

Construction Law Update

The worst part: inappropriate use of Part 8 proceedings in an effort to resist enforcement

Issuing a Part 8 claim is a strategy respondent parties sometimes adopt in an effort to resist enforcement of an adjudicator's decision. However, the criteria set out in Part 8 are narrower than is commonly imagined, and often as not, their use is inappropriate. In the recent unreported case of *Breakshore Ltd v Red Key Concepts Ltd* the Technology and Construction Court (TCC) was asked to consider whether that was so in this instance.

The Adjudication Proceedings

Breakshore Ltd ("**Breakshore**") engaged Red Key Concepts Ltd ("**Red Key**") under a JCT Contract dated 17 February 2020 (the "**Contract**") for works in connection with a mixed-use development at Erith, Kent, including construction of a 6-storey block.

A Dispute between the parties led to an adjudication to determine a series of issues including (but not limited to) whether Red Key had (i) unilaterally and unlawfully suspended works and demobilised, (ii) was it entitled to further extensions of time and/or whether Breakshore was (a) entitled to liquidated damages, or (b) had failed to obtain revised planning for the increased height of the 6-storey block (after it was built 1.55m too high).

The Adjudicator decided Red Key "*was not obliged to cease work on the building it had already built higher than approved planning permission, without an instruction by Breakshore to cease works whilst a resolution to the planning permission was sought...*" In consequence, Red Key was found liable to pay Breakshore liquidated damages in the sum of £285,523.41 (plus interest) for delay beyond the contractual completion date (the "**Decision**").

Red Key failed to comply with the Decision and Breakshore therefore applied to the TCC for summary judgment enforcing its terms.

Claim for Declaratory Relief

In response to this, Red Key sought to resist enforcement, but not by reference to what the judge described as familiar arguments as to (i) a lack of jurisdiction and/or (ii) a serious breach of the rules of natural justice. Rather, Red Key argued the Decision was obviously wrong and sought determination of the substance of the parties' underlying dispute by way of a Part 8 claim. By the Part 8 claim, Red Key sought no fewer than 14 no. declarations.

Despite later conceding that the majority of the declarations ought to be disposed of by way of conventional Part 7 proceedings, Red Key nevertheless requested that 4 remaining declarations be addressed there and then, at the enforcement hearing. Breakshore did not consent to this and it was therefore necessary for the court to decide whether a determination could still be made.

Applicable Legal Principles

The Court stated that where there is no consent to the determination on a Part 8 claim of substantive issues, it is only in very limited circumstances that it will be right to determine the substantive issues at an adjudication enforcement hearing.

The relevant legal principles were set out by Coulson J (as he then was) in *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC) (at p17-19). The Judge in that case stated, "*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 with 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... above is not forthcoming, then the following approach must be adopted*":

Construction Law Update

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

By way of example, Coulson J pointed to a situation where *“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 (e.g. a payment notice) was not capable of being decided as such.”* (Anything less in disputed cases would be contrary to *Macob, Bouygues and Carillion*) (para. 18).

In essence, *“if the effect of the issue the defendant wishes to raise is disputed, it will be most unlikely for the court to take it into account on enforcement. Any interleaving issues are likely to be fatal to a suggestion that the challenge falls within the limited exceptions.”*

Application to the Declarations sought by Red Key:

With this in mind, the Court turned to consider the 4 declarations sought by Red Key, namely:

- Breakshore was obliged to obtain amended planning for the increase in height (Declaration 4);
- Pursuant to cl.2.1.1 of Contract Red Key had an obligation to complete the works in accordance with statutory requirements. It could not achieve practical completion (“PC”) unless planning conditions were satisfied or discharged (Declaration 11)(1);
- As Breakshore had not discharged/satisfied planning it (i) impeded / prevented Red Key from achieving PC (ii) the acts of prevention/default were

relevant events (iii) the date for completion could not be set until Breakshore’s acts/omissions of prevention ceased. (Declaration 12);

- the Decision was unenforceable and should not be enforced by the court (Declaration 14).

It was clear to the Court that each of the issues raised/declarations sought required a determination of fact. For example, even assuming the building height was a relevant event under the contract, whether that would entitle Breakshore to liquidated damages for the period would involve a determination of fact as to whether it was reasonable for Red Key to suspend works and/or whether the issue was the cause of delay.

In turn, whether Red Key had been reasonable in suspending work was not itself before the court. This was a vital point of the dispute and the Judge noted that the building height had not been cited as a reason for suspension in August 2021. Each raised issues of causation and simply showing a relevant event is not enough to justify an extension of time. Causation of delay is a dispute of fact and a very significant one.

Again, the Court found the further declarations pursued could not be readily separated from others or they were simply no longer part of the Part 8 claim being dealt with at the enforcement hearing (i.e. Breakshore’s alleged instruction to raise the height of the building, such instruction being central to Red Key’s case.)

Decision

Overall, the Court found there was no clear-cut issue which it could be said that the adjudicator was obviously wrong to decide. Therefore, liquidated damages were due for the period. Contrary to the exceptions in Hutton, it was clear the declarations sought were all interleaving, both issues of fact and evaluation, which could not be disposed of at enforcement proceedings. As such, the Part 8 could not be used to defeat the summary judgment application. The Judge went on and stated that in the present case, Part 8 was not appropriate at all. It followed the agreed

Construction Law Update

directions (for Part 7 proceedings) would apply to the whole of the Part 8 claim pursued by Red Key.

As a consequence, Red Key was held liable to pay costs on an indemnity basis summarily assessed at £77,000 for two reasons:

- (1) it was hard to see what of the Part 8 documents would survive the conversion to Part 7; and
- (2) There was an important point of conduct. Red Key had taken the wrong course of action bringing the Part 8 for tactical advantage. If the claim had been brought properly under part 7, Red Key would have needed to wait for a defence and then applied giving 14 days' notice of any points on which summary judgment was sought. Instead, it brought a Part 8 and announced the day before the hearing the points it wanted disposed of summarily.

Analysis

The case serves as an important reminder to parties that enforcement of adjudication decisions is a robust process which is very difficult to derail. Those contemplating Part 8 proceedings to resist enforcement of such decisions must ensure such a claim would meet the narrow criteria set out in Hutton. Any failure to do so is liable to be costly.

This article contains information of general interest about current legal issues, but does not provide legal advice. It is prepared for the general information of our clients and other interested parties. This article should not be relied upon in any specific situation without appropriate legal advice. If you require legal advice on any of the issues raised in this article, please contact one of our specialist construction lawyers.

© Hawkswell Kilvington Limited 2022