

Construction Law Update

Is Challenging an Adjudicator's Decision by Using Enforcement Proceedings an Abuse of Process?

The courts have adopted a swift approach to adjudication enforcement. However, in the recent case of *Amey LG Limited ("ALG") v Amey Birmingham Highways Limited ("ABHL")*, ALG sought to use that same process to have an adjudicator's decision declared a nullity. The court therefore had to consider whether this was an abuse of process.

Background

ABHL is a PFI contractor engaged by Birmingham City Council ("BCC"). ALG is ABHL's sub-contractor.

BCC issued proceedings against ABHL and ABHL in turn issued Part 20 proceedings against ALG. ALG challenged the jurisdiction of the court and the Part 20 proceedings were stayed under a consent order.

Meanwhile, ALG had been unsuccessful in adjudications which it had commenced against ABHL and issued Part 8 proceedings challenging the adjudicator's decision. ALG issued the Part 8 proceedings before the consent order had been agreed in the Part 20 proceedings but did not serve them on ABHL until after the court had approved the consent order and only days before the Part 8 hearing.

Was this an adjudication enforcement or an abuse of process?

ALG applied for directions from the court as though the Part 8 proceedings were an adjudication enforcement, including seeking an abridgment of time. However, rather than seeking to enforce an adjudicator's decision, ALG was seeking that it be declared a nullity, presumably so it could adjudicate again on the same point.

The court noted that adjudication enforcement is subject to its own particular procedure under CPR Part 7 but in some cases Part 8 declarations are also sought. However, this is a consensual process and the court held that it had been undermined by ALG embarking on

Part 8 proceedings without giving notice of this to ABHL. Further, the court stated:

"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."

The court therefore concluded that ALG's claim was an abuse of process. However, the court considered that it would be disproportionate to strike out ALG's claim and decided that ALG's conduct would be more appropriately addressed through a costs order.

Was there a multiplicity of proceedings?

The court has to exercise its jurisdiction to ensure that, as far as possible, all multiplicity of legal proceedings is avoided. The court concluded that allowing both the Part 8 proceedings and Part 20 proceedings to continue would have been wholly contrary to this principle as both proceedings were commenced at the same time, between the same parties and concerned the same contract terms. Accordingly, the court imposed a non-consensual stay on the Part 20 proceedings meaning they could not be reactivated without a further court order.

Analysis

Whilst the courts have adopted a robust and quick approach to adjudication enforcement, this decision makes clear that parties will not be permitted to abuse that process to circumvent the usual time limits set out in the CPR and obtain an early listing of their case "by the back door". Parties should therefore refrain from attempting to shoehorn their claim into this process, regardless of the potential time savings.

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