.

31. There is an allied point taken by Mr. Choat that determination of the suggested point of construction will not determine all the aspects of the dispute between the parties. He relies inter alia upon Clause 30(4) of the contract between the parties, which provides: "*The decision of an adjudicator appointed under this Sub-Contract shall be binding until the dispute or difference is finally determined by legal proceedings in the English Courts*". I do not regard it as being necessary to decide that point given that I have concluded for other reasons that this case falls outside the principles in *Hutton*.

32. There is another difficulty: as I have pointed out, declaration (a) as sought by ISG goes as far as contending that the Adjudicator's construction of the contract is beyond any rational justification. This is a reflection of paragraph [18] of Coulson J.'s judgment. However, in my view it is impossible for ISG to succeed on that case where the Adjudicator did what she was asked to do by both ISG and Platform.

33. For these reasons, in my judgment this is not a case falling within either of the two exceptions defined by Coulson J. in *Hutton*.

The Declarations Sought

34. The underlying purpose of the decision of Coulson J, in *Hutton* was to address what he described in paragraph [21] of his judgment as cases which are an abuse of the court process.

35. It is important to note that he did not hold that Part 8 has no part to play in determining whether a legal principle underlying an adjudicator's decision was correctly decided by an adjudicator.

36. There are clearly cases where a claim for a declaration under Part 8 is entirely appropriate even if not falling within either of Coulson J.'s two exceptions. In my judgment, what the judgment is concerned with are the circumstances in which a Part 8 claim may be deployed in order to prevent timely enforcement of adjudicators' decisions.

37. The interrelationship between adjudication enforcement and consideration of legal issues under Part 8 was explained by the same judge in *Fenice Investments*

Inc. v Jerram Falkus Construction Ltd (2009} 128 Con LR 124 at paragraph [48]:

> "I am in no doubt that an adjudicator's decision is binding on the parties and, save in exceptional circumstances, it must be complied with, no matter how quick or slow the Pt 8 procedure to challenge that decision. A losing party who makes a challenge to the decision by using the CPR Pt 8 procedure can do so, but in the ordinary case he must, in the meantime, pay the sum found to be due."

38. In my judgment, *Hutton* is concerned to identify the cases which are exceptions to that general principle.

39. Against that background I turn to consider the relief sought. It is clear that the relief sought in the declarations has been crafted to fall within the principles laid down in *Hutton* so as to avoid an order for immediate enforcement of the Adjudicator's Decision.

40. In his skeleton argument, Mr. Clarke made the following submissions at paragraphs 56 and 57:

> "56. At the time of the issue of the Part 8 Claim, it was unclear whether the Part 8 Claim would be heard at the same time as the enforcement proceedings. It is understood from the direction from the court that the order in the enforcement proceedings will be made at the same time as the Part 8 Claim hearing. It is assumed that the order in the enforcement proceedings will be made in the light of the determination of the Part 8 Claim. Insofar as that assumption is wrong, it is submitted that that would in any event be the proper approach in the circumstances.
>
> "57. On that basis ISG seeks declarations in the following terms or such terms as the court decides any declarations should be made:
>
> "a. In respect of the proper construction of the Subcontract, which are not set out as declarations on the Part 8 Claim form as addressed above:

> "i. Upon the valid termination of the Subcontract between ISG and Platform dated 28 January 2018 by ISG pursuant to Clause 27(1), Platform is entitled to payment in accordance with Clause 27(4), such entitlement being the value of the works carried out by Platform up to the date of termination, subject to deductions or adjustments permitted by the Subcontract; and
>
> "ii. Clause 27(5) does not entitle Platform to recover any sums from ISG.
>
> "b. In respect of the adjudicator's Decision (from the declaration at paragraphs 29 a-c of the Part 8 Claim Details of Claim…"

41. The declarations sought at paragraph 57(a) of the skeleton argument are in wider terms that those sought in the Details of Claim. In his oral submissions Mr Clarke did not press for a declaration in the terms of paragraph 57(a), doubtless because in themselves they would not fall within the principles in *Hutton*.

42. In my judgment, given that ISG cannot bring itself within either of the exceptions set out in *Hutton*, it would be wrong in my discretion to grant the declarations sought.

43. It is a matter for ISG as to whether it wishes to apply to amend the Details of Claim in the Claim Form in order to seek the declarations referred to in paragraph 57(a) of Mr Clarke's skeleton argument in this action. I understand that if such an application is made it may be opposed upon the basis of the arguments to which I have made brief reference at paragraph 31 above, and which are contained in paragraphs 53 to 61 of Mr. Choat's skeleton argument. I do not resolve any such dispute in this judgment.

44. It is sufficient for present purposes to determine that to grant the declarations sought with the purpose and effect of preventing enforcement of the Adjudicator's Decision would be wrong.

Conclusion

45. For the above reasons I decline to grant the declarations sought at this stage by ISG.