

TCC Adjudication guidance and a robust TCC response to an arbitration challenge

TCC guidance on the ability to challenge Adjudicator's Decisions on payment and pay less notices during TCC summary enforcement

Mr Justice Coulson has issued guidance, in the course of TCC enforcement proceedings, on the ability to challenge the decision of an Adjudicator on payment and pay less notices which supersedes the guidance at paragraph 9.4.3 of the TCC Guide. **Jonathan Lewis** represented the successful Claimant.

***Hutton Construction Limited v Wilson Properties (London) Limited* [2017] EWHC 517 (TCC)**

Since *Caledonian Modular Limited v Mar City Developments Limited* [2015] EWHC 1855 (TCC), the TCC has regularly been faced at enforcement hearings with arguments that, contrary to an adjudicator's decision, a payment notice was invalid or a pay less notice was valid as a result of which payment is not due. There has often been consensus between the parties that the issue could be conclusively determined in the course of the enforcement hearing, the judgment effectively 'trumping' the decision of the Adjudicator.

Such an approach has generally followed the TCC Guide, which provides at paragraph 9.4.3 that:

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This guidance has now been superseded by the judgment in the recent case of *Hutton Construction*.

In *Hutton Construction*, the parties had contracted on the standard form 2011 JCT SBC without quantities, and a payment dispute was dealt with by adjudication.

The Judge was highly critical of the interim valuation/payment regime set out therein, which was said to be 'prolix, convoluted and desperately difficult to operate in practice'. It was a dispute over the operation



of this regime which arose at the Adjudication, the Defendant contending that its pay less notice was actually an interim certificate, alternatively a valid and effective pay less notice. Ultimately, these arguments were unsuccessful.

After enforcement proceedings were commenced, the Defendant failed to identify clearly its grounds for resisting, and only submitted a Part 8 claim form at a relatively late stage. In the event, new issues of fact and conversations said to be relevant were raised, and the Defendant failed to set out the declarations it was seeking. In these circumstances, the Judge refused to permit the challenge to be heard at the enforcement hearing. The Part 8 claim could proceed, but would be heard in due course and would not be permitted to frustrate the speedy TCC enforcement process.

In the course of giving judgment, Coulson J issued wider guidance, which was expressly said to supersede the guidance at paragraph 9.4.3 of the TCC Guide. In particular, he indicated that where the parties had not agreed a consensual approach to judicial determination of the issues in dispute, the following procedure should be adopted by a Defendant seeking to resist enforcement:

- The Defendant must issue a prompt 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. A prompt Part 8 claim is the preferred option.
- The Defendant must be able to demonstrate that:
 - There is a short, self-contained issue which arose in the adjudication and which it continues to contest;
 - 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; and
 - The issue is one which, on a summary judgment application, it would be unconscionable for the Court to ignore.

In practice, the Judge suggested, this means 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. Furthermore, such an issue could only be raised on enforcement if the consequences were clear-cut. If the effect of the issue is disputed as well, it is unlikely that the Court would take it into account on enforcement.

This guidance is likely to have significant repercussions on 'smash and grab' adjudications, and is likely to reinforce the requirement of 'pay now, argue later'. The ability of dissatisfied defendants to resist enforcement by arguing about the same issues as were disputed in the adjudication is now severely restricted, and defendants seeking to do so will have to act quickly, limit their arguments and seek a measure of consensus with the claimant on the procedure to be adopted.



The TCC refuses to set aside an ICC Arbitration Award

Symbion Power LLC v Venco Intiaz Construction Co [2017] EWHC 348.

This was an arbitration claim issued in the TCC, in which the Claimant sought to set aside an ICC arbitration award on the basis of serious irregularity, alleging that the tribunal had failed to deal with all the issues that were put to it (section 68(2)(d) of the Arbitration Act 1996). Jefford J dismissed the claim, dealing robustly both with what constituted an “issue”, and what constituted “dealing with” an issue. **Benjamin Pilling QC** appeared for the Defendant.

One notable feature of the case was the disclosure of some correspondence between the Claimant’s US lawyers and the arbitrator appointed by the Claimant, in which the arbitrator was highly critical of the president of the tribunal. In the light of her conclusion on the question of serious irregularity the Judge did not have to decide whether it would have been appropriate to remit the case to the tribunal, notwithstanding this correspondence, but the indication is that she would have been slow simply to set the award aside.

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