

## Construction Law Update

### Immediate Payment Obligation under Section 111 is Paramount

The important recent decision of the TCC in *Bexheat Limited -v- Essex Services Group Limited [2022]* serves to clarify further the paramountcy of the immediate payment obligation under s.111 of the Housing Grants, Construction and Regeneration Act 1996 (the “Act”).

#### Background

On 8 October 2019, Bexheat Limited (“BHL”) entered a Sub-Subcontract for plumbing works with Essex Services Group Limited (“ESG”) (the “Contract”). The Contract contained compliant provisions for interim payments and adjudication along with the following bespoke clauses:

*Cl.30.2 “Sub-Contractor shall be entitled to set off or make deductions against an Adjudicator’s award in respect of any amounts which may at any time be due or have become due from the Sub-Subcontractor to the Sub-Contractor under the Sub- Subcontract or otherwise.*

*Cl.30.3 If the Sub-Contractor shall so elect the Adjudicator shall be entitled to adjudicate on more than one dispute at the same time and the parties agree that the Adjudicator shall so have jurisdiction and shall be entitled to set off one decision against another.”*

There had been two adjudications concerning BHL’s entitlement to payment, as follows:

**The First Decision:** BHL was granted a declaration as to the ‘true value’ of its July 2021 Application for Payment (“AfP 22”). The sum awarded was a much-reduced £141,646.35 + VAT.

**The Second Decision:** as a result of ESG’s failure to serve a timely pay less notice, BHL was entitled to be paid the sum notified by its August 2021 Application for Payment (“AfP 23”). The sum awarded was £706,029.70 + VAT, notwithstanding the gross amount claimed by BHL under AfP 23 aligned with the gross claimed in its earlier AfP 22.

The Decision in Adjudication 1 as to the true value of AfP 22 was published before the deadline for serving any pay less notice in respect of AfP 23, and before BHL commenced Adjudication 2. ESG complied with the First Decision but not the Second. It attempted to commence a third adjudication, but the adjudicator resigned.

#### The Proceedings & Issues

BHL applied for summary judgment of the Second Decision. ESG resisted enforcement on multiple grounds:

**Was the true value of AfP23 determined in the First Adjudication?** ESG argued the True Value of AfP23 had been determined by the First Decision, and that the dispute in Adjudication 2 was the same or substantially the same as that decided in Adjudication 1.

The court disagreed. While the figures claimed in AfP23 reflected those claimed in earlier AfP 22, the applications concerned two distinct payment periods and the disputes were not the same. The Second Decision did not concern ‘true value’ and related solely to BHL’s entitlement to be paid the ‘notified sum’.

Further, ESG had not resisted the second adjudication based on the adjudicator’s alleged lack of jurisdiction to award any sum by reason of the First Decision. It had thus waived its right to argue this on enforcement.

Further still, ESG’s argument ignored s.111: “*the payer must pay the notified sum on or before the final date for payment...[or] give to the payee a notice of the payer’s intention to pay less...*”. If ESG had wanted to argue the ‘true value’ of AfP23 had already been determined, it should have served a pay less notice to that effect, in reliance on the First Decision.

**Was ESG entitled to set off against the Second Decision?** ESG argued it had an express entitlement (cl. 30.2) “*to set off or make deductions against an*

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*Adjudicator's award in respect of any amounts*", specifically an entitlement to deduct its contra charge claim in the amount of £163,345.10 from the sum awarded to BHL in the Second Decision.

The court again disagreed. An unqualified contractual right to set-off offends against the statutory requirements providing for immediate enforcement of an adjudicator's decision and the clause in this case did not fall within the very limited exceptions set out in *Thameside Construction Co Ltd v Stevens*. ESG had been directed to pay a specific sum to BHL and the set-off of contra charges related to neither Decision, nor had the Second Decision permitted set-off.

**Had ESG been denied a contractual right to have the 'true value' of AfP 23 determined at the same time as the 'notified sum' dispute in respect of that application?** ESG argued BHL had breached cl. 30.3 in refusing to allow a parallel 'true value' determination in the second adjudication and that the adjudicator had wrongly refused the joinder.

The Court considered ESG's claimed unilateral right was inconsistent with the Scheme, which required the consent of all parties to a multiple dispute adjudication. If one party could require multiple disputes to be determined within the tight adjudication timetable, "*a difficult task could become impossible*". In this context, the Court noted cl 30.3 merely *entitled* the adjudicator to determine more than one dispute and did not compel this.

Further, s.111 in any event precluded ESG from relying on cl.30.3 to refer the 'true value' dispute prior to satisfying its obligation to pay the 'notified sum'; as explained (obiter) in *S&T (UK) Ltd v Grove Developments Ltd*, the Act "*...create[s] a hierarchy of obligations...the immediate statutory obligation is to pay the notified sum...Therefore both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of work before he has complied with his immediate payment obligation*".

Those principles were followed in *Davenport v Greer*, in which the judge held that "*...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*".

In light of those authorities, the Court held it was now clear that where a valid application for payment has been made, an employer who fails to issue a valid Payment Notice or Pay Less Notice must comply with its immediate payment obligation under s.111 before seeking to establish the true valuation of the work. The entitlement to commence such adjudication under s108 "*is subjugated to the immediate payment obligation in section 111. Unless and until an employer has complied with its immediate payment obligation... it is not entitled to commence, or rely on, a 'true value' adjudication under section 108.*"

Applying the above principles, the Court held that ESG's exercise of any contractual right under cl. 30.3 to require the adjudicator to determine the true value dispute together with the notified sum dispute was subject to ESG'S compliance with its immediate payment obligation. ESG had failed to comply and was not entitled to adjudicate on the true value dispute, whether pursuant to clause 30.3 or otherwise.

Further, even if both disputes were before the adjudicator, ESG would still have needed to specify a lesser sum in a timeous payment or pay less notice prior to any determination of the true value dispute. ESG had not done so and had not paid the notified sum, such that the adjudicator could not at that stage go on to determine the true value dispute.

### The Decision

The Court rejected all grounds of defence and granted BHL summary judgment.

**Stay of enforcement** In a final attempt to avoid payment, ESG sought to stay enforcement (in line with the principles in CPR 83.7 and *Wimbledon v Vago*)

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asserting that there was a real risk that subsequent determination requiring return of any part of the judgment sum would go unsatisfied as a result of BHL's financial position and/or that BHL had organised its financial affairs for the purpose of dissipating or disposing of the judgment sum.

The Court preferred BHL's evidence and declined to grant the stay. ESG's submission that a stay should be ordered pending final determination of the 'true value' of AfP23 by subsequent adjudication or litigation, was contrary to general rule that adjudicators' decisions are intended to be enforced summarily. The Second Decision was valid and enforceable, and the case was not so exceptional as to justify a stay of execution.

### Analysis:

The case provides clarity and serves as a stark reminder that s.111 creates an immediate obligation to pay the notified sum; and that the employer's right to commence a true value adjudication is subjugated to this requirement. Employers should be sure to meet payment and pay less notice deadlines rather than allowing the contractor's application to dictate the notified sum.

The case also stands as a reminder to practitioners to exercise caution when drafting contractual provisions so as to ensure their compliance with the Act; and of ensuring that any jurisdictional challenges are effectively stated at the appropriate stage so as to avoid the risk of waiver.

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