

Case No: HT-2019-000089
HT-2019-000095

Neutral Citation Number: [2019] EWHC 1192 (TCC)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
TECHNOLOGY & CONSTRUCTION COURT (QBD)

The Royal Courts of Justice
Fetter Lane
London EC4A 1NL

Friday, 3 May 2019

BEFORE:

MR JUSTICE FRASER

BETWEEN:

WILLOW CORP SARL

Claimant

- and -

MTD CONTRACTORS LTD

Defendant

MR P COWAN (instructed by Bryan Cave Leighton Paisner) appeared on behalf of the Claimant

MR A JINADU (instructed by BDB Pitmans) appeared on behalf of the Defendant

JUDGMENT
(As Approved)

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Lower Ground, 18-22 Furnival Street, London, EC4A 1JS
Tel No: 020 7404 1400
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1. MR JUSTICE FRASER: This is an unusual situation that has arisen and I am just going to explain the background to it. In view of the limited time between this hearing and a listing of this case on 13 May 2019, I am going to give an *ex tempore* judgment. On 11 March 2019 MTD Contractors obtained an adjudicator's decision from Mr Matt Malloy, that was in fact the third adjudication decision between these parties on this particular project. It was in relation to the second moiety of retention and whether that should be released to MTD. MTD were successful and obtained a decision in their favour from the adjudicator that potentially entitled MTD to payment in the sum of £862,000. The other party to that adjudicator's decision was Willow Corporation (to whom I will refer as "Willow"). They issued Part 8 proceedings on 15 March 2019, so just a couple of days after the decision to which I have referred. These Part 8 proceedings seek final determination of certain points on the contract itself including a point of construction. That action was given number HT-2019-000089.
2. MTD issued Part 7 enforcement proceedings just a couple of days later than the Part 8 proceedings, namely on 20 March 2019, and that action was given action number HT-2019-000095. The TCC Guide deals with the situation where, as often happens in some cases, each party might issue both Part 7 and Part 8 sets of proceedings in relation to the issues that are subject of the same adjudicator's decision. That is contained in paragraph 9.4.3 of the TCC Guide. What that says, and I am just going to quote part of it, is:

"It sometimes happens that one party to an adjudication commences enforcement proceedings while 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 involves the parties and 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 should 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 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."

3. That paragraph of the guide was subject to further comment by Coulson J (as he then was) in a case called *Hutton Construction Limited v Wilson Properties (London) Limited* [2017] EWHC 517 (TCC). In paragraph 16 of that judgment he explained that that passage in the guide had to be taken to be superseded by the guidance given in that judgment by him. He was at that point the Judge in charge of the TCC, and he set out principles between paragraphs 14 and 22 of that judgment, concerning how parties should conduct themselves where one has issued a Part 8 and the other has issued a Part 7 enforcement action.
4. In this case, what happened is as follows, and I am not going to go in too much detail, but just to explain for future reference as this explains the unusual course being adopted in this case. The Part 7 proceedings issued by MTD came to me as the Judge

in charge and I made standard directions for hearing the application for enforcement of the adjudicator's decision. That was with an aim to bringing the case on as soon as possible, which is the approach of the TCC to adjudicators' decisions and is consistent with the policy enshrined in the Housing Grants Construction and Regeneration Act 1996. Those directions were dated 22 March 2019. A couple of days after those directions had been given, it came to the court's attention that in fact there was a separate Part 8 claim related to the same adjudicator's decision as well. The court therefore invited the parties to liaise between themselves, consistent with the approach required following *Hutton*. What that led to was sensible discussions between the parties, and they submitted a signed consent order of 11 April 2019. This lodged an agreed set of directions which goes to nine paragraphs. That consent order, which required the approval of the court, says at paragraph (1) that the order for directions I had made on 22 March 2019 in relation to the Part 7 claim be set aside, and replaced in the terms of the agreed consent order. This included that the Part 8 proceedings would be heard at the same time as the Part 7 claim, and the different dates and directions for the various other steps were specified. These were given in respect of service of evidence, filing of reply evidence and filing of hearing bundles, et cetera. The only part of those directions that was left blank and required consideration of the court was in paragraph (6), namely the date of the hearing, which was left sensibly to the court to decide, based upon the court's availability. However, the directions were accompanied by, or lodged shortly after, an email from the parties to TCC Listing. It came from MTD's solicitors but it was copied to Willow's solicitors and this email is dated 8 April 2019. It said, and I am reading from it:

"We are in discussions with BCLP who represent Willow, the other party in these cases, with regard to agreeing directions for the cases to be heard together. In relation to this, below is a copy of an email from the court which shows it is the view of Fraser J these cases should be heard together. Would it be possible, please, for a one-day hearing to be listed for 13 or 14 May with half a day reading time allocated for the court before the hearing?"

5. That led to a decision by the court to list this matter on 13 May, in other words to provide the detail, and the only outstanding detail required in paragraph (6) of the agreed directions. The court also complied with the joint request of the parties that the hearing be listed for 13 May 2019. However, what has happened since then is somewhat unusual, and what as follows in very brief summary. On 26 April 2019 a further witness statement was received from Willow's solicitor seeking to move the date of 13 May. That had been preceded by an email to the court sending a letter which asked for the 13 May hearing not to take place. Given that date was one of the dates requested by both parties, that was surprising. However, the reason that was given in that initial application was the availability of Willow's counsel. It was said he was not available until much later in the summer. Availability of counsel is only taken into account very rarely in these cases, not because the court is naturally opposed to the difficulties that busy counsel have in dealing with their diaries, but simply because of the way in which judicial resources are available. It is simply not possible to list matters for availability of counsel. Further, in adjudication matters, challenges to decisions ought to be heard promptly, and enforcement is an important matter.

6. Matters have however moved on a little bit since then. I called the parties in before me today for a short appointment to try and deal with what turned out to be a contested listing issue. MTD are very anxious that they have their Part 7 proceedings dealt with as soon as possible, as they consider they are entitled to a sizeable sum by way of retention and they wish to be paid this. Willow have now explained that the reason for moving the fixture of 13 May is no longer the availability of counsel; that submission was withdrawn yesterday. The explanation now is said to be the linkage between this case and another case, or rather two other cases which have action number HT-2018-000395 and HT-2019-000009. The first of those is a Part 8 claim by Willow, the second being a Part 7 adjudication enforcement application by MTD in relation to an earlier decision of the same adjudicator on the same project in respect of which the sum awarded to MTD was £1.17 million.
7. Those other proceedings have the following history. An application was heard, or those two applications were heard together, on 15 February 2019 by Pepperall J. In those proceedings, MTD seek payment of the sum to which I have referred and these are defended on, amongst other things, alleged breaches of natural justice. The Part 8 claim relates to the construction of contract terms. However, that hearing on 15 February went part-heard and the second day was 25 March 2019. The case was heard on 25 March, that hearing was completed, and the judge reserved judgment. One week later one of the parties requested the ability to lodge further submissions following a judgment in another case by another judge, that other case being called *Mears*. The parties were given until 15 April 2019 to lodge those further submissions, and they have now lodged those further submissions, and that judgment is still outstanding.
8. Mr Cowan who appears today before me on behalf of Willow has explained very clearly and helpfully that in his professional view there is a close degree of linkage between the Part 8 decision awaited from Pepperall J, and the contractual issues in the Part 8 proceedings which are before the court in action HT-2019-000089. He accepts that some of the Part 8 points are not linked, but depending on the decision of Pepperall J on the point of construction which, as he put it, is one of the two limbs that is alive in these Part 8 proceedings, the second limb potentially is linked to the decision of Pepperall J. I would observe that if that is right, it must have been known about on 11 April 2019, as that date fell before the further submissions were even lodged with Pepperall J. It seems curious to ask the court for a date on 13 and 14 May, and ignore in April such linkage that there may be, such that now, less than one week before the hearing of these proceedings on 13 May, Willow suddenly realise that the judgment of Pepperall J is needed in order for it properly to argue the Part 8 proceedings on this adjudication decision. However, given construction of a contract requires it to be construed as a whole – this is trite law – I can see the force in Mr Cowan’s point.
9. However, what that means is the court is therefore faced with the following three alternatives so far as 13 May is concerned. One is to move both the Part 7 and the Part 8 proceedings together off, but to an indeterminate date to be re-fixed at some point in the future when the judgment in that other set of linked proceedings is available. That would mean adjourning generally, and it would also deny MTD the ability to find out if they have an enforceable adjudicator’s decision or not. That decision, as I have said, was issued on 11 March and by 13 May will be over two months old already. The other option is to deal with both the Part 7 and the Part 8 proceedings on 13 May and

plough on regardless, ignoring Mr Cowan's submission that the two points of construction are linked. That is a possibility in theory, but it does have certain unsatisfactory features to it, not least that the judge who hears the case on 13 May may wish, and in fact probably would want, to consider in detail either some of the arguments and/or potentially the judgment in those other proceedings so far as they affect this Part 8 claim. The third is to deal with the Part 7 in any event on 13 May so that MTD find out if they have an enforceable decision, and simply move the Part 8 claim off to be relisted after Pepperall J has handed down his judgment in those other proceedings.

10. None of those ways forward are entirely satisfactory. It is usually the case that Part 8 and Part 7 proceedings on the same points are dealt with at the same time. That saves time, it is also more efficient, and my decision in this case should not be interpreted by any other litigants as being of wide application, or undermining what is stated in both the TCC Guide and also importantly in *Hutton*. However, in the unique circumstances of this case, it seems to me that it is no longer possible for both the Part 7 and the Part 8 proceedings to take place on 13 May 2019. Mr Cowan accepts that on 11 April when the agreed directions were lodged, and both parties agreed that the cases should be dealt with together, the point concerning linkage between them was perhaps not given the attention that it ought to have been given. That may or may not be the case; however, regardless of that, the court is faced with what is really an application to move two sets of proceedings, one of which includes an adjudication enforcement application, off to an indeterminate date, and I am not prepared to do that. It would, in my judgment, be contrary to the ethos of the Act to do that, and would be contrary to the approach of the TCC over the past twenty years in terms of enforcement applications and the need to deal with them speedily. Therefore, in terms considering the least unsatisfactory of the three potential options, I am going to order that the Part 7 hearing will take place on 13 May, the Part 8 proceedings are going to be adjourned. The Part 8 proceedings will not heard on 13 May due to the linkage point which has been explained in great detail by Mr Cowan. That will be relisted after the judgment from Pepperall J is available, and that means that the directions that were agreed by the parties and approved by the court on 11 April will need to be changed in that respect. I will now consider with counsel the correct order to make in terms, which I am going to give next.

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Lower Ground, 18-22 Fumival Street, London EC4A 1JS

Tel No: 020 7404 1400

Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge