



Pay first, or risk disappointment: court declines to save 'true value' adjudication commenced prematurely

In *Henry Construction Projects Ltd v Alu-Fix (UK) Ltd* [2023], the TCC dismissed a contractor's application for summary judgment to enforce a 'true value' adjudication decision in its favour as that adjudication had been commenced before the contractor had discharged its immediate payment obligation to its subcontractor arising from an earlier dispute.

This was notwithstanding the earlier award had, in the meantime, been paid.

Background

In June 2021, Henry Construction Projects Ltd ("Henry") engaged Alu-Fix (UK) Ltd ("Alu-Fix") under a JCT standard building sub-contract, to carry out works at a boutique hotel development in central London (the "Sub-Contract").

Following a dispute, on 11 November 2022, Alu-Fix terminated the Sub-Contract at will pursuant to clause 7.12. This triggered the payment mechanism contained in clause 7.11, which required Alu-Fix to submit an application for payment. Alu-Fix submitted that application on 15 November 2022 in the sum of c.£260k plus VAT, and Henry had until 13 December 2022 to pay the notified sum.

The Adjudications

On 15 December 2022, following Henry's failure to pay, Alu-Fix referred the matter to adjudication on what is commonly referred to in the construction industry as the 'smash and grab' basis (the "SGA")

– that is to say that Henry had failed to give notice of its intention to pay less than the notified sum.

In response, Henry contended it had submitted two potentially valid pay less notices on 25 November and 12 December 2022 respectively.

On 18 January 2023, before any decision had been reached in the SGA, Henry commenced its own 'true value' adjudication claiming that Alu-Fix was, as a result of overpayment, indebted to Henry in the sum of c.£235k plus VAT (the "TVA").

On 23 January 2023, Alu-Fix wrote to the TVA adjudicator, Mr Molloy, challenging his jurisdiction and requesting that he resign. Mr Molloy declined to resign.

By a decision dated 27 January 2023, the SGA adjudicator, Mr Rayner, instructed Henry to pay Alu-Fix the sum of c.£260k by 3 February 2023 (the "Rayner Decision"). Mr Molloy stayed the TVA pending payment by Henry of the Rayner Decision; and confirmed he would resign if payment was not made in accordance with that Decision. On 2 February 2023, Henry made full payment to Alu-Fix in accordance with the Rayner Decision and the TVA stay was lifted.

The Dispute

By a decision dated 6 March 2023, in respect of the TVA, Mr Molloy found that Alu-Fix was indebted to Henry in the sum of £190k plus interest (the "Molloy Decision").

Alu-Fix failed to comply with the Molloy Decision and argued that Mr Molloy had had no jurisdiction to reach his decision, as Henry had commenced the TVA before making payment of the notified sum pursuant to s.111 of the Housing Grants, Construction and Regeneration Act 1996 (the "Act").

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In response, Henry applied to the TCC for summary judgment, maintaining it should be allowed to rely upon the Molloy Decision, having made payment of the Rayner Decision, which had followed the raising, by Henry, of a 'genuine dispute', namely, contending the validity of the two pay less notices.

Key Legal Principles

The key legal principles set out in *Bexheat v Essex Services Group* [2022] (see our previous bulletin [Bexheat Ltd v Essex Services Group Ltd 2022](#)) and relied on by the Judge in this case were as follows:-

- 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 Act, an employer who fails to issue a valid payment or pay less notice must pay the notified sum in accordance with s.111 of the Act by the final date for payment.
- The courts will take a robust approach to adjudication enforcement, enforcing adjudicators' decisions by summary judgment regardless of procedural errors, fact, or law. The exceptions to this rule are where the adjudicator has acted without jurisdiction or has breached the rules of natural justice.
- Where a party is required to pay a notified sum following its failure to issue a valid payment or pay less notice, such party is entitled commence a true value adjudication in respect of that sum (but only if it has complied with s.111 of the Act).

Held

The Judge, DJ Baldwin, refused Henry's application for summary judgment to enforce the Molloy Decision for the following reasons:-

In accordance with s.111(1) of the Act, the notified sum must be paid by the final date for payment which creates an immediate payment obligation. The Rayner Decision determined the final date for payment by Henry was 13 December 2022 and that was the date the immediate payment obligation commenced. The Judge rejected Henry's contention that the final date for payment was 3 February 2023 and described this date as the "*final date for late payment*". As such, Henry had not been entitled to commence a TVA on 18 January 2023, without having first discharged its immediate payment obligation pursuant to the Rayner Decision, and as a result Mr Molloy lacked jurisdiction.

The court also made observations regarding Henry's submission that there had been a "genuine dispute" as to any purported immediate payment obligation. The Judge considered that Henry's argument as to the existence of a genuine dispute risked tipping the balance unfairly towards the disputing party and essentially prejudiced the right of the payee to be paid, which would ultimately undermine the cashflow policy of the Act. To find otherwise would amount to asking the court to launch a value judgement as to whether any rejected dispute raised was "*genuine*" or not.

The Judge did add that if the Rayner Decision had upheld a "zero" pay less notice, or the validity of Alu-Fix's underlying application had been successfully challenged, then there would in his view have been no notified sum within the meaning of the Act and therefore no immediate payment obligation. In those circumstances, "*the TVA may well not, on the facts, be found to be premature and reliance on it might well be permitted*".

Analysis

This case lends further support to the court's policy of 'pay now, argue later'. Although it does not fully close the door on commencing a true value

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adjudication prior to the outcome of a SGA and later relying on the TVA, it ought to serve as further deterrent to those considering such a course of action, unless they have, in the words of the Judge, *“a sufficient level of confidence that any dispute raised [in the SGA] should result in a finding of no immediate payment obligation having been established.”*

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