Neutral Citation Number: (2023) EWHC 3133 (TCC)

Case No: HT-2023-NCL-000003

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

The Moot Hall, Castlegarth,
Newcastle upon Tyne, NE1 1RQ

Date: 23/06/2023

Before:

HIS HONOUR JUDGE KRAMER
(Sitting as a Judge of the High Court)

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Between:

MELTON TOWN FOOTBALL CLUB LIMITED **Claimant**

- and -

HUNTS CONTRACTORS LIMITED **Defendant**

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MR MARTIN HIRST (instructed by **Harrison Drury & Co Ltd**) for the **Claimant**
MR GEORGE WOODS (instructed by **Berwick Law Solicitors**) for the **Defendant**

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JUDGMENT
Received and approved by HH Judge Kramer on 4 August 2023

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HIS HONOUR JUDGE KRAMER :

1. This is an application to vary directions for the hearing of adjudication enforcement proceedings made by O'Farrell J. She made the order on 6 June 2023 under which she directed there be a summary judgment hearing on 14 August 2023 and gave directions as to what was to happen in between. On or about 13 June 2023, O'Farrell J became aware that the defendant had applied for security for costs. She did not make an order about that but she seems to have caused the listing office to notify the parties that the application for security for costs should be listed to be dealt with after the adjudication enforcement hearing if judgment was not granted. The defendant asks that its application for security for costs, which was made on 1 June, be heard on the next available date and that enforcement proceedings be stayed pending the outcome of the security for costs application.

2. Counsel before me appear for both sides, Mr George Woods appears for the defendant, who is the applicant here, and Mr Martin Hirst appears for the claimant. I have seen the evidence in relation to this application from the defendant's solicitors, Dominic Patching and in addition I have seen a statement from Warren Berwick of the defendant's solicitors in support of the security for costs application. I have also read the statement, dated 22 June 2023, from the claimant's witness, Katherine Sibley, dealing with this application and her statement of 24 May 2023 in support of the summary judgment application. I have read in less detail, because I only received them this morning, statements from Mr Drury, Mr Patching and Mr Berwick, for the defendants. Mr Drury is the managing director of the defendant. That is their evidence in response to the summary judgment application. I have also read Mr Berwick's statement in support of the security for costs application.

3. The summary of the parties' positions is as follows. The claimant, obtained their adjudication decision on 12 May 2023 for £933,891.58, in addition to which there are adjudicator's costs of about £30,000 to be paid. They say the sums remain unpaid, they are entitled to enforce and that the procedure for enforcement of adjudication awards is designed to ensure speedy and just resolution of disputed enforcement proceedings and this underpins the ethos of the adjudication process which is pay now, argue later.

4. Mr Hirst says that to allow the application would be contrary to the ethos of adjudication and introduce interim procedures which increase cost and delay and he says that the application for security for costs is a cynical attempt to make it more difficult for the claimant to pursue their application for enforcement. He also says that on the merits the security would not be granted; although I have an eye to that, that really is an argument for another day. He says what lies behind the application is cost-building to frustrate the claimant's pursuit of the enforcement.

5. The defendant's argument in a nutshell is that it has grounds for seeking security for costs, the accounts of the claimant show a negative balance sheet. In addition, a director of the claimant has said that the consequence of the damage which gave rise to the adjudication award is such that the claimant, which is a community football club, may not be able to continue unless the damage is remediated and therefore it is said that the club must be in financial difficulty. The defendants say they have got a defence to enforcement, which is a challenge to the jurisdiction of the adjudicator on the basis that the notice of adjudication was served on its solicitors and not in accordance with section 115 of the Housing Grants, Construction and Regulation (sic) Act 1996.

6. Secondly, the court will not give a judgment to enforce this award, or will certainly stay the award, because the amounts are so great that, looking at the financial position of the claimant and what it intends to do with the money, if it gets it, if it is found that the award should not have been made the claimant would not be in a position to repay it. They say that they should have security for costs for the summary judgment application as there is a real risk that the claimant will not be able to pay if it loses.

7. The defendant originally put the costs of the summary judgment at £69,200 but it reduced that to £53,200 on the basis that they are proposing to use a forensic accountant's report and the forensic accountant has reduced their fees from £30,000 to £15,000, which actually on the maths suggests costs at £54,200. On this last point, the claimants say the fees that the defendant is proposing to incur on the summary judgment are excessive and an example of cost-building.

8. That has been the broad position. Mr Woods has drawn my attention to a letter that was written on 19 May 2023, so just a week after the decision of the adjudicator, in which the defendant said that if the claimant was contemplating bringing proceedings, looking at their accounts they were not solvent and security for costs would be sought. It asked that this letter be put before the court when directions for the TCC procedure for adjudication enforcement were considered by the judge. They say they do not know if it was put before the judge and they point to a response from the claimants to their letter, which says that the costs would be *de minimis,* to which the defendant says that on an adjudication of this sort with nearly £1 million in issue, £50,000 costs would not be surprising and that is hardly *de minimis*.

9. The point is made by Mr Wood that Part 25 says that an application for security for costs can be made at any stage. The notes to the rules, which are supported by

authority in this respect, say that you should make the application as soon as you are aware of the facts from which it is apparent that security may be needed. Mr Wood says that the right to apply for security is an entitlement under the rules and it should not be thwarted by the exigencies of an attempt to get the adjudication enforcement application on more quickly. He referred me to what he says is the ethos, I use that word again, for applications for security for costs which is that our system works on the basis that successful litigants recoup all or most of their costs and they are paid by the loser. A defendant who has been forced into litigation by the issue and service of the claim would suffer an injustice if they were required to litigate against a claimant who was not able to pay their costs.

10. Mr Hirst has provided me with a skeleton argument. I do not want to be too critical of what has been produced but it might be called the sort of skeleton that shouts headlines. It just says that this is entirely unjustified, the application that is made today, the application to apply for security for costs is entirely unjustified and this is an outrageous attempt to deflect the claimant from recovering what it is due under the adjudication award. Well, hyperbole of that sort unsupported by authority is not really a great deal of assistance.

11. Mr Hirst says that the claimants themselves would like the application brought forward because, as is said by Ms Sibley, the claimant is a football club, they do not have a functioning football pitch at the moment; in support I have been shown pictures of water pooling on the pitch. This pitch, as we shall see, was a result of the construction work to which this case relates and if they do not get this work done quickly, they will lose their teams and drop out of the league that they are in and that, really, will be the end of Melton Town Football Club.

12. Before I go into the background, I will just say this, as the hearing has been progressing, I have been looking at how dates could be rearranged. Everybody is available on 30 June and 7 July but not on 4 July. The claimants are not available on 4 August and the summary judgment is listed for 14 August. I would have availability on 7 July and 30 June and 4 August.

13. Although Mr Hirst was suggesting that 30 June could be a suitable date for the summary judgment and therefore I could bring matters forward to that date, or indeed 7 July, I think Mr Woods makes the fair point that actually to get everything in order, that is to say the claimant's witness statements in response to the statements they have received today, even on the limited issues that are dealt with there and preparing an agreed bundle in a form which is acceptable to the court, not just every scrap of paper lumped together, would make the bringing forward of the summary judgment to 7 July too much of a pinch.

14. There is too much risk of a procedural hurdle if I start altering the directions to get the summary judgment hearing on by 7 July. I could, as I said, have managed 4 August which would have brought matters forward ten days but that is not suitable for the claimant, so it seems that 14 August is going to remain the date for the summary judgment. There is then the question as to what happens in between. I should say that both parties would be available on 7 July and 30 June for a security for costs application.

15. The background to the case is this. The claimant has a football pitch at Sign Right Park, Melton Sports Village, Melton Mowbray. They had a grass pitch, but that became unplayable in wet weather. On 2 July 2021, the claimant entered into a construction contract with the defendant for the design and construction of a new

football pitch with a synthetic surface. These pitches, apparently, have to be acceptable to FIFA. I should say acceptable to FIFA in their finished form once completed, not just the use of a synthetic surface which they recommend or something of that sort.

16. The defendant holds itself out as expert in the field of the design and laying of synthetic football pitches. The contract price was £355,000. There was a subsequent variation to the specification. There is no dispute but that the contract was a construction contract for the purposes of the Housing Grants, Construction and Regeneration Act 1996. The defendant installed the pitch but, as built, the claimant complained it has numerous defects which they say can only be remedied by removing what was laid and redoing the job. That is going to cost £796,793 plus VAT and there is also consequential loss such as loss of revenue and the like.

17. On 15 March 2023, the claimant sent a notice of adjudication to the defendant's solicitors. This followed correspondence between those solicitors and the claimant's solicitors concerning complaints about the defective work. An adjudicator was nominated by TECBAR, that is Ms Grace Cheng, a barrister. The defendant challenged the jurisdiction of the adjudicator on the basis that the notice had not been properly served for the purposes of section 115 of the Act.

18. On 1 April 2023, after receiving written submissions from both sides, Ms Cheng ruled that she did have jurisdiction, although that is a non-binding ruling. She made reference to emails which she concluded evidenced an agreement by the defendants for the method of service which was adopted. The defendant took a full part in the adjudication whilst reserving its position on jurisdiction. It was fully contested.

There were experts on both sides. There was a site inspection. There was written evidence. Both sides were legally represented.

19. On 12 May 2023, the adjudication decision was issued. Ms Cheng accepted there were defects, found the defendant to be in breach of contract, accepted the pitch needed to be replaced and determined a sum due to the claimant of £785,477.50 plus VAT and some other small amounts in relation to interest and the referral fee; she said that as regards her costs both sides were liable but the incidence of costs should follow the success and the total payable, I am told, is £933,891.58 together with the adjudicator's fees of £30,807.20, which if paid by claimant are to repaid to them by the defendant.

20. On 24 May 2023, the claimant filed the adjudication claim. I have already referred to the pre-action correspondence referring to notifying the judge that there was to be an application for security for costs and the draft application for summary judgment and supporting evidence was included with that filing. On 1 June 2023, the defendant applied for security for costs and for the action to be stayed until this had happened and there had been compliance.

21. On 6 June 2023, O'Farrell J gave standard TCC directions, or I should say almost standard TCC directions, for this claim was transferred to Newcastle, which I should explain arises from the fact that the courts outside London assist The Rolls Building to get through their adjudication applications and, indeed, other applications. So, although this case has rather a closer connection with Birmingham than Newcastle, that is how it happens how it fetches up here. On 13 June 2023, listing notified the parties that O'Farrell J had directed that the security for costs application would be

listed after the summary judgment and on 14 June 2023, the defendant made this application.

22. The law on security for costs is to be found in CPR Part 25. Part 25.12 provides

> "A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings."

The application can be made at any time. The notes under the heading "Ideal time for applying" say that *"although an application for an Order for security for costs may be made at any stage of the proceedings, this should be made promptly as soon as the facts justifying the order are known."* As to conditions to be satisfied, the court has to be satisfied that it is just to make the order, CPR 25.13(1) and one or more of the conditions in rule 25.13 (2) apply. The Part of paragraph (2) relied upon by the defendant is:

> "(c) the claimant is a company or other body… and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so."

23. On the making of an application, the court has a discretion whether or not to grant the order. In exercising that discretion, there are a number of relevant considerations to take into account, which were set out in case of *Sir Lindsay Parkinson v Triplan Ltd* [1973] 2 WLR 632, to which reference is usually made, albeit that that was an application for security under the Companies Act, the relevant provisions being repealed and replaced by the rule to which I have just referred. The court is concerned to see whether the claim is bona fide, not a sham, and whether the company has good prospects of success. It looks at admissions on the pleadings or elsewhere that money is due and there are other considerations, one of which is whether the application for security is being used oppressively to try and stifle a genuine claim.

24. I do not need to go into all of that now, suffice it to say that there is a discretion once the condition as to being unable to pay is met. I should add that there has been authority after *Triplan* on the subject of security, for instance the court is not to try the merits of the case or take merits into account unless it is perfectly clear what the outcome is likely to be, to paraphrase, but there has been a gloss placed on some of these considerations and an explanation as to how they should apply.

25. I accept that the justification for this jurisdiction is to avoid a defendant being vexed by being required to take part in proceedings against somebody who is never going to be able to pay their costs. This would be particularly unjust if, for instance, one of the examples identified in *Sir Lindsay Parkinson*, the claim was a sham and the company did not have reasonably good prospects of success. But there it is, it is a protection for a defendant.

26. Then we look at adjudication. I have not really been referred to any authority on the ethos of adjudication but it is well recognised. I will just read briefly from *Coulson on Adjudication*, 4th Edition, Chapter 2, paragraph 3 where the author refers to the case of *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 where it was argued that in circumstances where the validity of a decision was challenged, it was not binding until the decision had been determined or agreed. Dyson J, as he then was, said in response, at 97:

> "It will be seen at once that, if this argument is correct, it substantially undermines the effectiveness of the scheme for adjudication. The intention of Parliament in enacting the Act was plain. It was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional interim basis, and requiring the decisions of adjudicators to be enforced pending the final determination of disputes by arbitration, litigation or agreement."

Later on the in this passage Dyson J said:

> "The time table of an adjudication is a tight one…Many would say unreasonably tight , and likely to result in injustice. Parliament must be taken to have been aware of this."

27. Another case that I am often referred to on enforcement applications, *Bouygues v Dahl-Jensen* [2000] BLR 522 dealt with companies in liquidation. There it was argued that there would be an injustice, in that particular case, if an order was made where there was a mistake in the award and the company was in liquidation. Buxton LJ said at [15]:

> "Bouygues contended that such an outcome was plainly unjust in a case where it was agreed that a mistake had been made and particularly in a case, such as the present, where Dahl-Jensen was in insolvent liquidation, and therefore the eventual adjustment of the balance by way of arbitration will in practical terms be unenforceable on Bouygues' part. I respectfully consider that the judge was quite right when he pointed out that the possibility of such an outcome was inherent in the exceptional and summary procedure provided by the 1996 Act and the CIC Adjudication Procedure. And in any event unfairness in a specific case cannot be determinative of the true construction or effect of the scheme in general."

28. I have to accept from the above that it is recognised that adjudication is a very summary process, an attenuated process I should say, which can lead to injustice. Once you get to the court hearing, that is enforcement, the TCC guide, para 9.1.2, itself makes it clear that the special procedure is intentionally swift, which further underlies the need to support the primacy of adjudication.

29. It seems to me, having outlined those two procedures, security and adjudication, there is clearly a tension between them because the security for costs application could have such an impact on the application for enforcement that this could run counter to what underpins adjudication. When you have a decision in your favour the money is owed, subject to some limited defences, it has to be paid. Thus, anything which postpones payment, such as some application which has that effect, undermines that principle.

30. On the other side, and here is the tension, let us say that Mr Woods' arguments prevail on a summary judgment hearing. He may well be litigating against a claimant who has no money, so that the defendant will not recover their costs of the summary judgment hearing even if successful. As to what those costs are likely to be, whilst the claimants say they are likely to be *de minimis*, and I am bound to say given the limited issues involved it seems to me the suggestion of £50,000 plus is much more than I would expect. I would not necessarily accept the proposition that just because there is a lot of money at stake that entitles the parties to splash a lot of money on the case on the two limited issues which are to be considered, nevertheless even if it is £10,000 it is a substantial sum of money and therefore the defendants themselves could be subject to an injustice if they are required to defend the claim on grounds which are ultimately found to be good grounds and end up out-of-pocket. So there is the tension.

31. My conclusion is this. There is no inherent inconsistency between the ethos underlying adjudication to allow or listing an application for security for costs if it can be done without derailing the summary judgment application. I say that because the Civil Procedure Rules provide that an application for security for costs can be made in any claim, so there has to be some good countervailing reason for not allowing it to be made and thereby depriving a party of the exercise of their right to make such an application.

32. A good reason could be that the direction sought would prevent the summary judgment taking place, for instance, if I were to go along with the suggestion that the summary judgment proceedings should be stayed pending the application. That could have an effect of preventing the hearing of the summary judgment proceedings and

would run counter to the importance given to ensuring that adjudication enforcements are dealt with swiftly.

33. In this case, the timings are such that there is time to hear a security for costs application. I do not see, on what I have heard, that allowing the application to be heard in advance of the summary judgment is going to derail the summary judgment. It may be that one of the arguments on the security for costs is that there needs to be some special consideration in adjudication enforcement and some, what might be called, tweaking of the stifling aspect. It may be argued that security should not be given because, if ordered, it will prevent the summary judgment taking place till security is given. These are points to argue at that hearing. The fact is on the timings, there is time to hear both the security application and it will not, of its nature, affect the timing of the hearing on 14 August.

34. So, although I can see there can be a tension between these two procedures, the timings in this case really remove that tension and I cannot see, therefore, a good reason why the defendant should not have its opportunity of seeking to show to the court that the claimant has not got the wherewithal to meet an award of costs if it loses the summary judgment application and if it gets that far, to satisfy the court that in all the circumstances of the case it is just that an order for security should be made. I will list the case for security.

35. It seems to me it is probably best to do it on 7 July, because 30 June is just next Friday and that is going to be an awful rush to have everything in order by then, including a statement in response, skeleton argument and, well, as regards the bundle, I am not quite sure what to do about the bundle. There will need to be a bundle for

the security application which I should like to have in paper form together with any authorities. Skeleton arguments I print off myself.

36. I will allow the application to the extent that I will list the application for security, 10.30 by Teams for two hours on 7 July before me but I am not ordering a stay of the rest of the proceedings and directions until that has been dealt with or security has been provided. That means on the order of O'Farrell J, that the claimant still has until 2 July to serve their witness statements in response. Indeed, I do not think I need to alter the order of O'Farrell J.

(For proceedings after judgment see separate transcript)

37. You will need to make an application to the Court of Appeal because I am going to refuse each one of your grounds. Firstly, I do not regard looking at what the options are by giving parties dates as an indication of bias. Secondly, the second ground which is that the ruling cuts across the adjudication process producing an unjust result is not a recognised ground of challenge to a decision. It does not say that there is an error of law or a discretion which has been exercised in a way which no reasonable judge would have exercised it.

38. Finally, the ground that there is no jurisdiction to make this because it overrules a decision made by O'Farrell J, there was no order made by O'Farrell J, she simply seems to have told listing that is how the matter was going to be dealt with. I am dealing with the application for security and an application within that application for security for listing and since there is no question of me seeking to act as a Court of Appeal against O'Farrell J and an order that she has made, that ground too fails and all this will be in the N460.

(For proceedings after judgment see separate transcript)

39. I have an application for costs from Mr Woods for the defendant for the application. He is the successful party in that he has managed to get his security for costs hearing in advance of the adjudication summary enforcement hearing which was resisted by the claimant. He has not succeeded in having the adjudication proceedings stayed pending the hearing of the security for costs and, as I pointed out and Mr Hirst adopts as a point, the order that he has got has arisen because I have identified dates when we could hear the security for costs application and they just happened to fall before 14 August leaving the security application to be heard without affecting the adjudication enforcement hearing.

40. So it may be said, and Mr Hirst urges me to say by inference because he says I have said something which he was going to say, that the defendant has succeeded in a way which was not really how they had put their case and he said it is really the fault of the judge, this is O'Farrell J, for not considering the application in the first place and it is not his client's fault.

41. The reality is here is that the defendant wanted its application for security for costs and the claimant has steadfastly said "you are not going to have it, we are going to have our adjudication". You can see that in the early correspondence where they say *"you are not going to be able to succeed on an application for security for costs".* Today I was provided with a skeleton which arrived very late in which Mr Hirst simply said the very fact of making an application for security for costs was something which was improper and was designed to deprive the claimants of their just deserts. That is the reality here.

42. The Civil Procedure Rules does require the parties to cooperate and if what the claimant was worried about was the loss of the hearing on 14 August, they could have approached the defendants and said “okay, yes, we agree to your application being heard provided it could be heard in good time before 14 August,” They did not do so because their stance has always been it is not going to be heard at all before 14 August. Accordingly, this application by the defendant was made necessary because the claimants had said there was going to be no application for security for costs heard before 14 August

43. Therefore, when I asked the question under Part 44 “who is the successful party here?” it is the defendant who is the successful party on the application and although they have succeeded in a way which is slightly different from the way they put their application, it is an outcome which could have been reached if the claimants had acknowledged that there could be an application for security for costs provided it was dealt with in advance of 14 August which they never were prepared to do. So, it seems to me that the claimant should pay the defendant’s costs.

(For proceedings after judgment see separate transcript)

44. Dealing with the bill, the various objections, it is right that Mr Patching is being charged at in excess of the guideline rate. However, this is a £1 million claim and in the Business and Property Court and it seems to me that enhancement of hourly rate above the guideline rate is justified in those circumstances, so I am not going to alter that.

45. As regards the first item, is attendance on defendant, so on this application to vary there is no attendance on their own client, is that right? There is not, is there?

MR WOODS: The defendant is Mr—

JUDGE KRAMER: The defendant, I see what you mean. Yes, sorry, I got that the wrong way round.

Yes, attendance on defendant, so that is six letters – sorry, six personal attendances, they are short (inaudible) by telephone. No, six personal attendances, six letters out and two telephone calls. In fact, the personal attendances are probably half an hour attendances. These are modest figures in the great scheme of things and it does not seem to me that this is unreasonable, that level of contact.

46. Time spent on opponents is not objected to. Attendance on others, this is twelve letters and four telephone calls. I am told this is attendance upon not only the court but also upon counsel and, indeed, some other counsel were involved as well while Mr Woods was not available. Again, these are not large sums and I do not regard them as disproportionate or unreasonable.

47. Time spent on documents is totalled. There has not been a challenge to time spent on documents and £2,693.50 for all the documentation as the applicant again seems to me to be reasonable and dealt with at the correct level, largely grade B, so that will all be allowed.

48. Attendance at hearing, I think it is a fair point that solicitors' attendance is not necessary at this type of hearing and all that is being sought is an application. The solicitor does need to be available by telephone or WhatsApp but that is all, so I shall take that out. £530 comes out of there.

49. Then there is the fee for the hearing. I appreciate that there is work to be done in reading, preparing a skeleton argument, researching the matter, as to which there is not really much to find, and reading everything but I take the view that 6,750 is far in

excess of what is a reasonable and proportionate brief fee for a two hour hearing to list a security for costs application and also it did not succeed to have the matter stayed until that is done and it seems to me for this level of hearing £3,000 is quite sufficient, so I will reduce that to 3,000.

(For proceedings after judgment see separate transcript)