

Legal Briefing

Ted Lowery considers an attempt to apply the Hutton principle in Scotland

D McLaughlin & Sons Ltd v East Ayrshire Council [2020] CSOH 109

Opinion of Lord Clark

Outer House, Court of Session

Judgment delivered 30 December 2020

The facts

McLaughlin was engaged by the Council to build an extension at a primary school in East Ayrshire and commenced work in 2016. On 10 August 2017 McLaughlin issued an Interim Payment Notice claiming some £949,556.50. No Payless Notice was issued but despite further exchanges, the Council did not pay the amount claimed by McLaughlin.

The Council issued a Final Certificate on 17 July 2019 with a gross valuation of £3,343,223.82. In September 2019 McLaughlin issued proceedings in the Sheriff Court claiming a gross valuation of £3,711,242.80 and seeking an order for payment of the balance.

In March 2020 McLaughlin commenced an adjudication claiming a gross valuation of £3,802,614.87 relying upon the Interim Payment Notice dated 10 August 2017. The Council argued for a nil valuation on grounds that the Interim Payment Notice was invalid and that the Final Certificate issued on 17 July 2019 was conclusive evidence of the sum due. The adjudicator disagreed: having decided that the Interim Payment Notice was validly issued and that the Final Certificate could not affect a dispute concerning an Interim Payment Application, he awarded McLaughlin £427,578 plus VAT and interest.

McLaughlin commenced enforcement proceedings. The Council counterclaimed (there being no Part 8 in Scotland) opposing enforcement on grounds that: (i) where McLaughlin had not commenced the Sheriff Court proceedings within 60 days, as required by the contract, the Final Certificate was conclusive evidence and ought to have been treated as such by the adjudicator; and, (ii) the Interim Payment Notice was invalid.

The council acknowledged that there had been no jurisdictional error or breach of natural justice. However, they contended that the adjudicator's approach to the effect of the final certificate had been manifestly wrong and that this was a short self-contained issue which it would be unconscionable to ignore and which could be dealt with at the same time as the enforcement application in line with the English decision in *Hutton Construction Ltd vs Wilson Properties (London) Ltd* [2017] BLR 344.

The Council accepted that assessing the validity of the August 2017 Interim Payment Notice would require some brief oral evidence but considered this was permissible under the guidelines set out by Coulson J in *Hutton*.

McLaughlin argued that having been challenged within 60 days, the Final Certificate did not have any conclusive effect and that the adjudication concerned what should have been paid in 2017. McLaughlin also submitted that the decision in *Hutton* was inconsistent with Scottish Appellate authority and that if *Hutton* did apply, then the Council's case did not meet Coulson J's exceptional criteria.

The issue

Did *Hutton* have any force in Scotland and if so should the Council's counter-claim succeed?

The decision

Having considered Coulson J's decision at length, the judge stated that he could see no difficulty with *Hutton* applying in Scotland. He observed that the law was clear that the decision of an adjudicator was binding until final determination but he agreed that there could potentially be circumstances in which in the interests of justice, the final determination could properly be made at the time of the adjudication enforcement proceedings, although those circumstances were likely to be few and far between. The judge acknowledged that Coulson J's guidelines in *Hutton* should be treated as a broadly helpful indication of what amounted to exceptional circumstances.

The judge considered that the present case was unusual in that the Sheriff Court proceedings had been raised in advance of the adjudication but he concluded that the Council's

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arguments did not fall within the *Hutton* criteria because the adjudicator's decision could not be said to be beyond rationally justifiable and more significantly, the Council's challenge did not seek the final determination of the disputes between the parties: the Council's challenge would only go to the enforceability of an interim application and therefore would not resolve the dispute over the gross valuation of McLaughlin's works, which remained to be decided in the Sheriff Court proceedings. On a proper analysis, the Council's challenge was based upon an alleged error by the adjudicator and as such was bound to fail.

Commentary

Whilst this decision confirms that *Hutton* can apply in Scotland, on the facts, the Council could not make its case fit within the *Hutton* criteria where disposal of the enforcement application would not have led to a final determination of McLaughlin's entitlement. As in England, the judge reiterated that *Hutton* should only apply in exceptional circumstances, observing that it would be unusual for any final determination to be "oven ready" at the time of the enforcement.

Ted Lowery
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