

Construction Law Update

Can a Party Set-Off Against an Adjudicator's Decision?

Disputes regarding set-off against an adjudicator's award are rare in enforcement proceedings. However, in the recent case of MI Electrical Solutions Limited ("MI") v Elements (Europe) Limited ("Elements") the court considered this very point. The decision highlights the difficulties which a party seeking to advance such an argument will encounter and gives an insight into why such arguments are rare in enforcement proceedings.

Background

Elements engaged MI as its mechanical and electrical sub-contractor in relation to the construction of apartment modules on a project known as Orchard Village. MI obtained an adjudicator's decision in its favour to the effect that Elements should pay MI the sum of £179,931.57. Elements made part payment of the sum ordered leaving a balance of £168,452.33 unpaid. MI therefore sought to pursue the balance by enforcing the adjudicator's decision. As a result of alleged defects with MI's works, Elements sought to set off from the adjudicator's decision a cross-claim.

Had the adjudicator decided the cross-claim?

The notice of adjudication was a claim for payment based on applications valuing the works at around £179,000. The Pay Less notice purported to show that there was an overpayment of £38,000. The adjudicator decided that his decision was not limited to the procedural compliance by Elements with the Pay Less notice requirements but extended to a substantive determination of the claim identified within it. He decided that Element's allegation of delay was not a good ground for non-payment. As to defects, the adjudicator decided that whatever the merits of the allegations, they could not amount to a defence to the claim in the adjudication as they were not the subject of Elements' Pay Less notice.

The Court held that it was a "necessary ingredient" of the adjudicator's decision that Elements was not

entitled to cross-claim for defects because that cross-claim had not been included in the Pay Less notice. Therefore, it was not open to Elements to run that point as a defence to enforcement because the adjudicator had already decided that only points included in the Pay Less notice could be relied on.

Did the contract permit a set-off?

Clause 5.5 of the sub-contract provided that Elements was entitled to set-off any liability which MI had to Elements against any liability which Elements had to MI. Clause 10.2 provided that Elements was entitled to set-off from sums due to MI any costs which Elements incurred in removing, dismantling, reassembling and reinstating the sub-contract work. Further, clause 10.2 stated that MI's liability under that clause was in addition to and not in lieu of any liabilities in contract, tort or otherwise. Elements argued that both of these clauses permitted a set-off to be made.

Contractual provisions which permit set-off must either be consistent with the policy of the Housing Grants, Construction and Regeneration Act 1996 (the "HGCRA") or must be struck down. The judge concluded that this meant that the clauses either had to be read as permitting set-off subject to the effect of the 1996 Act or be struck down. This presented Elements with what the court described as Hobson's Choice, as neither outcome provided a defence to enforcement. Rather than strike the clauses down, the court concluded that they should be read as simply not applying to monies due by reason of an adjudicator's decision. Further, he held that Elements could not rely on the decision in Parsons Plastic Ltd v Purac Ltd in which a set-off was permitted because that case had been distinguished by a subsequent Court of Appeal case.

Analysis

This case shows how important it is for parties to include in their Pay Less notice anything which they

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may wish to rely on in a later adjudication. As the judge said, *“The time at which to raise defective works in defence of a cross-claim to a claim for payment is in the Pay Less Notice”*.

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