Neutral Citation No: [2019] NIQB 117 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **HOR11264** *ICOS:* **18/084823** *Delivered:* **02/12/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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COMMERCIAL DIVISION

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BETWEEN:

FLEXIDIG LIMITED

v

M&M CONTRACTORS (EUROPE) LIMITED

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HORNER J

Ex Tempore

Introduction

[1] This is an application for summary judgment of an adjudication award made on 17 December 2018. It has obviously been the subject of some delay. The explanation offered to the court is that there had been attempts between the parties in the interim to achieve some final resolution of the dispute between them. That has not happened. I do not intend to add to that delay and therefore I am going to give this as an ex tempore judgment. If either side wishes to appeal then I reserve the right to provide a more detailed written judgment amplifying my reasons which of course will remain the same.

[2] First of all, I should say that I am grateful for the written and oral submissions from both counsel.

[3] This is an application to enforce the adjudication award made by Mr Dennis Baldwin almost a year ago on 17 December 2018. He determined that Flexidig Limited the sub-contractor, ("the plaintiff"), should pay to M&M Contractors (Europe) Limited, the main contractor, ("the defendant"), £462,456.20 together with the fees of the adjudicator of £17,525.50 inclusive of VAT in respect of various disputes arising out of a sub-contract entered into between the defendant and the plaintiff dated 9 March 2017. The defendant is a power telecoms, civil engineering and infrastructure contractor based in Belfast and the plaintiff is a

ground works and civil engineering contractor based in Yarburgh near Louth in Lincolnshire.

[4] The sub-contract required the plaintiff to carry out certain excavation and reinstatement works for the installation of ducts in footpaths, verges and carriageways in respect of the Virgin Media project known as Project Lightning in Louth ("the works") where, as I have noted, the defendant was employed by Virgin Media as the main contractor. The plaintiff commenced work in February 2017 and left the site in or about June 2018. The defendant complained, inter alia, that the plaintiff did not complete the sub-contract works, it had over measured and as a consequence had been paid money to which it was not entitled. But primarily the defendant claims that the works that were carried out had been done so defectively. I will refer to all claims collectively for ease of reference as defective work.

[5] A dispute had arisen because of the plaintiff's failure to pay to the defendant the on-account sum of £462,456.50 (to which VAT is not applicable) per the decision of Mr Dennis Baldwin, the adjudicator, dated 17 December 2018. I was told without contradiction that it is agreed that £12,679.52 is due to the defendant from the plaintiff.

[6] It would appear that soon after the date of the award in December 2018, the defendant issued an Order 14 summons on 7 January 2019. This was not pursued while it is alleged the plaintiff attempted to make good the defective work pursuant to an agreement that had been reached between the parties. The defendant did not seek to enforce the adjudication award then, but has now sought to do so nearly a year later and after the plaintiff had attempted to make good the defective work pursuant to the agreement reached between them. Quite understandably the defendant is now met with the defence of, inter alia, estoppel by convention. Any work which had to be carried out by the plaintiff has been executed. Any complaint the plaintiff says is motivated by bad faith. To be fair there are grounds for such claims. Firstly, it would appear that the Lincolnshire County Council and Virgin Media are content with the quality of at least a substantial proportion of the works which had been carried out by the plaintiff and that neither Virgin Media nor Lincolnshire County Council are making any claim that there are continuing problems with the execution of those works. Secondly, the email traffic suggested that it was the plaintiff who was pushing to have the "defective" work remedied and that it was the defendant who was resisting. Thirdly, Mr Lloye of the defendant on 28 August 2019 allegedly told Mr Bett of the plaintiff that he could not allow the plaintiff to proceed with any remedial work because it was diminishing the value of the adjudication award and that he intended to instruct other contractors presumably to run up costs until the plaintiff was "buried." Mr Lloye's response to this allegation from the plaintiff was, to put it as neutrally as possible, anodyne.

[7] In any event the standstill agreement came to an end at the tail end of 2019. The defendant then sought to enforce the adjudication award when by common consent much work had been carried out in the interim to remedy the "defective

work" which had not been carried out by the plaintiff which was the subject of the disputed adjudication award. In *Macob Civil Engineering Limited v Morrison Construction Limited* [1999] PLR 93 Dyson J said in respect of the introduction of the adjudication process as follows:

> "The intention of Parliament in enacting the Act was plain. It was to introduce the speedy mechanism for settling disputes in construction contracts on provisional interim basis, and requiring the decisions of adjudicators to be enforced, pending the final determination of disputes by arbitration, litigation or agreement …"

[8] This Court is a great supporter of the adjudication regime which requires construction disputes to be resolved promptly. This Court strives to provide speedy enforcement of adjudication awards. Here it 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.

[9] The plaintiff and the defendant dispute the effectiveness of those works which were carried out but not the fact that they were carried out. I asked if there was any clause in the standstill agreement that allowed a third party expert to determine where the remedial work had been carried out to the requisite contractual standard. There was no such term.

[10] The Court's position is, as I have said, hopelessly compromised. It cannot reach any conclusion about the work carried out because it has no evidence that would enable it to reach a definite conclusion. The first issue for the court to determine is whether the court should decline to enforce the adjudication award because the adjudicator in making the award of damages on account plainly got it wrong. The primary provision relating to the sub-contract is Clause 6 and that is:

> "The sub-contractor shall maintain and protect the sub-contract Works and shall make good at the sub-contractor's own expense at such time as to be decided by the Contractor, any defects in or damage to the sub-contract works to the satisfaction of the Contractor and the Client, at all times during the progress of the sub-contract works and thereafter for a period of two years following certification of completion of the equivalent works and services under the principal contract or for the period of 'Defects Liability' stated in the sub-contract order, whichever period is longer. Where the sub-contractor does not make good any

> sub-contract works to the satisfaction of the Contractor and the Client the Contractor may engage another contractor to, or the Contractor may itself make good the sub-contract works and the Contractor may deduct any costs, expenses, loss or damage which the Contractor suffers or incurs as a result of making good the sub-contract Works, from any monies due or which may become due to the sub-contractor (including any retention monies) of the Contractor may recover such costs, expenses, losses or damages from the sub-contractor as a debt."

[11] The adjudicator also mentions Schedule 3 but both parties did not attempt to argue that this was relevant to the debate between them. Of course, this court will not step in and refuse to enforce an award because it would have come to a different view to that of the adjudicator. But the plaintiff argues that the adjudicator has made an egregious error of law when he says in his decision that the fact that the plaintiff is yet to incur the costs of actually rectifying those defects is no bar to the defendant recovering these costs as damages from the plaintiff by way of a reasonable sum on account and as a contribution to such costs. In making his award the adjudicator makes various estimates as to what those costs will be. In the *Caledonian Modular Ltd v City Developments Ltd* [2015] EWHC 1855 (TCC) at paragraph [12] Coulson J asked himself why was the judge being asked to deal with an enforcement on the very issue on which the adjudicator ruled against the defendant in the adjudication. He said in respect of the importance of the courts enforcing adjudicators' awards:

> "That is, of course, the general rule and it will apply in 99 cases out of 100. But there is an exception. If the case is a short and self-contained point, which requires no oral evidence or any other elaboration than that which is capable of being provided during a relatively short interlocutory hearing, then the defendant may be entitled to have the point decided by way of a claim for a declaration."

[12] So is this the uncommon and rare situation whereby looking at the papers the court can reach a conclusion that the adjudicator got it wrong and that he was not entitled under the contract to make the award he did? The short answer in the instant case is that the adjudicator did obviously err as he was not entitled to award any sum on account for work to be carried out. Clause 6 provides that during the course of the contract, as was the position here:

(a) The sub-contractor shall make good any defects at the sub-contractor's expense during the period of such sub-contract for 2 years following certification of completion.

(b) If the sub-contractor does not make good the sub-contract works the contractor can engage another contractor to make good the works and the contractor may then deduct the costs which the contractor incurs from any monies due or which may become due to the sub-contractor or may recover his costs as a debt.

[13] This clause does not permit the recovery of prospective costs on account. It permits only the recovery of incurred costs either by way of a set-off or by way of recovery of the debt.

[14] Under the sub-contract the adjudicator should obviously not have produced the formulae he did to estimate the prospective costs of repair of the disputed defects. He was obviously wrong in respect of awarding a payment on account. It is agreed that the balance due in respect of the actual work is the sum of £12,679.52.

[15] Secondly, as I have noted, it is alleged that there is an estoppel. There was an award which the defendant did not seek to enforce. Rather the defendant attempted to negotiate a settlement under a standstill agreement which has now broken down. Mr Dunlop said that there is an estoppel by convention. He quoted the Court of Appeal in England and Wales in *Dixon v Blindley Health Investments Limited and Others* [2015] EWCA Civ 1023 at paragraph [73] where the court said:

> "Estoppel by convention is not founded on a unilateral representation, but rather on mutually manifest conduct by the parties based on a common, but mistaken, assumption of law or fact: its basis is consensual. Its effect is to bind the parties to their shared, even though mistaken, understanding or assumption of the law or facts on which their rights are to be determined (as in the case of estoppel by representation) rather than to provide a cause of action (as in the case of promissory estoppel and proprietary estoppel); and see Snell's Equity 33rd Ed at 12-012. If and when the common assumption is revealed to be mistaken the parties may nevertheless be estopped from departing from it for the purposes of regulating their rights inter se for so long as it would be unconscionable for the party seeking to repudiate the assumption to be permitted to do so …"

[16] If I am wrong on the first issue and the defendant could have enforced the award straightaway for the full amount, then once the parties entered into an agreement for a standstill to allow the plaintiff to carry out the works and the plaintiff did carry out the works, the defendant then on the face of it is estopped from enforcing the award in respect of those works in respect of which an award

was made on account. So again the same result is achieved. The defendant is entitled only to the sum of £12,679.52 which I order should be paid into court. It would be unconscionable in all the circumstances for the defendant to receive more.

[17] What is required is another adjudication to assess what works have been carried out defectively or not carried out at all.

[18] Having reached a settlement that required the plaintiff to carry out what were agreed works, it would be both unfair and unjust to allow the defendant once those works had been completed to turn the clock back to enforce the earlier adjudication award in respect of those very same works. In these circumstances, if I had made any different order in respect of the sum found by the adjudicator, I would have stayed the judgment because fairness and justice demands it. In *Equitix ESC CHP (Wrexham) Limited v Bester Generacion UK Limited* [2018] EWHC 177 (TCC) Coulson J said at paragraph [77]:

> "For these reasons, I conclude that, as a matter of fairness and justice between the parties, some form of stay is necessary."

[19] Finally, there is the issue of impecuniosity. There is cogent evidence before this court that the defendant is in a parlous financial position. I refer to my earlier decision in the application of *Flexidig Limited v M&M Contractors (Europe) Limited* (HOR10791) where I set out the relevant principles to be applied where it is likely that the paying party will be unable to recover the sum paid on foot of an adjudication award if it subsequently succeeds at the trial. In all the circumstances I direct that the plaintiff pay the sum of £12,679.52 into court.