

Construction Law Update

Enforcement of an Adjudicator's Decision and Stays of Execution

We recently represented the successful claimant in the case of *J & B Hopkins Limited -v- Trant Engineering Limited*, in which the Technology and Construction Court (the "TCC") had to consider the enforcement of an adjudicator's decision as well as an application for a stay of execution.

Background

By way of a sub-contract dated 20 April 2018, Trant Engineering Limited ("Trant") engaged J & B Hopkins Limited ("J&B") to carry out M&E works at a new recycling plant on the Isle of Wight.

On 30 July 2019, J&B submitted its interim application for payment number 26 to Trant ("Application 26"), seeking payment in the sum of £812,484.94 plus VAT. Trant failed to issue any valid or effective payment and/or pay less notice in response to Application 26. The sum sought in Application 26 therefore became the 'notified sum' for the purposes of section 111 of the Housing Grants, Construction and Regeneration Act 1996 (as amended).

Trant did not make payment of the sums sought in Application 26, a dispute arose between the parties and J&B gave notice of its intention to refer that dispute to adjudication by way of a Notice of Adjudication dated 17 January 2020.

Mr Silver was appointed as Adjudicator and the dispute was referred to him on 22 January 2020. Trant argued before the Adjudicator that it had issued a payment notice and a pay less notice in response to the Application 26. Those arguments were rejected by the Adjudicator who decided on 2 March 2020 that the sums sought in Application 26 were due and payable to J&B immediately in full and without deduction (the "Decision"). The Adjudicator also directed that his fees and expenses were to be paid by Trant. Trant participated fully in the adjudication without reserving its position as to jurisdiction or natural justice.

Nonetheless, Trant failed to comply with the Decision and failed to make payment of either the sums sought in Application 26 or the Adjudicator's fees and expenses.

J&B therefore applied to the TCC for summary judgment to enforce the Decision. Trant opposed enforcement of the Decision and, in the alternative, sought a stay of execution of the Decision on the basis of purported manifest injustice.

The Issues

At the summary judgment hearing, the TCC noted that Trant did not contend that the Adjudicator was in breach of natural justice in the way the adjudication was conducted, nor that Trant was raising any challenge to the Adjudicator's jurisdiction (the TCC also added that, having failed to raise any such challenge during the adjudication, and having taken full part in the adjudication without reservation, Trant would have faced "*substantial hurdles*" raising such arguments at enforcement).

Rather, Trant argued that J&B had "*gone along with subsequent payment cycles*" and that Application 26 had been "*superseded*" by subsequent interim payment cycles which were subject to valid payment notices, all of which provided that no further sums were due to J&B. Trant asserted that, as a result, enforcement of the Decision would "*undermine the 'correction principle'*", i.e., the principle that interim payments can simply be 'corrected' in the next interim payment cycle. The TCC rejected that argument.

The Honourable Mr Justice Fraser noted, at paragraph 25 of his judgment, that Trant's argument: "*ignores the ability of any party to a [construction contract] [...] to adjudicate "at any time". Secondly, [Trant's] analysis implicitly includes the categorisation of a party making subsequent interim payment applications in the payment cycle as removing the possibility of any*

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possible disputes on earlier payment applications remaining as disputes. Those possible disputes on earlier applications could be substantive ones, by which I mean disputes about the valuation of particular elements of the works, or the quality of the works, or the valuation of the variations, or more technical disputes in terms of compliance with the statutory regime or contractual regime of payless and payment notices. Those disputes on earlier applications do not disappear and cease to exist because a subsequent application is made on an interim basis."

In other words, the TCC found that where a dispute has arisen in relation to a particular interim payment application (in this case, Application 26), such disputes do not cease to exist because a subsequent application has been made. The Honourable Mr Justice Fraser concluded that: *"What, in law, was the notified sum under Interim Application 26 does not, in my judgment, become incapable of adjudication simply because the payment cycle moves on to Interim Application 27 and subsequent applications."*

The TCC therefore concluded in view of the above and in the absence of any valid natural justice and/or jurisdictional points on Trant's part, that the Decision should be enforced by means of summary judgment.

Having decided to enforce the Decision, the Honourable Mr Justice Fraser turned to Trant's application for a stay of execution on the basis that enforcement would result in manifest injustice. Trant pointed out that a 'true value' adjudication was under way concerning a later interim application which would determine the true value of J&B's account. Trant therefore argued that it would be manifestly unjust to enforce the Decision.

The TCC rejected Trant's arguments finding that: *"There is a danger in considering a stay where the Claimant has a valid Adjudicator's Decision of using the concept of manifest injustice as a wider examination of the supposed "merits" of the underlying dispute. If that were to occur, it would frustrate the purposes of the Act and it would frustrate the intention of Parliament."*

The Honourable Mr Justice Fraser concluded: *"If an Adjudication Decision has been issued with jurisdiction and without material breaches of natural justice, it will be enforced by way of summary judgment. That is therefore, in my judgment, the correct outcome on this application. I therefore grant the Claimant summary judgment on the Adjudicator's Decision and I dismiss the Defendant's application for a stay."*

Analysis

This case again reiterates that the Courts will enforce adjudicators' decisions which have been issued with jurisdiction and without material breaches of natural justice.

The case also reiterates that a party cannot withhold a payment in respect of an adjudication decision on an earlier interim payment cycle because of subsequent developments in later payment cycles. A losing party must comply with an adjudicator's decision and cannot withhold payment on grounds of anticipated recovery in a future adjudication based on different issues.

Finally, this case is notable in that the Honourable Mr Justice Fraser clarifies comments in a previous decision of his, namely *ICI Limited v Merit Merrell Technology Limited* [2017] EWHC 1763 (TCC) in which he declined to follow the analysis of Edwards-Stuart J in *ISG Construction Limited v Seevic College* [2014] EWHC 4007 (TCC). In this case, Fraser J confirms that he considers the judgment in *ISG v Seevic* was wrong, and that the line of cases leading to the Court of Appeal's decision in *S&T (UK) Limited v Grove Developments Limited* 2018 EWCA Civ 2488 (which confirmed the 'correction principle') remains the correct course.

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