

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Case No. HT-2021-000261

7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Friday, 22nd October 2021

Before:
ROGER STEWART QC
SITTING AS A JUDGE OF THE HIGH COURT

B E T W E E N:

RHP MERCHANTS AND CONSTRUCTION LTD

and

TREFOREST PROPERTY COMPANY LTD

MISS A N MARKIDES appeared on behalf of the Claimant
MR J STEEL appeared on behalf of the Defendant

JUDGMENT
(Approved)

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ROGER STEWART QC:

Introduction

1. This is an application for a stay and subsequent strike-out by the defendant in a claim brought by the claimant building contractor, RHP Merchants and Construction LTD (“RHP”), against the defendant property development company, Treforest Property Company LTD (“Treforest”).
2. The grounds for the orders sought, the precise details of which have changed, are essentially the failure of RHP to comply with an adjudicator’s award (“the first adjudication award”) despite an order of HHJ Parfitt enforcing the same on 5 November 2020 and paying a judgment sum of £300,247.04 made up as to £264,274.60 in relation to the adjudication award, interest of £3,027.94, and costs of £32,934.50.
3. The application for a stay is resisted on a number of grounds but at the forefront of RHP’s submissions is the fact that, on 13 November 2020, eight days after the judgment of HHJ Parfitt, a second adjudication took place between the same parties in which Treforest was ordered to pay RHP £223,170 plus the adjudicator’s costs of £19,449.72 (“the second adjudication award”). It is common ground that this sum was calculated on the assumption (which is, of course, not correct) that RHP had paid the first adjudication award to Treforest.
4. This application accordingly raises some interesting questions as to the correct approach of the Court in exercising its discretion as to whether to order a stay of proceedings and/or make orders in respect of consequential strike-outs in the light of the general case management powers in the CPR, and particularly that at Rule 3.1(2)(f) which gives the Court an express power to stay the whole of the proceedings either generally or until a specified date or event.
5. These questions concern the balance which the Court should seek to strike given:
 - a) the general policy of the Housing Grants, Construction Regeneration Act 1996 which has, in relation to adjudications, often being expressed as, “pay now, dispute later”;
 - b) the general and important right of parties to have access to the courts;
 - c) the importance of litigation being conducted promptly and efficiently;
 - d) the existence of two adjudication decisions; and, of course,
 - e) the particular facts of this case.

The Facts

6. In this action RHP seeks a payment of £104,894.40 in relation to what is said to be the final account balance on a development of 62 residential units at Olympia House, Upper Dock Street, Newport. The contract was based on the JCT standard Form, Design and Build 2016 edition. Practical completion was certified on 27 August 2019. Thereafter:
 - a. the claimant submitted a final statement seeking a payment of £5,116,638.20 which resulted in a net payment of £144,895.40 plus VAT, leading to a total sum alleged to be due of £152,140.17;
 - b. the employer’s agent on 25 November 2019 issued a statement for £100,000 less than this but accordingly accepted that £52,140.17 was not paid, although it appears from the papers that the agent wrongly identified the amount which had in fact be paid;
 - c. On 16 March 2020, Treforest issued a pay less notice and a dispute notice, seeking total deductions of £1,070,000. Those were under four heads which can be described

as asbestos, where the dispute was whether or not RHP was entitled to be paid the sums which were included, apparently, within the contract but not carried out; contingency; snagging; late completion and remedying of defective works. It will be apparent that the dispute covered a number of different and related topics but it can be seen that all of these matters were properly raised as being the subject of a final account dispute.

- d. On 24 June 2020, RHP commenced adjudication which led to Mr Peter Garcia, the adjudicator, deciding on 7 August 2020 that RHP was required to pay £264,274.60 with 50% of his fees. This adjudication appears to have covered the whole final account dispute which is now at issue in these proceedings;
- e. Following the non-payment of this award, enforcement proceedings were issued on 3 September 2020, which led to the decision of HHJ Parfitt to which I have referred; and
- f. RHP in the meantime issued a second adjudication which became before Mr Derek Pye. The basis of this second application was said to be a breach of contract in respect of the schedule of defects during a period of suspension which the first adjudicator had found to be in existence and which was alleged to lead to an instruction that Treforest was not required to be rectify any defects;
- g. Perhaps unsurprisingly, there was a jurisdictional challenge to the second adjudication on the grounds, essentially, that the substance of the dispute had already been decided by the first adjudication. The second adjudicator rejected the submission that he did not have jurisdiction and found that RHP was entitled to damages in the sum of £223,170 for breach by Treforest;
- h. These proceedings were issued by a claim form and particulars of claim on 9 July 2021;
- i. Arbitration proceedings were also issued on 12 July 2021 apparently covering the same grounds as these Part 7 proceedings – the apparent reason for this being a concern there was an arbitration clause in the underlying contract. I understand that Treforest has said that the arbitration proceedings should be stayed, and I anticipate that this is agreed; see the letter from Treforest’s solicitors at page 573 of the bundle;
- j. The application for a stay was issued on 30 July 2021. The order sought in that application was an order that, until the claimant complied with the order of Judge Parfitt, the action would be stayed. I interpose to say that there was no request in that application for any strike-out or consequential orders.
- k. On 2 August, RHP, by its then solicitors, wrote an email saying it agreed to a stay but would not be making any payment; also, by separate email, that it would not agree to pay any costs; it appears therefore at that stage the parties were either in agreement or very close to agreement, although neither party has stated that there was in fact a binding agreement as to the terms by which this matter should be disposed.
- l. On 9 August 2021, RHP resiled from that position but, by an email from its solicitors at page 619, offered to pay in £57,637.62. That is shown by the letter which accompanied it to be made up on the basis that it was the net figure netting off the sums due on the first judgment’s sum and the sums due under the second adjudication award.
- m. That offer was refused by Treforest on 10 August;
- n. On 11 August 2021, ICC Judge Briggs dismissed Treforest’s partition for a winding-up order against RHP and ordered indemnity costs at £23,000 to RHP. I have no substantive information or evidence as to the basis of the judge’s decision in relation

- to that but it appears to be the case that it was based on the fact that the petition sum, i.e. the judgment, was disputed substantially by reference to these proceedings;
- o. On 26 August 2021, Treforest's solicitors offered to set off the costs order which they were subject to with the costs order which HHJ Parfitt had made.
 - p. On 29 September 2021, RHP offered to pay the sum of £36,494.69 to Treforest on the basis that this application was withdrawn.
 - q. Following the taking of instructions in relation to that, Treforest's solicitors wrote on 7 October, stating that the application was not accepted and making a number of detailed points, saying that the total amount due to their client was £297,010.63, and that the conduct of RHP amounted to a flagrant disregard of the pay-now-argue-later regime imposed by the HGCRA.
7. In her skeleton argument for these proceedings, Miss Markides, who appears for Treforest, has sought a different order to that which was sought in the original application. What is sought is set out very helpfully by her at paragraph three of the skeleton argument and she seeks four orders, the first two being in the alternative. The first is that the sum of £57,637.32 be paid to it by the respondent within 14 days in part satisfaction of the judgment debt; alternatively that the sum of £36,464.69 should be paid. The third order is that the proceedings should be stayed pending payment of the outstanding amount of the judgment debt; however, such stay should be subject to a longstop whereby the claim should be struck out in the event of the respondent's failure to pay the full amount of the judgment debt with the longstop being six months. The fourth order is that, in any event, RHP should pay the costs of, and associated with, this application.
8. I should say that an initial objection was taken by Mr Steel in relation to this formulation of the relief sought on the basis it was not included within the original application. However, he very fairly stated that he was not prejudiced by it, albeit he said that the change in position should be taken into account both in the exercise of discretion and no doubt, in due course, if applicable, in relation to costs. I accordingly intend to decide the application on the basis of the orders now sought.
9. As far as the position is now concerned, the position of RHP is that, in principle, the proceedings should not be stayed at all because this case does not fall within established principles. Alternatively, if the Court is minded to grant a stay, that should be on the basis of a draft order which has been provided which would see the Court order a stay of the proceedings until RHP pays the balance of the sums owed between the parties pursuant to the respective adjudication and court orders. I have read with care the three witness statements which have been filed in relation to this matter, although in general terms it seems to me that they set out matters which are not substantively in dispute and most of which I have sought to summarise above.

Discussion

10. It will be apparent that this case raises interesting questions as to the proper approach of the Court. The applicant, Treforest, seeks to maintain that it is appropriate to order a stay with the consequential orders which I have set out, on the basis that there has been no action taken by RHP to comply with the judgment, and Miss Markides says that this case falls within the principles set out by Akenhead J in *Anglo Swiss Holdings LTD & Ors v Packman Lucas Ltd* [2009] EWHC 3212 (TCC). She draws my attention to the facts in that case and in particular

the summary by the judge of the relevant principles, which are set out at paragraph 21 of the judgment where Akenhead J said:

- i. The Court undoubtedly has the power and discretion to stay any proceedings if justice requires it.
- ii. In exercising that power and discretion, the Court must very much have in mind a party's right to access to justice and to issue and pursue proceedings.
- iii. The power is one that is to be used sparingly and in exceptional circumstances.
- iv. Those circumstances include bad faith and where the claimant has acted or is acting particularly oppressively or unreasonably”.

11. At paragraph 22 the judge specifically considers as to whether the established refusal to honour or satisfy a previous adjudication decision, court judgment, about the very subject matter the court case which the defendant seeks to have stayed will justify a stay of that case pending payment, and, in effect, an adjudicator's decision which requires payment by one of the parties involves a requirement to pay now and argue later, and he pointed out the contracts of engagement in that case reflected this framework. In that case the judge, having summarised the key features of the claim, concluded that there was unreasonable and oppressive behaviour and some elements of bad faith involved in the claimants pursuing the claims without first honouring the adjudicator's decisions in particular, and the Court's judgment enforcing them. The judge drew particular attention to the fact that the claimants were simply ignoring the contractual and statutory requirements they should honour adjudicator's decisions; that they were therefore avoiding the pay-now-argue-later approach adumbrated by the HGCRA, which altered the commercial balance in existence; that the defendant was not insured with regard to fee recovery claims. He pointed out that the bad faith involved putting forward claims which they either knew or significantly exaggerated in all the knowledge they themselves had or which they had become aware of, and he said that the claimants had no difficulty in funding solicitors and counsel to act for them in the current claims.
12. Miss Markides says that the same considerations] apply to this claim, namely the respondent is ignoring the contractual and statutory framework; that, had the applicant been paid, it would have the money in hand; that the applicant is not insured; the respondent can fund solicitors and counsel; and that the parties are not in an equal footing. She also draws my attention to the fact that the respondent has commenced a barrage of different forms of dispute resolution and specifically draws my attention to the email on 2 August in which the respondent confirmed by its solicitors that it had no intention of complying with the Court's order of 5 November. She also relies on the decision of O'Farrell J in the recent decision of *Kew Holdings Ltd v Donald Insall Associates Ltd* [2020] EWHC 1862 (TCC) in support of the proposition that the orders she seeks should be granted.
13. In response, Mr Steel says that this is a very different sort of case from that which had to be considered by the Court in the *Anglo Swiss* case, and in particular he relies heavily upon the existence of the second adjudication. He draws attention to the fact that, insofar as the policy of pay now and argue later is concerned, that applies with equal force to the second

adjudication decision, and that that second adjudication decision affects the majority, although not, it is true, the entirety of the sums due under the first adjudication decision.

14. He also draws attention to the features of the case before Akenhead J and in particular that the claimants were not simply ignoring the contractual and statutory features, and the rather obvious points which could be taken in that case which demonstrated bad faith on the part of the claimants.
15. Finally he also draws my attention to the recent decision of Veronique Buehrlen QC, sitting as Deputy High Court Judge in *Prater Ltd v John Sisk and Son (Holdings) Ltd* [2021] EWHC 1113 (TCC), and points out that the judge, as an essential element of her decision, effectively treated a second adjudication award, which was based on a first, as necessarily valid until challenged, a first adjudication award, even though jurisdiction could be said to be doubtful.
16. By way of response to those submissions, in summary, Miss Markides says that there is a substantial difference between the position of the first adjudication award which has been found to be enforced, and that of the second adjudication decision, which has not only not been sought to be enforced but where, she says, there are plain and obvious question marks as to the jurisdiction. I have, I am conscious, not summarised all of the various arguments and points which have been made to me but I have sought to identify the main points which seem to me to be relevant.

Discussion

17. Standing back from this it seems to me that the cases in this area involve a tension between two important principles: the first, which was identified specifically by O'Farrell J in the *Kew* decision, is the importance that the Court always attaches to access to justice. As she points out, this has been a feature of the English law since Magna Carta and, of course, features in the European Convention on Human Rights and the jurisprudence associated with it. More importantly, the core essence of the regime which is introduced in relation to adjudications is pay now and argue later, which necessarily involves the ability to argue later. Against that, the policy of the HGCRA, which has now been adopted and followed in a number of other jurisdictions, is unquestionably that one should pay now and argue later. In balancing these considerations I note that even in the context of the *Anglo Swiss* decision, Akenhead J cautioned of the need to apply a stay only in clear cases.
18. Against that background, I have sought to identify what seems to me to be the relevant considerations which I should take into account in deciding this matter. First, I need to always bear in mind the importance of access to justice and the fact that adjudication decisions are, by their very nature, only temporary. Second, I need to take into account the importance of the statutory policy introduced by the HGCRA, which is pay now and argue later. This also has a necessary aspect of policy that I should not do anything which would encourage people to issue frivolous proceedings without paying in the hope that it will actually assist them in relation to not paying but not actually arguing later. Third, I need to look with some care at the odd facts which have taken place in this case where one has two adjudication decisions. Fourth, I need to stand back and consider the overall conduct of the parties as against each other in order to see whether there are any facts which, at this interlocutory stage, can cause me to take a legitimate view as to whether a party is or is not manifesting abusive and unreasonable behaviour.

19. Against that background, I have come to the following conclusions. First, it seems to me that the second adjudication is of importance when considering the overall position between the parties. I confess to having very considerable doubts as to whether or not the second adjudicator did in fact have jurisdiction. That is not an issue which I am required to decide but it seems to me entirely unsurprising that jurisdiction was challenged.
20. Nevertheless, it was always open to Treforest to seek a declaration that there was no jurisdiction, and the adjudicator was, as it seems to me, validly appointed. He was an experienced adjudicator, he considered the matters before him, and it does seem to me that, in the context of the pay now argue later, the existence of the second adjudication award is important.
21. Secondly, I do need to consider the fact that ICC Judge Briggs decided not to permit the winding-up of RHP on the basis of the judgment debt represented by HHJ Parfitt. In those circumstances, to decide that the whole amount was going to have to be paid in circumstances where a different judge, for reasons which I have not seen, had decided that there was a real dispute which was going to be decided in these proceedings, would seem strange.
22. Thirdly, against that it seems to me that there is no valid reason why RHP has not paid the net sum which is due to Treforest on the basis of the two adjudication decisions, and even taking into account the costs orders. It seems to me that, on the basis of the pay now argue later policy, and taking account of the fact that RHP has managed to achieve success in the second adjudication award, it owes a minimum sum of £36,494.69, always taking into account the fact that they could, in due course, seek to reopen that in, essentially, these proceedings.
23. Fourth, I am not persuaded by Miss Markides' overall submissions that this is a case where RHP have been guilty of the sort of lack of good faith and obvious bad conduct to which Akenhead J's attention was drawn in *Anglo Swiss*. It seems to me that RHP's actions are equally consistent with a determined view that they were owed money rather than the other way around. I note that the first adjudication was started by RHP and it certainly seems to me, without going into the merits at all, that there were, at the very least, valid points which could be put forward in relation to the underlying dispute.
24. Moreover, there is not, as I see it, the sort of late issue of witness statements and obvious indication as to bad faith to which Akenhead J drew attention. In those circumstances it seems to me that I should say that, unless the minimum sum of £36,494.69 is paid, then these actions should be stayed. However, I do not consider that this is a case where it would be appropriate to give simply an order to that effect without any time limit and without any sanction. The reason is this: it is an important part of the case being put forward by RHP that it can pay that sum. Moreover, any concerns it may have as to paying over to Treforest were considered by HHJ Parfitt and were dismissed in relation to the enforcement of the award.
25. Furthermore, if I were simply to grant a stay indefinitely, the effect would be that these proceedings could be put off for a very long period, essentially at the instance of RHP, and it does not seem to me that that is in accordance with the desire to have access to justice. In those circumstances, it does appear to me that there ought to be a definite period for payment

and it seems to me that, unless payment is made, these proceedings should be struck out because the position would be that would demonstrate that, instead of seeking to comply with adjudicator's orders and go forward, these proceedings were being brought in bad faith. It also seems to me that I can take some account of what can, I think, fairly be described as the somewhat revolving position of RHP as to what orders should be made.

26. In all the circumstances, I have decided that the appropriate order is that, unless RHP pays the sum of £36,494.69 to Treforest within 28 days of today, these proceedings will be struck out, and in the meantime this action will be stayed.
27. That is, therefore, the order that I make.

End of Judgment

Transcript of a recording by Ubiquis
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