Neutral Citation Number: [2017] EWHC 517 (TCC)

Case No: HT-2016-000362

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 16th March 2017

**Before**:

**THE HON MR JUSTICE COULSON**

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**Between:**

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| **Hutton Construction Limited** | **Claimant** |
| **- and -** | |
| **Wilson Properties (London) Limited** | **Defendant** |

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**Mr Jonathan Lewis** (instructed by **Fenwick Elliott LLP**) for the **Claimant**
**Mr William Webb** (instructed by **Birketts LLP**) for the **Defendant**

Hearing date: 23 February 2017

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# Judgment Approved

**The Hon. Mr Justice Coulson :**

## 1. INTRODUCTION

1. This is a summary judgment application by the claimant, seeking to enforce the decision of the adjudicator, in the sum of £491,944.73. The defendant does not raise any issue as to the adjudicator's jurisdiction, nor is it said that there was any breach of natural justice. Instead, the defendant seeks to defend the summary judgment 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. The claimant denies that this is a legitimate approach on the facts of this case.

2. As I pointed out to the parties during the course of argument, the defendant's stance is an increasingly common one amongst those who are dissatisfied with an adjudicator's decision. It raises fundamental points of principle and practice concerning the enforcement of adjudication decisions. For that reason, having informed the parties that I would enter summary judgment for the claimant and would not permit the defendant to raise their challenge in defence of the claim, I reserved this Judgment.

## 2. THE RELEVANT PRINCIPLES

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). 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 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.
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> 13. It needs to be emphasised that this procedure will rarely be used, because it is very uncommon for the point at issue to be capable of being so confined. But in the present case, it is common ground that the proper meaning and interpretation of the documents of 13 February is a straightforward matter for the court. No other evidence of any kind is required. It is also common ground that, if the adjudicator was wrong, and those documents do not constitute a proper claim for payment or a payee's notice, then the defendant's payless notice was valid

> and there is no entitlement to summary judgment. Accordingly, this is one of those rare cases where the substantive point in issue can be determined at the enforcement hearing. During the course of his clear submissions on the substantive issues, Mr Webb properly did not suggest to the contrary."

6. What, I think, nobody could have predicted at the time of ***Caledonian Modular*** was the proliferation of what I understand are (unhappily) called 'smash and grab' cases: those adjudication claims (usually, but not always, brought by contractors) based on the contention that the other party has failed to serve proper or timeous applications for payment or payment/pay less notices, thereby automatically entitling the claiming party to the sums claimed, no matter how controversial. The significant increase in these sorts of claims seems to me to arise principally from the ill-considered amendments to the 1996 Act, and the over-prescription of the payment terms included in the standard forms of contract, which have led to provisions of unnecessary complexity. I am also aware of the widely-held view that this problem has been inadvertently compounded by the run of authorities starting with ***ISG Construction Ltd v Seevic College*** [2014] EWHC 4007 (TCC), which prohibit a second adjudication dealing with the detailed valuation of an interim payment already awarded by an adjudicator.

7. What should the court do on enforcement in circumstances where the claiming party – whom I shall call the claimant – has been successful, because the adjudicator has ruled that the responding party – whom I shall call the defendant – failed to serve a notice in time, or failed to comply with some other provision of the contract in relation to applications for payment or payment/pay less notices? In many ways, the answer to that is conditioned by the nature and extent of any agreement between the parties.

## 3. THE SUBSEQUENT AUTHORITIES

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 pay less 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:

   a) ***Leeds City Council v Waco UK Limited*** [2015] EWHC1400 (TCC), a case where LCC was given leave to defend, only on the basis that they pay the sums awarded by the adjudicator to Waco. LCC complied with that order and then brought CPR Part 8 proceedings for a declaration that Waco's application for an interim payment was not a valid application and that the adjudicator's decision was therefore wrong.

   b) ***Manor Asset Limited v Demolition Services Limited*** [2016] EWHC 222 (TCC), a case where the point in issue in the adjudication was the proper

construction of the contract. The losing party, MAL, then brought Part 8 proceedings seeking a declaration that the adjudicator's interpretation was wrong. DSL responded by seeking summary judgment. The adjudicator's decision was upheld, albeit for different reasons.

c) ***Bouygues (UK) Limited v Febrey Structures Limited*** [2016] EWHC 1333 (TCC), another dispute about the construction of the contract. Bouygues, who lost the adjudication, sought declarations by way of Part 8. They made plain that they would not pursue any of the issues that they had raised with respect to Febrey's enforcement proceedings, so everything turned on the Part 8 Claim.

d) ***Kersfield Developments (Bridge Road) Limited v Bray and Slaughter Limited*** [2017] EWHC 15 (TCC), a case in which there were parallel enforcement and Part 8 proceedings, which were dealt with simultaneously. The judge was required to deal with no less than six issues as to the timing and the content of various notices, and concomitant arguments about estoppel.

e) ***Surrey and Sussex Healthcare NHS Trust v Logan Construction (South East) Limited*** [2017] EWHC 17 (TCC), a case in which the Trust lost the adjudication and challenged the decision by way of Part 8. The parties agreed that the questions raised were amenable to consideration by the court by way of a Part 8 claim and that, by consent, there were no separate enforcement proceedings. The judge found that the adjudicator had been right, that there was a valid interim payment notice, but wrong to say that the Trust had not served a valid pay less notice. Thus, the result in the adjudication was reversed.

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. This is critically important for the making of directions, a purely paper exercise undertaken by the judge. 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. ***Kersfield*** is a good example of this sort of case: extensive pre-reading, a whole day's hearing, and a detailed reserved judgment by O'Farrell J.

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.

## 4. THE PROPER APPROACH WHERE THERE IS NO 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.

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.

22. In addition, because it is a potential abuse of the court process, a defendant who unsuccessfully raises this sort of challenge on enforcement will almost certainly have to pay the claimant's costs of the entire action on an indemnity basis. Of course, the other side of the coin is that, if the claimant does not agree to the defendant's proposal to deal with the issue on enforcement, but the court concludes that the issue does fall within the limited exception to which I have referred, it is the claimant who runs the risk of being penalised in costs.

23. With those principles in mind, I now turn to the present case.

## 5. THE FACTUAL BACKGROUND

24. By a contract dated 12 November 2014, the claimant engaged the defendant to carry out the conversion of Danbury Palace in Chelmsford into 13 apartments and associated outbuildings. The contract incorporated the JCT Standard Building Contract, Without Quantities, 2011.

25. At clauses 4.9-4.17, the Standard Form sets out an interim valuation/payment regime. Whilst acknowledging that this regime is, at least in part, the result of the amendments to the ***Housing Grants (Construction and Regeneration) Act 1996***, I consider that these provisions are prolix, convoluted and desperately difficult to operate in practice. I am unsurprised that they were the source of the disputes between the parties at the adjudication.

26. On 17 August 2016, Hutton served Application for Payment No. 24. The issues in the adjudication were whether there was a valid interim certificate or pay less notice in response. These issues involved a consideration of the contract, of the factual background to the relevant documents said to constitute the notices, and the notices themselves. Amongst other things, the defendant argued that its pay less Notice of 23 August 2016 was actually an interim certificate (because it was thought that this improved the defendant's position as to when the document should have been served under the contract), or that, if it was a pay less notice, it was valid both as to its timing and its contents. The adjudicator rejected all of the defendant's submissions.

27. Following the commencement of these proceedings, the defendant's solicitors notified the claimant's solicitors that the defendant intended to resist the enforcement. Contrary to Mr Webb's submissions, I consider that the defendant's solicitors' correspondence was unhelpful, because it did not identify why the defendant was resisting enforcement. The correspondence did not give any detail at all. The defendant served no defence and counterclaim. Their evidence in response, a statement by their solicitor, Ms Champion, was served on 3 February 2017. This evidence:

    (a) Raised issues of fact about previous interim applications 22 and 23;

    (b) Identified conversations between the main protagonists in the middle of 2016 which were said to go to the merits of the dispute and which do not appear to have been raised in the adjudication;

    (c) Set out a history, but did not identify how and why the adjudicator was wrong, let alone explain how this fell within the exceptional sort of case noted above;

    (d) Failed to identify what declarations, if any, the defendant was seeking from the court.

28. On 16 February 2017, the defendant issued a Part 8 claim form. That also did not seek any specific declarations. Instead, the relevant part of the claim form confined itself to the following:

> "7. The Claimant asked the Court to decide that the Decision was incorrect because the Claimant's Notice dated 23 August

> 2016 amounted to a valid Interim Certificate notwithstanding that it bore the title 'payless notice' given that the Contract does not prohibit the use of an Interim Certificate before the due date for payment.
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> 8. In the alternative, the Claimant asks the Court to decide that the Claimant's Notice dated 23 August 2016 was validly issued as a payless notice notwithstanding clause 4.13.1.3 of the Contract because no Interim Payment Notice has been physically given by the Defendant."

29. On the basis of that background, and in the absence of agreement between the parties, I have to decide whether or not the issue(s) raised by the defendant fall within the exceptional category explained above.

## 6. THE CHALLENGE TO THE ADJUDICATOR'S DECISION

30. For the reasons set out below, I have concluded that the challenge to the adjudicator's decision, raised by the defendant in its Part 8 proceedings, should not (and cannot) be considered by the court on this adjudication enforcement hearing. There are a number of reasons for that.

31. First, I am in no doubt that this type of challenge should have been the subject of a separate Part 8 claim at the outset. The defendant's solicitor's correspondence did not make clear how and why the enforcement was being resisted. Neither did the witness statement served on 3 February 2017.

32. Accordingly, it was only when the Part 8 claim was provided that the claimant (and the court) was given an inkling as to the defendant's stance. But even that was inadequate. As noted, no specific declarations are sought in the Part 8 claim. Instead:

    (d) Paragraph 7 unsuccessfully welds together two different elements of the defendant's case, namely that (i) the pay less notice was, in fact, an interim certificate (despite being called a pay less notice); and that (ii) if it was an interim certificate, it was valid because the contract did not prohibit the issue of a certificate before the due date for payment;

    (e) Paragraph 8 argues that, if it was a pay less notice after all, it was in time because of a particular reading of clause 4.13.1.3 of the JCT Form.

33. The Claim Form does not address a major issue in the adjudication, namely whether the document could have been a pay less notice (or indeed an interim certificate) in any event, because of the absence of any proper information setting out how the defendant had arrived at a nil valuation. However, Mr Webb made plain that this was also a matter which the defendant wanted to raise to resist enforcement. Indeed, it would have had to have been, because otherwise the challenge to the adjudicator's decision would have been incomplete. But it meant that the Part 8 Claim Form was not only very late, but it was also incomplete.

34. On this basis, I consider that the points raised by the defendant endeavour to rerun the entirety of the issues in the adjudication. Indeed, on one view, the defendant seeks to

raise and rely on other matters too, such as the earlier sequence of interim applications and how they were dealt with by the parties, and the conversations referred to by Ms Champion, for example, in paragraph 12 of her statement. The court, on an adjudication enforcement, simply cannot deal with all of the points – and more – raised in the adjudication.

35. It is also plain that the defendant now wishes to rely on a number of factual matters. It may be that, once they have been set out properly, most or all of those can be agreed, but the claimant has not had sufficient time to consider them in order to know its precise response. The documents suggest that, at present, there may well be disputes. That is another reason why the defendant's challenge is wholly inappropriate for any consideration on the summary judgment application.

36. There is nothing unconscionable in this result. On the contrary, since the defendant described the document as a pay less notice and the adjudicator explained at length why it was a pay less notice, on enforcement the court is hardly likely to say that it was, in fact, something else altogether. As to the timing and content of the document, the adjudicator considered all the relevant issues carefully and decided them against the defendant. In the ordinary way, the claimant is entitled to the fruits of that victory.

37. Finally, it is appropriate to stand back and to consider the ramifications of all this. The adjudicator's decision ran to 73 closely-typed paragraphs. It was the product of an adjudication which lasted from 11 October to 15 November 2016. I have only seen some of the documents relating to the adjudication but they fill more than one file. It cannot be right, absent any consent from the claimant, to let the defendant shoehorn into the time available at the enforcement hearing the entirety of that adjudication dispute. Such an approach would mean that, instead of being the *de facto* dispute resolution regime in the construction industry, adjudication would simply become the first part of a two-stage process, with everything coming back to the court for review prior to enforcement. That is completely the opposite of the principles outlined in ***Macob***, ***Bouygues*** and ***Carillion*** and cannot be permitted.

38. For these various reasons, the challenge to the adjudicator's decision must fail. The claimant is entitled to summary judgment in the sum of £491,944.73. That must be paid in 7 days. The defendant is entitled to pursue its Part 8 claim separately. The defendant will, I think, need to amend that claim and there needs to be a proper exchange of pleadings. However, as I indicated to the parties, it may be that the Part 8 Claim could be ready for a trial in May or June of this year.