Neutral Citation Number: [2023] EWHC 278 (TCC)

Case No: HT-2022-000230

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

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 10 February 2023

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- - - - - - - - - - - - - - - - - - - -

Between :

WRB (N.I.) LIMITED

Claimant

- and -

HENRY CONSTRUCTION PROJECTS LIMITED

Defendant

- - - - - - - - - - - - - - - - - - - -

James Frampton (instructed by **Quigg Golden Solicitors LLP**) for the **Claimant**
Joshua Brown (instructed by **Archor LLP**) for the **Defendant**

Hearing date: 15 September 2022

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Approved Judgment

This judgment was handed down remotely on 10 February 2023
by circulation to the parties and by release to the National Archives.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. By this action, WRB (NI) Limited ("WRB") seeks to enforce an adjudicator's decision in its favour against Henry Construction Projects Limited. The claim arises out of a development at The Fox, 413 Green Lanes, Palmers Green, London, N13. Henry Construction was the main contractor for the development. By a sub-contract, Henry Construction engaged

"WRB Limited" to design, supply, install, test and commission the mechanical, electrical and public health systems for the development for a total sum of £2,180,000 plus VAT.

2. The oddity of this case is that WRB is and always has been a dormant company and disputes that it was party to the sub-contract. It argues that the true employer under the sub-contract was WRB Energy Limited while Henry Construction contends that it contracted with the claimant. The parties might yet litigate that question, but the issue was resolved for present purposes by an earlier adjudication in favour of Henry Construction's argument.

3. Henry Construction does not resist judgment to enforce the adjudicator's decision although the parties are in dispute as to sum for which judgment should be entered. The principal issue is that Henry Construction seeks a stay of execution of any judgment.

THE ADJUDICATION

4. On 30 March 2022, WRB served a notice of adjudication in respect of the value of its interim application for payment number 15. Henry Construction had already paid the sum of £1,757,483.36 but WRB claimed that it was entitled to a further payment of £815,618.37. By its response, Henry Construction argued that it had overpaid WRB and sought a repayment of £563,395.65.

5. By a corrected decision dated 18 May 2022, the adjudicator, John Riches, decided that the true balance owed to WRB was £120,655.35 plus interest of £96.79 to 13 May 2022. He then directed that Henry Construction should pay the sum of £120,752.14 including the interest payable to 13 May 2022. He directed that thereafter Henry Construction should pay interest until payment at the daily rate of 99p.

6. In addition, the adjudicator directed that Henry Construction should pay any VAT payable upon the capital sum. He stated that his total fees and expenses were £18,775.80, being £15,646.50 plus VAT. He then directed as follows:

> "189. In the first instance WRB shall pay my fees and expenses. Both parties shall remain jointly and severally liable for those fees and expenses.
>
> 190. Although their recovery is much less than the claim WRB are a net winner therefore HCP shall be liable for the whole of my fees and expenses.
>
> 191. HCP shall reimburse the whole of those fees and expenses to WRB at the same time as making payment of this Award."

7. Henry Construction made no payments pursuant to the adjudicator's decision.

THE JUDGMENT SUM

8. On 19 May 2022, WRB's solicitors sought payment of the sum of £139,434.90 alleged to comprise the sum due (£120,655.35), the interest awarded to 13 May (£96.79), modest further interest then due (£6.93), and the adjudicator's fees and expenses (£18,775.80). The maths was wrong and it will be noted that WRB did not then seek any VAT on the adjudicator's valuation.

9. Henry Construction did not make payment and asked for an invoice. An invoice was then issued on WRB Group paper. Hedging its bets, the invoice was simply raised in the name "WRB" and removed all other details of the business that was raising the invoice. It now corrected the maths and sought payment of £139,534.87 into the solicitor's bank account. Again, no VAT was sought on the works.

10. Henry Construction raised its concerns that the invoice was not properly drawn and did not include the necessary statutory information as to the company raising the invoice. Accordingly, on 24 May 2022, WRB raised a revised invoice including its full name, WRB (N.I.) Limited, and details of its registered office and company number. The solicitors explained that their client did so expressly without prejudice to its primary case that it was not the true sub-contractor. They expressly added that WRB did not seek VAT on this payment "at this time."

11. This adjudication claim was issued on 8 July 2022. The claim was pleaded in the sum of £136,398.64, being £120,752.14 inclusive of interest to 13 May 2022 and the adjudicator's net fees & expenses of £15,646.50. It recited the adjudicator's decision that Henry Construction was also liable to pay any VAT and sought payment of the "applicable VAT." On the same day, WRB applied for summary judgment. The draft order again fudged the tax issue and sought payment of the "applicable VAT."

12. In his skeleton argument, James Frampton, clarified that WRB seeks VAT on the adjudicator's valuation of the works. It therefore sought the new total sum of £173,026.32 comprising:

    12.1 £144,902.57 (being £120,752.14 plus VAT) for the substantive sum and interest to 13 May 2022;

    12.2 £123.75 for further interest to 15 September 2022;

    12.3 £18,775.80 (being £15,646.50 plus VAT) for the adjudicator's fees and expenses; and

    12.4 the further sum of £9,224.20 (£7,686.83 plus VAT) for the adjudicator's additional fees and expenses.

13. There are some immediate problems with that formulation. First, I note that WRB never directly asserted an entitlement to VAT. Indeed, the solicitors were astute pre-issue to make clear in their letter of 24 May 2022 that the company did not then seek VAT. Consistently, I have not been shown any VAT invoice, or indeed anything to indicate that the claimant was even VAT registered. Given WRB's dormant status that I will return to later in this judgment, it seems to me most unlikely that it is entitled to charge VAT on the work done. In any event, there is simply no evidence before the court to establish WRB's entitlement to charge VAT. In oral argument, Mr Frampton sensibly recognises the force of these points and concedes that he cannot pursue summary judgment for VAT on the sum payable under the sub-contract.

14. Secondly, the claim for the additional fees and expenses was not included in this application for summary judgment. Such additional claim is, however, pleaded in the Amended Particulars of Claim which were amended by consent pursuant to r.17.1(2)(a) of the Civil Procedure Rules 1998 on 2 September 2022. The amended statement of case pleads that the adjudicator issued a claim on 25 July 2022 against both parties to these enforcement proceedings to recover his unpaid fees. Those proceedings were said to have been settled on 18 August by a Tomlin order under which WRB agreed to pay the additional sum of

£7,686.84 comprising an administration fee; additional fees; interest; the court fee; and legal costs. WRB argues that the additional liability arose from Henry Construction's failure to comply with the adjudicator's decision. While the claim was amended, there was, however, no amended application for summary judgment or fresh evidence. Instead the claimant simply seeks to place material before the court in respect of the amended case. That approach is, in my judgment, hopeless:

14.1 The only application for judgment before the court is that contained in the application of 8 July.

14.2 Rule 24.4(3) is clear in requiring the respondent to have at least 14 days' notice of the issues which it is proposed that the court will decide.

14.3 Further, it would in any event have been too late to file further evidence in accordance with either the rules or the timetable set by O'Farrell J.

15. Accordingly, I give summary judgment for the sum of £139,799.20 comprising:

15.1 £120,752.14 plus further interest of £271.26 to the date of this judgment; and

15.2 £18,775.80 by way of reimbursement of the adjudicator's fees and expenses that Henry Construction concedes were paid by WRB.

THE APPLICATION FOR A STAY

16. By its cross-application, Henry Construction formally applies for a stay of execution. The company's Commercial Manager, Thomas Gallagher, asserts that it has cross-claims totalling £754,495.72 for liquidated damages and costs incurred in supplementing WRB's labour, plant & materials. At the time of his statement (made on 3 August but signed on 11 August 2022), Mr Gallagher said that he anticipated issuing the notice of adjudication the following week.

17. Joshua Brown, who appears for Henry Construction, rightly accepts that the existence of a possible cross-claim does not provide a defence to these enforcement proceedings. It is of course trite that statutory adjudication provides temporary finality and that the proper approach is encapsulated in the aphorism pay now, argue later. That said, Mr Brown argues that WRB's parlous financial standing means that it is highly probable that any monies paid now will not be repaid in the event that Henry Construction should succeed in its own claim.

18. Mr Brown stresses that only a short stay is required while his client establishes its alleged entitlement to its larger cross-claim.

19. Mr Frampton objects that even a short stay would undermine the statutory purpose of construction adjudication. He stresses that WRB has always been dormant and yet Henry Construction chose to commence the first adjudication against WRB and contest the jurisdiction challenge that it was not the true contracting party. Having succeeded in obtaining a decision that WRB was the true sub-contractor, it cannot now complain that it finds itself being required to pay monies owed to a dormant company. Indeed, if Henry Construction is right that WRB was the true sub-contractor, it chose to place the sub-contract with a dormant company and accept the risks inherent in doing business with such a company.

20. Mr Frampton therefore argues that a stay should be refused upon a proper application of the principles summarised by His Honour Judge Coulson QC, as he then was, in Wimbledon Construction Company 2000 Ltd v. Vago [2005] EWHC 1086 (TCC), (2005) 101 Con LR 99. While he submits that it should not be necessary, if the court would otherwise be minded to grant a stay, he confirms that WRB Energy Limited offers to guarantee the repayment of any part of the judgment sum in the event that Henry Construction obtains a valid order, decision or judgment in its favour for payment within three months of Henry Construction's own payment. Further, WRB offers to extend such period to six months should the court consider three months to be too short.

DISCUSSION

21. Rule 83.7(4)(a) of the Civil Procedure Rules 1998 provides that the court may stay the execution of a judgment or order if there are "special circumstances which render it inexpedient to enforce the judgment or order." In Wimbledon Construction Company 2000 Ltd v. Vago, Judge Coulson QC helpfully summarised the applicable principles at [26]:

> "(a) Adjudication … is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
>
> (b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.
>
> (c) In an application to stay the execution of summary judgment arising out of an adjudicator's decision, the court must exercise its discretion … with considerations a) and b) firmly in mind (see AWG Construction Services v. Rockingham Motor Speedway [2004] EWHC 888 (TCC)).
>
> (d) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances … rendering it appropriate to grant a stay (see Herschell Engineering Ltd v. Breen Property Ltd (unreported) 28 July 2000, TCC).
>
> (e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd (2000) 73 Con LR 135, [2001] 1 All E.R. (Comm) 1041, CA and Rainford House Ltd v. Cadogan Ltd [2001] B.L.R. 416).
>
> (f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:
>
> (i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see Herschell); or
>
> (ii) the claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see Absolute Rentals v. Glencor Enterprises Ltd [2000] C.I.L.L. 1637)."

22. In LXB RP (Crown Road) Ltd v. Squibb Group Ltd [2016] EWHC 2669 (TCC), Stuart Smith J, as he then was, cited Wimbledon and added, at [11]:

> "Without derogating from that statement of principle a decision to enforce or not is an exercise of the court's discretion, which must balance the well-known

> interest in enforcing valid adjudication decisions - for reasons that have been repeated frequently elsewhere and do not need further repetition now - against the perceived or actual risk of future injustice if the party subsequently becomes unable to reciprocate in the payment of what it owes under the same contract."

23. In Herschel Engineering Ltd v. Breen Property Ltd the defendant sought a stay of execution where the claimant company had only been formed three months before the contract was entered into. In refusing a stay, His Honour Judge Lloyd QC considered this highly relevant. He observed:

> "In my view, on an application for a stay where a party has [entered] into a contract with a company whose financial status is or may be uncertain and finds itself liable to pay money to that company under an adjudicator's decision, the question may properly be posed: is this not an inevitable consequence of the commercial activities of the applicant that it finds itself in the position it is in? It has, as it were, contracted for the result. That is not normally a ground for avoiding the consequences of a debt created by the contractual mechanism … It is very easy (and prudent and relatively inexpensive) to carry out a search or to obtain credit references against a company whose financial status and standing is unknown. Not to do so inevitably places a person at a significant disadvantage. It has only itself to blame if the company selected by it proves not to have been substantial (as opposed to a material deterioration in its finances since the date of contract)."

24. Likewise, in Granada Architectural Glazing Ltd v. PGB P&C Ltd [2019] EWHC 3296 (TCC), Nicholas Vineall QC, sitting as a Deputy Judge, refused a stay in a case where the claimant was balance-sheet insolvent at the date of the contract and at the time of enforcement but, based on support by way of inter-company loans, had always paid its debts as they fell due. While the primary ground for refusing a stay was that the judge rejected the argument that the company would probably be unable to pay, the deputy judge added that he would in any event have rejected the application for a stay because the claimant's position had not changed. He observed pithily, at [43], that:

> "RGB chose to contract with Granada. In the absence of a material change in the financial position of Granada, it seems to me that it would be unfair and contrary to the spirit of the adjudication regime to allow RGB to escape its liability to meet an adjudication award on the basis of the essentially unchanged financial position of Granada. Accordingly, I decline to order a straightforward and unconditional stay of execution."

25. Of particular note is the case of Westshield Civil Engineering Limited v. Buckingham Group Contracting Limited [2013] EWHC 1825 (TCC), 150 ConLR 225, in which Akenhead J refused a stay. There are a number of parallels with the instant case in that the claimant had been a dormant company both at the time of the sub-contract and enforcement proceedings, and had itself contended that the true contracting party was a different and solvent company. The parties were, however, bound by an earlier adjudication decision that the claimant was the true sub-contractor. In Westshield, the associated company that claimed to be the true sub-contractor offered to guarantee the repayment of the judgment sum in the event that it was later determined that it was the true contracting party.

26. In my judgment, this is a case where it is probable that, should the court refuse a stay and Henry Construction later establish its own cross-claim, WRB would be unable to repay the

judgment sum. While such risk could be addressed, or at least mitigated, by the guarantee offered by WRB Energy Limited, I am not satisfied that Henry Construction has established that it would be inexpedient to enforce the adjudicator's decision:

26.1 First, upon its own case, Henry Construction chose to place the sub-contract with a newly formed dormant company. The risk that it now complains of is, to quote Judge Lloyd's observations in Herschell, the "inevitable consequence" of having placed this sub-contract with a dormant company. It is "the result for which it contracted." As the deputy judge observed in Granada, it would be unfair and contrary to the spirit of the adjudication regime to allow Henry Construction now to escape its liability to meet an adjudication award on the basis of WRB's essentially unchanged financial position.

26.2 Secondly, it was Henry Construction that resisted the argument that the true sub-contractor was WRB Energy Limited. It is not clear whether it considered there to be some forensic advantage in taking that line but it has essentially made its own bed.

26.3 Thirdly, this judgment became regrettably delayed behind a judgment in another very substantial TCC case. By the time it is handed down, Henry Construction will have had ample opportunity to establish its alleged entitlement upon its cross-claims.

27. Accordingly, I do not consider it necessary to require WRB Energy Limited to provide a guarantee and I dismiss the application for a stay.