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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION COURT (QBD)
[2020] EWHC 1947 (TCC)

No.HT-2020-000023

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 31 January 2020

Before:

MR JUSTICE FRASER

B E T W E E N :

ROCHFORD CONSTRUCTION LTD

Claimant

- and -

KILHAN CONSTRUCTION LTD

Defendant

MS H. WHITE (instructed by Goodman Derrick LLP) appeared on behalf of the Claimant.

MS R. DRAKE (instructed by Fieldfisher) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE FRASER:

1 Today is a case management hearing in two different sets of proceedings relating to the same project, and the circumstances in respect of which they arise I will explain. They both concern adjudication. Rochford Construction Ltd. ("Rochford") are defendants in an adjudication enforcement application brought by Kilhan Construction Ltd ("Kilhan"). I am just quickly going to outline the issues between the parties.

2 Kilhan have an adjudicator's decision in their favour for approximately £200,000. They have issued enforcement proceedings. These are listed to be heard on 13 February in this court, with a time estimate of two hours. The subject matter of that decision is interim application 9, which Kilhan lodged with Rochford on 20 May 2019. No payment was made in respect of the sum that Kilhan claimed was due to them, and that matter went to an adjudicator for his decision. The adjudication was commenced by way of a notice of adjudication on 27 November 2019, and in a decision that was produced by the adjudicator on Christmas Eve, namely 24 December 2019, Rochford was ordered to pay the sum of just under £200,000 in respect of that interim payment application. One (if not the main) issue which the adjudicator decided was the lack of a pay less notice. I am not going to go into the subject matter in any great detail, other than to say that the adjudicator considered the issues before him fairly carefully.

3 Rochford has issued a Part 8 claim. That was issued on 21 January 2020. The reason that the matter has been brought in before me, as the judge in charge, is that Rochford seek to have that Part 8 claim heard on the same occasion as the enforcement proceedings, which are currently listed for 13 February 2020. In the Part 8 details of claim, I am going to read out one paragraph of the executive summary, which was settled by counsel. It says:

"The adjudicator erroneously ignored the express term contained in the subcontract which stated that the defendant must serve an interim payment application on the last day of each month. This one clear error led the adjudicator to the incorrect conclusion that payment had fallen due to the defendant in default of the payment notice."

There is more to the Part 8 claim than that, but that is a useful place, for today's purposes, to identify at least part of the dispute, if not the whole of the dispute, under Part 8. In the subcontract terms, under "brief description of subcontractor works to be carried out", the following five words appear, "application date end of month". Under the heading "commercial terms" on the same sheet, it says "valuations monthly as per attached payment schedule end of month". Effectively, those words are relied on by Rochford as saying that an interim application had to be made on the last day of the month and if it was not made on the last day of the month, they did not have to issue a pay less notice.

4 Whether that is right or not is going to be resolved at the Part 8, but the court is in the current position. The parties do not agree, as set out potentially in the well known case governing such matters called *Hutton v Wilson*, that these proceedings should both be dealt with at the same time, namely the Part 7 enforcement of the adjudicator's decision, and the Part 8 hearing. In fact Ms White appears to have told me today - and I am not holding her to this, in case this is a misunderstanding or misapprehension on my part - that there are no issues on the validity of the adjudicator's decision other than those that are contained within the Part 8 claim. In other words, put slightly differently, it might be said to be the case that

there is no quibble that this is a valid decision by an adjudicator made with jurisdiction. The subject matter of the Part 8 proceedings really is that the adjudicator was wrong. In those circumstances, one might ask oneself why both the express terms of the Act and indeed its intent have not been complied with, because that sum has not been paid. However, I am not going to go any further into that, other than observe that if it is a valid adjudicator's decision, it should be paid. The authorities are crystal clear about that, and have been for some years.

- 5 What Ms White wants me to do is to set the Part 8 claim down on 13 February 2020 to be heard at the same time as the adjudication enforcement and also, it should be said, within the same time limit. That time limit is two hours. I have explored with her in her submissions how that two hours would be shared between each party. Consistent with the recent decision in the case of *Kazakhstan Kagasy v Baglan & Ors* [2020] EWHC 128 (Comm), a decision of Andrew Baker J, it is clear, as set down by the learned judge in that case at [15] and [16], that time estimates (a) have to be realistic, (b) have to include a sufficient time for all substantive arguments, and for an oral judgment to be delivered should the judge decide to give an *ex tempore* judgment, and the determination of consequential matters. Ms White's suggestion that her Part 8 claim can be heard within two hours is, in my judgment, wholly unrealistic. I will not labour the point, but it provides one hour for the judge to read, including any authorities that might be lodged (although she says there will not be very many) and 40 minutes per party for their oral submissions. I would observe that this morning has already taken 45 minutes, of which about three minutes have been spent in giving this *ex tempore* judgment. It is simply not remotely realistic that the Part 8 proceedings can be heard at the same time as the Part 7 enforcement, or within the two hours currently available on that date.
- 6 What that therefore means is that one moves to Ms White's secondary position, which is that 13 February 2020 should be put off, and both sets of proceedings should be listed to take place at the same time, with a longer time estimate, later in the year. I observe that this is in the context of an adjudication decision ordering payment having been delivered on 24 December 2019, with the payment not having been made. To put off the hearing on 13 February 2020 means that situation would continue into 2020. That is directly contrary both to the express terms of the Act, the intent of Parliament, and the substance of all of the enforcement decisions from *Macob* onwards. These have made it clear that adjudicator's decisions that are made with jurisdiction and in accordance with the rules of natural justice have to be complied with and, under the "pay now, argue later" ethos, it is the winner of the adjudication who is entitled to hold the money.
- 7 I am now going to deal with an authority which has been argued before me, because this sets down the modern current approach of the TCC in matters where there are competing enforcement and Part 8 proceedings. It is the case called *Hutton Construction Ltd. v Wilson Properties (London) Ltd.* [2017] EWHC 517 (TCC) to which I have already referred. It is a decision of the then judge in charge, Coulson J (as he then was), and he states in the relevant principles (between [2] and [7] of that judgment) what the starting point is in terms of enforcing an adjudicator's decision. He also identifies, from [14] onwards, what the court should do when there is no consent to Part 7 enforcement proceedings, and Part 8 proceedings on the substantive issue have been issued, being dealt with together. As he says at the end of [12]:

"The TCC has sought to support the principle of adjudication by endeavouring to fix an adjudication enforcement hearing within 28 days of the commencement of proceedings. These hearings are routinely listed to last for not more than half a day. If, at the outset of the case, the court is

aware that there is a Part 8 claim where the arguments will be more involved than would ordinarily arise on an adjudication enforcement, the court will be able to list the hearing for a longer timeslot, and will be less concerned about fixing it within the 28 days. After all, a hearing at which final declarations are being sought is rather different to a straightforward adjudication enforcement."

- 8 He then gives an example where there was a case called *Kersfield* which involved extensive pre-reading, a whole day's hearing, and a detailed reserved judgment. He said that in his view the practice that has grown up around challenges of that sort has worked relatively well but *only* where there is a large measure of consent between the parties, and that the problem in that case - and, I should add, the problem in today's case - was there was no such consent. The proper approach where there is no consent is set out between [14] and [19] in *Hutton*. He makes clear at [16] that the TCC Guide is to be seen as having been superseded by that judgment, and at [17] he says that a defendant must be able to demonstrate the following:

"(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 ...

(c) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore."

He then said at [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 ..."

Those are examples that the learned judge gives of the sorts of issues which fall into what he says are very limited exceptions. As he says at [14]:

"As I said in *Caledonian Modular*, in 99 cases out of 100 [the defendant's view that the adjudicator got it wrong] is irrelevant to any enforcement application."

- 9 It is, in my judgment, beyond clear that the Part 8 proceedings cannot be heard on 13 February as there is only two hours of court time available. That is the period routinely set aside for an adjudication enforcement application under Part 7, and it is simply not possible to say that only five or ten minutes of that two hours would be required. In any case, the Part 8 proceedings, in my judgment, should be set down for a day in any event. It cannot possibly be said, on the documents that I have seen, that the adjudicator's construction of the contract clauses is beyond any rational justification, and the word "must", which appears in the executive summary of the Part 8, and which forms part of the case advanced in those proceedings, does not appear in any respect in the subcontract terms.
- 10 The question therefore becomes: should the winner in the adjudication have to wait to have its opposed enforcement application heard, to a date much later in the term when the court can accommodate a whole day hearing? In my judgment, not only would that be the wrong approach, it is contrary to the authority of *Hutton*, and it is contrary to the approach of the TCC. I would go so far as to say it would be wrong in principle to adopt such a course. The

court does have a date available to hear a one-day application, and that is 12 March 2020. Admittedly, that is only a month after the current date of 13 February, but when one has a party that has won in an adjudication in relation to an interim payment application that was lodged in May 2019, in my judgment, the correct approach is as follows. The adjudication enforcement hearing will take place on 13 February 2020 as currently listed. The Part 8 claim will be listed on 12 March 2020 for hearing, with a time estimate for the hearing of a whole day, and reading set aside the day before. The time estimate for reading is to be half a day. Written skeletons have to be lodged by noon on 9 March 2020 by both sides. None of these directions are intended to or do interfere with the existing ones in relation to service or other steps between now and then. It should also be borne in mind that the parties will not necessarily have the answer on 12 March 2020; it might be that the judge reserves their judgment, and a few weeks goes by before the answer is available on the Part 8 claim. In the meantime, if Rochford maintain their opposition to payment of the sum awarded by the adjudicator and there is a contested hearing on 13 February, in the usual way if they lose, they will probably be ordered to pay the costs of that hearing. However, I am highly unlikely to be hearing the case on that occasion, and what any judge does in terms of costs is up to them. But there is a valid adjudication decision, it seems to me, in existence. The jurisdiction point is not challenged, natural justice is not challenged, and that will be dealt with on 13 February 2020, and the Part 8 claim cannot be dealt with at the same time. That can be dealt with on 12 March 2020.

CERTIFICATE

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This transcript has been approved by the Judge