

## Construction Law Update

### Challenging the Substantive Merits of an Adjudicator's Decision on Enforcement

We recently represented the successful claimant in the case of *J Tomlinson Limited v Balfour Beatty Group Limited*, in which the Technology and Construction Court (the "TCC") considered the limited exceptions where the enforcement of adjudicators' decisions can be successfully challenged.

#### Background

By way of a sub-contract, J Tomlinson Limited ("JTL") was engaged by Balfour Beatty Group Limited ("BB") to carry out certain electrical building services installations at a site known as Project Wren in Hull (the "Contract").

On 12 September 2019, JTL issued by hand its interim application for payment number 30, seeking payment of £1,246,467.00 (the "Interim Application"). JTL contended that the sum claimed in the Interim Application should have been paid by BB by no later than 4 November 2019. BB did not issue any payment notice and/or pay less notice in response to the Interim Application and nor did it pay the sums claimed in the Interim Application by the final date for payment.

JTL subsequently commenced adjudication proceedings against BB and successfully obtained a decision that the sum claimed in the Interim Application was due and payable to it (the "Decision").

The Decision went unpaid, therefore JTL commenced enforcement proceedings in the TCC.

#### The issues before the TCC

##### Contractual interpretation

In the enforcement proceedings, BB did not contend that either i) the Adjudicator was in breach of the rules of natural justice or ii) that the Adjudicator had acted in excess of his jurisdiction (being the two principal

grounds upon which the enforcement of an Adjudicator's decision may be resisted).

Rather, BB sought to resist enforcement on the basis that the Interim Application had been invalidly served. In particular, BB argued that the Interim Application had to be sent by both post **and** email and therefore it could not be relied upon by JTL as a default notice giving rise to entitlement to payment (as had been determined by the Adjudicator). In the alternative, BB argued that the Interim Application had been issued prematurely by JTL and had been served on an incorrect date, again arguing that such flaws led to the Interim Application being invalid and undermining the Adjudicator's finding that the Interim Application could suffice as a default notice.

BB's attempts to resist enforcement were therefore founded upon what it contended were errors within the Decision and which therefore rendered the Decision unenforceable.

##### Principles of law

In the absence of argument concerning either natural justice or jurisdiction, the TCC referred to the recent case of *Hutton Construction Ltd v Wilson Properties (London) Ltd* and identified the correct approach that the Court ought to take when faced with a challenge to an enforcement application which was based on the merits of the decision that had been reached. The TCC referred to the general rule as follows:

*"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."*

The TCC emphasised that this general rule is subject to two, very narrow exceptions which had been examined

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in *Hutton*, namely; i) an “admitted error” and ii) a “self-contained point”, concerning the timing, categorisation or description of the relevant application for payment, payment notice or pay less notice.

The first exception to enforcement did not apply in this case.

As to the second exception, (which BB's case could broadly be said to rely upon), the TCC held that “it is 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”.

The Court very much reiterated the “pay now and argue later” philosophy which underpins adjudication.

To the extent the second exception from *Hutton* is capable of application the TCC reiterated that in extremely limited circumstances Part 8 proceedings could be commenced provided that the point taken:

- (i) is a short and self-contained issue;
- (ii) requires no oral evidence; and
- (iii) is one which, on a summary judgment application, it would be unconscionable for the court to ignore (for example, the adjudicator's construction of a contract clause was beyond any rational justification).

Whilst no Part 8 claim had been raised by BB, the TCC nevertheless considered the substantive issues in this case in order to make clear why it disagreed with BB's substantive position but stressed that in doing it should not be taken as diluting the general rule set out in *Hutton v Wilson*.

#### The TCC's decision

Taking BB's contentious in turn; the TCC decided that:

- i) the payment terms of the Contract could not be construed as containing mandatory wording in respect of the mode of delivery of interim applications; and
- ii) that BB's position in relation to the dates by which interim applications could be served in order to be valid was incorrect.

The TCC therefore enforced the Decision.

#### **Analysis**

Ultimately, BB's resistance to the enforcement application was not based on a challenge to jurisdiction or a purported material breach of natural justice, nor did it fall within the realm of the narrow exception(s) identified in *Hutton v Wilson*. The TCC, therefore, granted summary judgment in favour of JTL.

This case confirms that “in 99 out of 100 cases” the merits of an underlying dispute will not be an obstacle to enforcement of an adjudicator's decision. Parties are generally expected to follow the guidance laid down in *Hutton v Wilson*.

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