Neutral Citation Number: [2023] EWHC 2010 (TCC)

Case No: HT-2023-LIV-000012

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LIVERPOOL
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

35 Vernon Street
Liverpool
L2 2BX

Date: 23rd May 2023

Before:

DISTRICT JUDGE BALDWIN

- -

Between:

HENRY CONSTRUCTION PROJECTS LIMITED

Claimant

-and-

ALU-FIX (UK) LIMITED

Defendant

- -
- -

Ms Brenna Conroy (instructed by **Archor LLP**)
for the **Claimant**
Ms Hannah McCarthy (instructed by Contract & Construction Consultants (Southern) Ltd)
for the **Defendant**

Hearing date: 17th May 2023

Approved Judgment

I direct that copies of this version as handed down may be treated as authentic.

Introduction – Claimant's application to enforce an adjudication decision

1. The Claimant applies by way of a summary judgment application dated 14th March 2023, within Part 7 proceedings, to enforce the "true value" adjudication decision of Mr M.T. Molloy dated 6th March 2023 ("TVA"), wherein he decided that the Defendant is indebted to the Claimant in the sum of £191,753.88 plus interest. The application is supported by a witness statement (and exhibits) of Ruth Kavanagh, a partner in the Claimant's solicitors also dated 14th March 2023. The application is opposed by the Defendant, which relies upon the witness statement (and exhibit) of Christopher William Dean of Contract & Construction Consultants (Southern) Ltd dated 11th April 2023.

2. By Order of 23rd March 2023, O'Farrell J transferred the claim to Liverpool certifying that the application is suitable for hearing by a TCC District Judge.

3. I have been supplied with a hearing bundle and an authorities bundle and I shall refer to the hearing bundle pagination thus [x]. Counsel each supplied a skeleton argument which they supplemented orally during the remote hearing by Teams.

4. The Defendant's opposition is essentially a jurisdictional one, Ms McCarthy confirming that the second ground at paragraph 31 of her skeleton is further, but not in the alternative, to the overall complaint as to Mr Molloy's lack of jurisdiction.

5. The Defendant contends that the commencement by the Claimant of the TVA before payment by the Claimant of a notified sum pursuant to s. 111 of the Housing Grants, Construction and Regeneration Act 1996 as amended ("HGCRA96") results in Mr Molloy having no jurisdiction to reach his decision.

6. The Claimant's position is that the factual basis for asserting jurisdiction in this case is a novel one, as yet not specifically addressed by authority. Put simply, it is argued that this is not a jurisdictional point, as such. Rather, the Claimant should be allowed to rely upon the decision in the TVA, having paid the immediate payment obligation consequent upon the decision of the first adjudicator, Mr F. Rayner, in the prior "smash and grab adjudication" ("SGA"), which followed the raising by the Claimant of a "genuine dispute", namely asserting the validity of two pay less notices ("PLN") following the Defendant's payment application ("PA").

Background and relevant chronology

7. The contract in question is a JCT Standard Building Sub-Contract, in relation to a boutique hotel development in Central London, dated 14th June 2021 and varied on 8th July 2021. The Claimant is the Contractor employing the Defendant as a sub-contractor.

8. On 11th November 2022, following the parties having been in dispute, the Defendant terminated the sub-contract pursuant to clause 7.12 (termination at will) triggering the payment mechanism at clause 7.11, requiring the Defendant to submit an application for payment, whereupon the Claimant would pay the sum properly due within 28 days of that PA.

9. The Defendant submitted a PA on 15th November 2022 in the sum of £257,004.50 plus VAT. The sub-contract required payment by 13th December 2022.

10. The Defendant had not been paid by 13th December 2022 and did not recognise any justification for non-payment and therefore, as it was entitled to do, referred the matter for the SGA on 15th December 2022.

11. The Claimant contended that it submitted two potentially valid PLNs, on 25th November and 12th December 2022 respectively[1] as part of its arguments in response to the referral.

12. The TVA was commenced by the Claimant on 18th January 2023, contending that the Defendant was, as a result of over-payment, indebted to the Claimant in the sum of £235,302.73 plus VAT. The submissions stage of the SGA was yet to be completed.

13. On 23rd January 2023 the Defendant wrote to Mr Molloy, raising the issue of his jurisdiction and asking him to resign[2] which provoked this response,

> "
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> …
>
> *2. As things currently stand the question of whether there is an undischarged primary payment obligation is in dispute and is the subject of the adjudication before Mr Rayner. As such, presently there is nothing preventing me from proceeding.*
> *3. In the event Mr Rayner reaches a Decision that there has been a failure to pay a notified sum then I accept that, unless and until a Court decides that such Decision is not valid, it will be binding on the parties. In*

[1] See SGA paras 51ff & 59ff [326 – 328]
[2] [300 – 307]

such circumstances, I accept that, unless that payment obligation is discharged, it would not be appropriate for me to proceed. However, we are not in that position yet."

14. Mr Rayner's decision in the SGA was issued on 27th January 2023. He rejected the issues raised by the Claimant and awarded the Defendant the sum claimed, to be paid by 3rd February 2023.

15. Mr Molloy stayed the TVA pending payment, confirming that he would resign if payment was not made in accordance with the decision.

16. The Claimant made full payment on 2nd February 2023 and the TVA stay was lifted, culminating in the decision referred to at paragraph 1 above.

Legal Principles

17. As noted by O'Farrell J in the recent case of *Bexheat v Essex Services Group* [2022] EWHC 936 (TCC), the following relevant principles are well established:-

> " **[36]** Where a valid application for payment has been made by a contractor in accordance with the terms of a construction contract falling within the scope of the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009) ('the 1996 Act'), an employer who fails to issue a valid Payment Notice or Pay Less Notice must pay the 'notified sum' in accordance with s 111 of the 1996 Act by the final date for payment. If the employer fails to pay the 'notified sum', the contractor is entitled to seek payment of such sum by obtaining an adjudication award in its favour.
>
> **…**
>
> **[38]** The courts take a robust approach to adjudication enforcement, enforcing the decisions of adjudicators by summary judgment regardless of errors of procedure, fact or law, unless the adjudicator has acted in excess of jurisdiction or in serious breach of the rules of natural justice: *Macob Civil Engineering Ltd v Morrison Construction Ltd (1999) 64 ConLR 1, [1999] BLR 93 per Dyson J at [14]; Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWHC 778 (TCC), (2005) 102 ConLR 167, [2005] BLR 310 per Jackson J at [80]; Carillion Construction Ltd v Devonport Royal Dockyard Ltd [2005] EWCA 1358, (2005) 104 ConLR 1, [2006] BLR 15 per Chadwick LJ at [85]–[87]; J & B Hopkins Ltd v Trant Engineering Ltd [2020] EWHC 1305 (TCC), (2020) 190 ConLR 233, [2020] BLR 534 per Fraser J at [12]–[16]; Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd [2020] UKSC 25, (2020) 190 ConLR 1, [2020] Bus LR 1140 per Lord Briggs at [17]–[26]*.

[39] Where a party is required to pay the 'notified sum' by reason of its failure to issue a valid Payment Notice or Pay Less Notice, such party is
entitled to embark upon a 'true value' adjudication in respect of that sum
but only after it has complied with its immediate payment obligation under s 111 of the 1996 Act: *Grove Developments Ltd v S&T (UK) Ltd [2018] EWCA Civ 2448, (2018) 181 ConLR 66, [2019] Bus LR 1847 per*
Jackson LJ at [107]–[111]; M Davenport Builders Ltd v Greer [2019] EWHC 318 (TCC), [2019] Bus LR 1273, [2019] BLR 241 per Stuart-Smith J (as he then was) at [21], [25], [35], [37]."

18. O'Farrell J went on to remind the parties of the relevant parts of s. 111 of HGCRA96:

" **[59]**
…
'(1) … where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment …
(3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.
(4) A notice under subsection (3) must specify—
(a) the sum that the payer considers to be due on the date the notice is served, and
(b) the basis on which that sum is calculated.
It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero …
(6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a) …' "

19. Her analysis continued:

" **[74]** Further, in this case, s 111 of the 1996 Act would preclude ESG from relying on (the contract) to refer the 'true value' dispute … prior to satisfying its obligation to pay the 'notified sum' as explained in *Grove v S&T* (2018) 181 ConLR 66, [2019] Bus LR 1847 by Jackson LJ at [107]:

'… Both the HGCRA and the Amended Act create a hierarchy of obligations, as discussed earlier. The immediate statutory obligation is to pay the notified sum as set out in s 111. As required by s 108 of the Amended Act, the contract also contains an adjudication regime for the resolution of all disputes, including any disputes about the true value of work done under cl 4.7. As a matter of statutory construction and under the terms of this

contract, the adjudication provisions are subordinate to the payment provisions in s 111. Section 111 (unlike the adjudication provisions of the Act) is of direct effect. It requires payment of a specific sum within a short period of time. The Act has created both the prompt payment regime and the adjudication regime. The Act cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime. Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a revaluation of the work before he has complied with his immediate payment obligation.'

[75] Although this part of the judgment was technically obiter, the principles enunciated were considered further in *M Davenport Builders Ltd v Greer* [2019] Bus LR 1273, [2019] BLR 241 by Stuart-Smith J (as he then was) and followed:

'[21] … it seems to me consistent with the policy underlying the adjudication regime that a defendant who has discharged his immediate obligation should generally be entitled to rely upon a subsequent true value adjudication and that a defendant who *has not* done so should not be entitled to do so. In answer to the question whether a person who has not discharged his immediate obligation *should* be entitled to rely upon a later true value decision by way of set-off or counterclaim in order to resist the enforcement of his immediate obligation I would give a policy-based answer that, in my view, he should not be entitled to do so since that would enable a defendant who has failed to implement the Payment or Payless Notice provisions to string the claimant along while he goes about getting the true value adjudication decision rather than discharging his immediate obligation and then returning if and when he has obtained his true value decision. In my judgment, the passages I have

cited from *Harding* (at first instance and in the Court of Appeal) are at least consistent with and provide support for the policy-based approach I have outlined. Adopting a phrase from [141] of the judgment of Coulson J in *Grove* at first instance "the second adjudication cannot act as some sort of Trojan horse to avoid paying the sum stated as due" …

[25] To my mind these statements are clear and unequivocal: the employer becomes free to commence his true value adjudication when (and only when) he has paid the sum ordered to be paid by the earlier adjudication …

[34] I recognise that the relevant section of the judgment of the Court

of Appeal in *Grove* is technically obiter. However, it was provided after full argument and was expressly intended to provide authoritative guidance on an issue that Coulson J had decided in the contractor's favour. I would feel obliged to follow it even if I

did not agree with it. As it happens I agree with the reasoning and the outcome.

[35] In my judgment, it should now be taken as established that an employer who is subject to an immediate obligation to discharge the

order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication. Both policy and authority support this conclusion and that it should apply equally to interim and final applications for payment …

[37] The decisions of Coulson J and the Court of Appeal in *Grove* are clear and unequivocal in stating that the employer must make payment in accordance with the contract or in accordance with section 111 of the Amended Act before it can *commence* a "true value" adjudication …'

[76] Thus, it is now clear that:

(i) where a valid application for payment has been made, an employer who fails to issue a valid Payment Notice or Pay Less Notice must pay the 'notified sum' in accordance with s 111 of the 1996 Act;

(ii) s 111 of the 1996 Act creates an immediate obligation to pay the 'notified sum';

(iii) an employer is entitled to exercise its right to adjudicate pursuant to

s 108 of the 1996 Act to establish the 'true valuation' of the work, potentially requiring repayment of the 'notified sum' by the contractor;

(iv) the entitlement to commence a 'true value' adjudication under s 108 is subjugated to the immediate payment obligation in s 111;

(v) unless and until an employer has complied with its immediate payment obligation under s 111, it is not entitled to commence, or rely on, a 'true value' adjudication under s 108."

20. The above passages were cited with approval by Mr Roger Ter Haar QC, sitting as a Deputy High Court Judge, in *AM Construction v The Darul Amaan Trust* [2022] EWHC 1478 (TCC), relied upon by the Defendant.

The Claimant's case

21. Ms Conroy argues that the instant case differs from those previously decided, as above, in that at the time of commencement of the TVA there was an ongoing "genuine dispute" as to the validity of the PLN of 25th November 2022[3]. As such, she contends that unless and until there was an adjudication that there was no valid PLN, no "immediate payment obligation" arose or subsisted. In such circumstances, the embargo upon launching a TVA prior

[3] Although only this notice is referenced in the Claimant's skeleton, it appears from Mr Rayner's decision that the validity of a further PLN said to have been sent on 12th December 2022 was also in issue [326]

to the payment of any immediate payment obligation is not engaged and no question of jurisdiction can or should arise. The obligation became immediate upon the ruling of Mr Rayner finding PLN invalidity and was discharged within the timeframe set down by him. Accordingly, this situation should not be treated as a jurisdictional point, nullifying the TVA ab initio, but rather fits into the "entitlement of the Claimant to rely upon the TVA" or "reliance" scenario, as referred to by Stuart-Smith J (as he then was) in *Davenport* and extracted by O'Farrell J by way of para. 76(v) of *Bexheat*.

22. Ms Conroy drew the Court's attention in particular to Stuart Smith J's analysis of *Harding (t/a MJ Harding Contractors) v Paice* [2015] EWCA Civ 1231 at para.19(vii) of *Davenport*:

> "The decision of the Court of Appeal implies that it is not an essential prerequisite to relying upon a later true value adjudication decision that the earlier immediate obligation should be discharged before launching the later true value adjudication. Paice did not pay its immediate obligation under the third adjudication before launching the fourth, and they were not precluded from proceeding with or relying upon the fourth adjudication for that reason. This suggests that the critical time will be the time when the court is deciding whether to enforce the immediate obligation."

23. The Claimant rejects any contention that *AM Construction* is on all fours with the instant case, as there was, ultimately, in that case no issue with the validity of the relevant PLN, i.e. no "genuine dispute", see, for example, para. 105 of *AM Construction*:

> "… the submission (that a contractor … cannot prevent the commencement of a 'true value' adjudication relying upon the above cases unless it has first obtained a monetary adjudication award in its favour) runs contrary to the policy considerations underlying the above trio of cases, that where no Pay Less Notice has been served, the Employer must pay before disputing the amount outstanding."

24. Ms Conroy submits further:

(i) that a finding of no jurisdiction must be wrong, as it would be tantamount to determining that, in a situation where there was a finding of a valid PLN or an invalid PA and thus no immediate payment obligation arose, nevertheless the early commencement of the TVA in a dispute situation would automatically remove jurisdiction, whatever the outcome;

(ii) that it cannot be right to arrive at a situation where there is some retrospective removal of apparent jurisdiction as a result of a finding in the SGA in favour of the Defendant; and

(iii) that it cannot be right that there might be a nil finding on a valid PLN, but that the TVA nevertheless had to await that outcome before being commenced – this is said to be an absurdity.

25. Overall, it is argued that a decision in the Defendant's favour would be a huge curtailment on "employers'" rights. Additionally, the Court should not have any concerns of a "Trojan Horse" nature in these circumstances, given that the sums due under the SGA decision had been paid within the timeframe ordered by the adjudicator.

The Defendant's opposition

26. The Defendant, through Ms McCarthy, asks the Court to find that the authorities are clear that a TVA cannot be started whilst there remains an unsatisfied immediate payment obligation and, in particular, that *AM Construction* is on all fours, to the extent that unfounded arguments as to the invalidity of a PN, where the was no PLN, did not permit the commencement of a TVA, where the Court found an unpaid immediate payment obligation.

27. Ms McCarthy stresses that the process is speedy in any event, even without being able to start before the outcome of any SGA and that the policy is clear, that any immediate payment obligation must be paid to assist with cashflow, without risk of any Trojan Horse style mischief undermining this.

28. The Court, it is submitted, must proceed on the basis that the payment obligation in this case, in the context of Mr Rayner's SGA findings, in fact dated from 13th December 2022, in advance of the commencement of the TVA – it was "there all along". There should be no attempt to impose retrospectivity to "save" the TVA in such circumstances. As such, the burden was on the Claimant to make that payment up front, before commencing the TVA or alternatively, on choosing to raise a dispute, to accept that the TVA will inevitably be delayed.

29. Ms McCarthy urges the Court to form the view that *Harding* is a stand alone decision on its own facts, with the relevant point being stayed and not argued at any stage, and to note the very cautious treatment which *Harding* is given in *Davenport*, see paras 19(v) – 19(vii) and the surmising as to Edwards-Stuart J's reasoning, see para. 13(vi). She also raises concerns that a decision in the Claimant's favour might encourage spurious objections in order avoid or delay any immediate payment obligations whilst also facilitating the commencement of a TVA, all seeming to militate against the "cashflow" policy to the detriment of the employed contractor or equivalent.

What is the date of the immediate payment obligation in this case?

30. In my judgment, the resolution of the issue before the Court lies in the Court's determination of the commencement date of the immediate payment obligation. If this date was or is to be treated as being before 18th January 2023, then the authorities are clear that the Claimant, in the absence of satisfying the same, was prohibited from embarking upon / not entitled to commence the TVA (*Grove* para. 107, *Davenport* para. 37, *Bexheat* paras 39 and 76(v)) and therefore Mr Molloy could not be said to have had jurisdiction in the TVA, being prematurely commenced. The TVA would be a nullity. The Court, despite generally adopting a robust approach to enforcement, would not enforce the TVA by way of summary judgment.

31. Section 111(1) of HGCRA96 provides that the notified sum must be paid by the final date for payment. This creates the immediate payment obligation (*Bexheat* para. 76(ii)).

32. In this case, the questioned validity of contended for PLNs required a decision from Mr Rayner in the SGA. His decision was that the final date for payment was 13 December 2022 (paras 50 and 67 SGA [326; 328]). I can see no basis, whether in statute or authority, for this Court concluding anything different.

33. As such, I reject the Claimant's contention that the final date for payment was 3rd February 2023 [231]. The best description that can be applied to that date, in my view, would be the final date for late payment, see para. 73 of the SGA [329].

34. In that the SGA determined the final date for payment in the context of rejecting the Claimant's arguments as to both the PLNs, there cannot be said to have been any valid PLN and my above analysis is, accordingly, entirely consistent with *Bexheat* paras 76(i) and (ii).

35. Further, this is not to impose some sort of retrospective lack of jurisdiction, but is straightforwardly finding the facts as they always existed and applying these to the question of the existence, ab initio, of jurisdiction.

36. Accordingly, in my judgment, the Claimant was prohibited from embarking upon / not entitled to commence the TVA on 18th January 2023 without first having discharged its immediate payment obligation and Mr Molloy lacked jurisdiction as a result, but it is proper, given the arguments fully put to this Court, that I make some further observations.

The existence of a genuine dispute as to the existence of any purported immediate payment obligation

37. The difficulty with this prima facie attractive submission leading to the conclusion sought by the Claimant is that, in my judgment, it would risk tipping the balance unfairly towards the disputing party and prejudicing the ultimately vindicated right of the payee to be paid, thereby undermining the

"cashflow" policy underlying the procedure in the Act. In other words, the disputing party not only could delay paying what might ultimately, as here, be decided to be a sum which was already due, but also, as a result of so doing, would be able to steal a march on the other party by being permitted to commence a TVA, when the notified payment should have been made all along.

38. If there is a genuine dispute as to the notified sum, the payer, of course, has the ability to protect itself by issuing a valid PLN.

39. To follow the Claimant's approach might also unhelpfully require a Court, being asked to enforce a TVA in such circumstances, to embark upon a value judgment as to whether any rejected issue or dispute raised was "genuine" or not.

When might a reliance situation materialise on facts similar to these?

40. It seems to me that any tension between an apparently premature TVA being a nullity or surviving for the purposes of reliance might be resolved in this way. Supposing that someone in the position of Mr Rayner had upheld a "zero" PLN or the validity of the PA had been successfully challenged, then it seems to me that in those circumstances there would have been no notified sum within the meaning of the Act and therefore no immediate payment obligation. As such the TVA may well not, on the facts, be found to be premature and reliance upon it might well be permitted.

41. Thus, Ms Conroy's concern about potential absurdity would be avoided.

42. Further, insofar as any implication of the decision in *Harding* as interpreted in *Davenport* is concerned, whilst it may well not be an "essential pre-requisite" to relying upon a later TVA for an immediate payment obligation to be paid before such TVA is launched, it does appear to me that the decision in *Grove* as explained in *Bexheat* means that any potential for reliance must be subsidiary to the clear prohibition on embarking upon or the lack of entitlement to commence a premature TVA, absent compliance with an immediate payment obligation, whether as a result of an unchallenged notified sum or a failed dispute raised within an SGA. There is certainly no issue in this case of the Court being required to consider enforcing the immediate payment obligation, let alone refusing to do so.

Conclusion

43. Overall, in my view, the outcome in this case, whilst not closing the door on commencing a TVA prior to the outcome of an SGA and later relying upon the outcome, ought to discourage such a course in areas of spurious SGA dispute, but not deter those who have a sufficient level of confidence that any dispute

raised should result in a finding of no immediate payment obligation having been established.

44. On these facts, however, the application for summary judgment stands to be dismissed.
