

Neutral Citation No: [2021] NIQB 34	<i>Ref:</i> HUM11449
<i>Judgment: approved by the Court for handing down (subject to editorial corrections)*</i>	<i>ICOS No:</i> 20/20381 & 20/20442
	<i>Delivered:</i> 15/03/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN’S BENCH DIVISION (COMMERCIAL)

Between:

KPR MECHANICAL LIMITED

Plaintiff

and

KEVIN WATSON GROUP LIMITED

Defendant

AND

KPR MECHANICAL LIMITED

Plaintiff

and

KEVIN WATSON CONSTRUCTION LIMITED

Defendant

Anna Rowan (instructed by McIl Dowies Solicitors) for the Plaintiff
Robert McCausland (instructed by Worthingtons) for the Defendant

HUMPHREYS J

Introduction

[1] In each of these actions, the plaintiff seeks summary judgment pursuant to Order 14 of the Rules of the Court of Judicature (NI) 1980 (‘the Rules’) to enforce an award of an adjudicator, appointed following the emergence of a dispute in the context of a construction contract.

[2] The court is grateful to counsel for their detailed written and focussed oral submissions.

The Construction Contracts

[3] The plaintiff in these actions is a mechanical sub-contractor which was engaged to provide services in respect of two projects:

- (i) A housing development at Eastcote Lane, Northolt, London, wherein Kevin Watson Group Limited ('KWG') was the main contractor; and
- (ii) The Holiday Inn Express Hotel at Strand Road, Derry, wherein Kevin Watson Construction Limited ('KWC') was the main contractor.

[4] In each case, a dispute arose between the parties in relation to the valuation of the plaintiff's account. In each case, the dispute concerned the true value of works done by the plaintiff at the date of submission of a valuation and was referred to adjudication by the defendant. In the case of contract (i), the statutory right to refer a dispute to adjudication arose under the Housing Grants, Construction and Regeneration Act 1996 whilst in contract (ii) the right to refer arose by virtue of the Construction Contracts (NI) Order 1997.

The Adjudications

[5] On 9 October 2019, Mr Mark Thomas was appointed as adjudicator in respect of the dispute in contract (i). The relief sought by KWG was a true valuation of the plaintiff's account, together with an order requiring the plaintiff to repay the difference between the sums paid to date and the true valuation.

[6] On 10 February 2020, Mr Thomas delivered his decision. He found that the true valuation of the plaintiff's account was £368,242. Given that the sum paid to the plaintiff by KWG was £205,547, he found that there was no sum due to be repaid by the plaintiff.

[7] On 20 December 2019, Mr W J Ferguson Bell was appointed as adjudicator in respect of the dispute in contract (ii). The relief sought by KWC was a true valuation of the plaintiff's account.

[8] On 4 February 2020, Mr Bell delivered his decision, finding that the true value of works carried out by the plaintiff, less any sums rightfully deducted, was £795,979.08.

The Enforcement Proceedings

[9] In relation to contract (i), the plaintiff issued a writ of summons on 26 February 2020 seeking judgment in the sum of £162,695 (plus VAT where applicable) and payment of the adjudicator's fees of £26,730.

[10] KWG served a defence and counterclaim on 9 April 2020, asserting that the plaintiff had no cause of action and pleading that KWG enjoyed a substantial counterclaim that exceeded any sum owing to the plaintiff.

[11] In contract (ii), the writ of summons was also issued on 26 February 2020. It claimed the sum of £145,878.81 (plus VAT where applicable), which was claimed to be the balance owing as a result of Mr Bell's determination, together with £13,172.64 being the adjudicator's fees.

[12] KWC issued a defence and counterclaim on 9 April 2020 which also claimed that the plaintiff enjoyed no cause of action and KWC had a counterclaim exceeding any amount owed to the plaintiff.

[13] The plaintiff issued a summons for summary judgment in each case on 17 September 2020.

The Principles of Enforcement of Adjudicators' Awards

[14] The approach of the courts to the enforcement of awards made by adjudicators is, by now, well-trammelled territory. Such awards will be enforced, by the means of summary judgment, unless a defendant can demonstrate that the adjudicator had no jurisdiction or breached the rules of natural justice. The courts have adopted a robust approach in order to further the statutory intention of providing a temporarily binding solution to construction disputes, pending final determination via agreement, arbitration or litigation.

[15] One aspect of this approach has resulted in the courts ordering the payment of sums found due by adjudicators even if a defendant asserts a substantial counterclaim. As Weatherup J stated in *Henry Bros v Brunswick (8 Lanyon Place Limited)* [2011] NIQB 102:

"Under the adjudication scheme the plaintiff is entitled to payment of the Adjudication award. The defendant is entitled to have a determination of the issue about the defects and of any entitlement to damages in respect thereof and to recover any amount that is found due in respect of those defects in any arbitration or in any litigation or by agreement. The defendant will in time recover that money if it is due. None of the above prevents the plaintiff obtaining judgment against the defendant for the sum found due to the plaintiff under the Adjudicator's award."

[16] The principle is one of "pay now, argue later". In Coulson on Adjudication, the learned Judge comments¹:

¹ 4th Edition at 9.23

“Generally, a party who has been ordered by an adjudicator to pay a specific sum forthwith cannot seek to set off against that sum a claim for damages or other losses, even if that claim was not considered in the adjudication itself”

[17] If a court determines that an adjudicator’s award is enforceable, and grants summary judgment, a defendant may nonetheless invite the court to stay enforcement of that judgment either under its inherent jurisdiction or pursuant to Order 14 rule 3(2). Whilst the power to grant a stay pending the determination of another claim undoubtedly exists, it is a fundamental principle of adjudication enforcement that a defendant is not entitled to a stay of execution simply because he has a claim which will be determined in the near future. Allowing a stay in such circumstances would have the same practical effect as permitting the court to take into account the defence of set off. As the jurisprudence in this field makes clear, the only basis upon which the court ought to countenance a stay is where the plaintiff is financially impecunious and there may be difficulties in recovering any sums paid over at the conclusion of the dispute resolution procedure – see *Wimbledon Construction v Vago* [2005] EWHC 1086.

The Defendants’ Arguments

(i) No Cause of Action

[18] One argument which featured heavily in the defendants’ pleadings was that since neither adjudicator had made an award in favour of the plaintiff, there was nothing to enforce and the plaintiff enjoyed no cause of action.

[19] In the finest traditions of the Bar, Mr McCausland brought to the court’s attention a recent authority which drove a coach and horses through this contention, and the argument was not pursued at the hearing.

[20] The judgment in question was that of Recorder Andrew Singer QC, sitting as a Judge of the TCC, in *WRW Construction v Datblygau Davies Developments* [2020] EWHC 1965 (TCC) in which the following fell for determination:

“The issue before me is whether on the basis of a valid, binding valuation of the post-termination account a court's enforcement of that valid award can include an order for payment of the sum due as a consequence of the binding valuation, or not.”

[21] Mr Singer QC found, as a matter of principle and authority, that the court could enforce the consequences of a valid and binding adjudicator’s award even though it did not contain an express obligation to make payment. I respectfully agree with his reasoning. To hold otherwise would be to compel the parties to engage in further adjudication proceedings, to which there would be no defence,

and, in all likelihood, further enforcement proceedings. This would only serve to undermine the intention of the legislation.

(ii) Delay

[22] The defendants say that the plaintiff has been guilty of egregious delay in pursuing its claims for summary judgment. They emphasise that the counterclaims have been pursued with alacrity and this should be contrasted with the lapse of 8 months between the issue of the writs and the service of the Order 14 summonses.

[23] In the first instance, I find that the delay point is not well made. Order 14 itself does not prescribe any time period within which an application must be brought. In this case, both the period of Covid-19 lockdown and the long vacation intervened between the various steps taken in the litigation by the plaintiff.

[24] Even if there were culpable delay on the part of the plaintiff, no prejudice has been occasioned by the defendants. In fact, the reverse is true since the plaintiff has been kept out of the money it was owed on foot of the adjudicators' decisions.

(iii) The 'Insurance Point'

[25] In contract (ii), there is a discrete point which relates to a claim for damages advanced by KWC in respect of loss and damage caused by a water leak which is said to be the responsibility of the plaintiff.

[26] In the adjudication under consideration, Mr Bell made a finding that the plaintiff was liable for this leak but held that it was too early to assess what damages might flow from this finding. Subsequently, it would seem that KWC entered into an agreement with its employer that £100,000 would be deducted from its final account in respect of the water leak damage. KWC then commenced fresh adjudication proceedings seeking recovery of this £100,000. Mr Bell issued his decision in that matter on 21 January 2021 and held that KWC was not entitled to the relief sought. In his opinion, it had not adduced satisfactory evidence to satisfy the burden of proof upon it in respect of such losses.

[27] In this respect, KWC relies on the judgment of Horner J in *Flexidig v M & M Contractors* [2019] NIQB 117 in which he stated:

"This Court...is placed in the intolerable situation of being asked to enforce an adjudication award that is nearly a year old and in respect of which both sides agree substantial further remedial works have been carried out in respect of alleged defective work or unfinished work which formed part of that adjudication award."

[28] In the event, the court held that the adjudication award was unenforceable due to an estoppel which had arisen. However, KWC contends that, by analogy, this court should decline to enforce the award of Mr Bell which is now over a year old. The logic of this argument is difficult to divine. Nothing has changed since the date of Mr Bell's first decision save that KWC has lost another adjudication. There has certainly been nothing like the change of circumstances which occurred in *Flexidig* or which could persuade the court to issue a stay on the grounds of manifest injustice.

(iv) Impecuniosity

[29] In his skeleton argument, Mr McCausland raised the entirely novel proposition that the court should decline to enforce an award against KWG on the grounds that it (not the plaintiff) is impecunious. The suggestion advanced is that enforcement of the plaintiff's adjudication award would prevent KWG from pursuing its counterclaim.

[30] This argument was not seriously pursued and is wholly without merit. The fact that a defendant may be unable to pay could not act as a bar to judgment. Given the admission in the skeleton argument, it must be likely that KWG will be required to provide security for the costs of the counterclaim in any event.

Conclusion

[31] There is no claim by the defendant in either case that the adjudicator lacked jurisdiction or acted in a manner contrary to the principles of natural justice. Further, there is no averment that the plaintiff is impecunious and may be unable to pay any future award to which the defendant may be entitled.

[32] On this basis, and for the reasons set out herein, I have concluded that none of the arguments advanced by either defendant amounts to a reasonably arguable defence and therefore the plaintiff's applications for summary judgment succeed.

[33] I am grateful to counsel for the agreement which was reached on the figures. In contract (i), the principal sum is £161,045 plus VAT as applicable. In contract (ii) the sum is £140,390.11 plus VAT as applicable.

[34] I have calculated the interest entitlement of the plaintiff based on time running from 28 days post the adjudication decisions at the rate of 5.75%. In contract (i) the sum for interest to the date of this judgment is £9,386.94. In contract (ii) the interest amounts to £8,315.71.

[35] There will be judgment for the plaintiff in each action accordingly. I will stay enforcement of these judgments for 7 days. I order that in each case the defendant pays the costs of the plaintiff's claim to be agreed or taxed in default of agreement. I will hear the parties as to directions for the counterclaims.