Neutral Citation Number: [2023] EWHC 2012 (TCC)

Case No: HT-2023-000160

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 02.08.2023

Before:

Adrian Williamson KC
Sitting as a Judge of the High Court

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Between:

ISG RETAIL LIMITED	**Claimant**
- and -	
FK CONSTRUCTION LIMITED	**Defendant**

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- -

SEAN BRANNIGAN KC and SIMON HALE (instructed by **Mantle Law**) for the **Claimant**
ALEXANDER HICKEY KC and MEK MESFIN (instructed by **Addleshaw Goddard LLP**) for the **Defendant**

Hearing dates: 22 June, 14 July and 31 July 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 02 August 2023 at 10:30am.

ADRIAN WILLIAMSON KC:

1. As explained in my earlier Judgment of 14th June 2023, these parties have been and are engaged in numerous disputes and proceedings. Reference should be made to that Judgment for the relevant background.

2. This Judgment, however, is confined to a single issue, namely ISG's application for the repayment of circa £1.7m, which has been described as the "Wood Overpayment". This issue arises as follows.

3. By a Notice of Adjudication dated 19th January 2023, FK sought the following redress from the Adjudicator, Mr Wood:

> "*16. The adjudicator is requested to decide that:*
> *16.1. ISG failed to issue a valid payment notice and/or pay less notice in respect of Application Nr 16;*
> *16.2. ISG is to pay FK the sum of £1,691,679.94 plus VAT as applicable or such other sum as the Adjudicator decides…*"

4. The basis of this contention is succinctly set out in the Notice as follows:

> "*7. On 27 September 2022 FK submitted its application for payment number 16 ("Application Nr16") in the gross sum of £4,590,478.67 which after the deduction of retention and previously certified amounts gave an amount due of £1,691,679.94 plus VAT. The dispute concerns the amount that ISG should have paid to FK as a result of ISG failing to issue either a payment notice or an effective pay less notice in response to Application Nr 16.*
> *8. ISG did not issue a payment notice against Application Nr 16 but purported to issue a pay less notice on 28 October 2022.*
> *9. ISG's purported pay less notice in respect of Application Nr 16 was not effective as it was not issued within the prescribed period as it was issued after the final date for payment, being 23 October 2022. ISG was therefore required to pay to FK the amount stated as due in Application Nr 16.*
> *10. Under Section 110B (4) of the Housing Grants Construction and Regeneration Act 1996 as amended ("the Act") as ISG did not give a payment notice then Application Nr 16 is to be regarded as a notice under section 110A (3) of the Act given pursuant to section 110A (2) of the Act (ie it is regarded as a payee notice to establish the notified sum). The notified sum was therefore the amount stated as due on Application Nr 16 ie £1,691,679.94. ISG is required to pay the notified sum as it did not give an effective pay less notice.*"

5. By a Decision issued on 27 February 2023, Mr Wood essentially agreed with these contentions ("the Wood Decision"). He held as follows:

> "*61. I find that on a proper interpretation of the provisions of clause 2 of the Sub-Contract that FK's AFP No. 16 is a valid application that constitutes a valid payee's notice in default of payer's notice and is to be regarded as a notice compliant with the Act and thereby constituting the notified sum relevant to FK's AFP No. 16.*
> *Summary*

> *62. It is not in issue that ISG did not issue a payment notice in respect of FK's AFP No. 16. I find ISG also did not issue a valid pay less notice in respect of FK's AFP No. 16.*
> *63. I find FK's AFP No. 16 is to be regarded as a notice complying with s110A(3) given pursuant to section 110A(2) of the Act and I find ISG is to pay FK the ("notified") sum of £1,691,679.94, plus VAT within seven (7) days of the date of this Decision.*
> *64. In summary, I find FK has succeeded in its case against ISG*."

6. ISG did not pay these sums as ordered, and so FK brought enforcement proceedings. These were heard by Joanna Smith, J, and on 5th May 2023 she issued an order to enforce the Wood Decision. At that hearing, ISG advanced a number of arguments as to why the Decision should not be enforced. However, ISG did not (and indeed could not realistically) submit that Mr Wood had been wrong in law to accede to the "notified sum" argument set out at paragraph 10 of the notice of Adjudication.

7. In the meanwhile, ISG had brought yet another adjudication, this time before Mr Molloy. On 14th April 2023, Mr Molloy issued a Decision ("the Molloy Decision") in which he held, so far as relevant, as follows:

> "*1. The gross valuation of FK's Works at 28th February 2023 is £3,736,679.72.*
> *2. FK is entitled to an extension of time of 188 days.*"

8. On 5th May 2023 (the very same day as the order of Joanna Smith, J) ISG issued the present proceedings, seeking the following relief, so far as material, in respect of the Molloy Decision:

> "*1. A declaration that the Decision is to be enforced and FK is not entitled to recover more than the sum of £3,736,679.72 being the gross valuation decided by Mr Molloy in the Adjudication;*
> *2. A declaration that FK is to repay sums received over and above the £3,736,679.72 gross valuation decided by Mr Molloy in the Adjudication*."

9. On 13th and 14th June 2023, I determined issues between these parties on two sets of Part 8 proceedings:

    a. HT-2022-000424 ("the Shawyer Proceedings"). This was a notified sum dispute on Project Barberry; and
    b. HT-2022-000430 ("the Triathlon Proceedings"). This also concerned a notified sum dispute, but on a different project, Project Triathlon.

10. In my Judgment in the Shawyer Proceedings, I held that Mr Shawyer had been wrong in his construction of section 110B of the Act:

> "*10. The question for me, therefore, is whether AFP 14 was, by virtue of the provisions of s.110B(4), to be regarded as a notice complying with s.110A(3).*
> *11. Although in their evidence and skeleton arguments, various other issues were canvassed by the parties, leading counsel for the parties narrowed the question before me, essentially, to one of statutory interpretation, namely whether AFP was submitted "in accordance with the contract" as required by s.110B(4)(b) of the Act.*

> *12. As to that, Mr Brannigan KC, who appeared for ISG, made the simple submission that AFP 14 was, by virtue of being sent a day late, not "in accordance with the contract." Mr Hickey KC and Mr Mesfin, who appeared for FK, argued that AFP 14 was saved by the provisions of cl.2(6), which allowed a late application of payment, nonetheless, to be treated as valid…*
> *14. In my view, this clause, although it allows a late application for payment to be treated as valid, does not render it an application "in accordance with the contract" for the following reasons:*
> *(1) the application is still late and therefore not in accordance with the contract. Indeed, cl.2(6) refers in terms to lateness;*
> *(2) the application is by definition "submitted after the date required for its submission," i.e., it is not in accordance with the contract*."

11. On 22nd June the parties once more appeared before me, on this occasion upon ISG's application to enforce the Molloy Decision.

12. On that occasion, I also gave ISG permission to amend its Particulars of Claim in the Molloy enforcement proceedings, subject to complying with certain undertakings to issue and serve an application notice for permission to amend and an application for summary judgment on the amended claim. In summary, ISG's amended case sought declarations in respect of (and repayment of) the sum of £1,751,063.70 paid to FK by ISG on 16 May 2023 ("the Wood Overpayment"), plus interest thereon. This sum had been paid by ISG pursuant to the Judgment of Joanna Smith, J, but ISG now sought to argue that the Wood Decision could no longer stand in the light of my judgment of 14th June.

13. Since the matters raised by the amendment had been put forward at relatively short notice, I considered, and ISG accepted, that these matters could not be disposed of on 22nd June 2023. The argument in respect of the Wood Decision therefore took place on 14th July 2023.

14. ISG's case was comparatively simple and may be gleaned from the following part of its skeleton argument for the 14th July hearing:

> "*10.1. ISG accepts that the Wood Decision was a valid, temporarily binding adjudicator's decision, and was properly enforced by the Smith Order on 5 May 2023.*
> *10.2. However, matters then moved on because, subsequent to the Smith Order, the Court held on 14 June 2023 in the Shawyer Judgment that FK could not rely upon a late AFP (AFP 14) as a default payee notice under s.110B(4) of the Act*
> *10.3. The Shawyer Judgment was a final determination of that issue of law within Part 8 proceedings.*
> *10.4. The Wood Decision, which was enforced by the Smith Order, was also a notified sum dispute in which FK again relied upon a late AFP as a default payee notice under s.110B(4) of the Act (AFP 16).*
> *10.5. There is no material difference of principle or law between the late AFP in the Shawyer Judgment (AFP 14) and the late AFP that underpins the Wood Decision and the Smith Order (AFP 16).*
> *10.6. In light of the Shawyer Judgment, the fundamental premise upon which the Wood Decision and the Smith Order were made – namely, there had been a valid AFP – has thus been shown to be wrong.*"

15. ISG rely heavily upon the decision of the Supreme Court in Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc [2015] 1 W.L.R. 2961 and, in particular, upon the following observations of Lord Mance, with whom Lords Wilson, Sumption, Reed and Toulson agreed:

> "*23. In my view, it is a necessary legal consequence of the Scheme implied by the 1996 Act into the parties' contractual relationship that Aspect must have a directly enforceable right to recover any overpayment to which the adjudicator's decision can be shown to have led, once there has been a final determination of the dispute… 24. I emphasise that, on whatever basis the right arises, the same restitutionary considerations underlie it. If and to the extent that the basis on which the payment was made falls away as a result of the court's determination, an overpayment is, retrospectively, established. Either by contractual implication or, if not, then by virtue of an independent restitutionary obligation, repayment must to that extent be required… Whether by way of further implication or to give effect to an additional restitutionary right existing independently as a matter of law, the court must have power to order the payee to pay appropriate interest in respect of the overpayment. This conclusion follows from the fact that, once it is determined by a court or arbitration tribunal that an adjudicator's decision involved the payment of more than was actually due in accordance with the parties' substantive rights, the adjudicator's decision ceases, retrospectively, to bind*."

16. It seems to me that, where the dispute referred to an Adjudicator has then been referred to the Court, or arbitration, and a different, final, outcome arrived at, it must follow that any sums paid over pursuant to the decision of the Adjudicator should be repaid. The temporarily binding effect of the (incorrect) decision must yield to the final effect of the (ex hypothesi) correct Judgment.[1]

17. If ISG had taken Part 8 proceedings which directly sought to reverse the Wood Decision, then I think that the analysis set out in the preceding paragraph must be the right one. In fact, ISG's Part 8 proceedings, which I decided on 14th June, did not directly relate to the Wood Decision. However, this seems to me to be a distinction without a difference: the effect of my Judgment of 14th June is to undermine the basis upon which Mr Wood proceeded, which can now be seen to be wrong.

18. As against that, FK raise a number of arguments.

19. Firstly, they say that ISG should seek to apply or apply for a repayment in a future payment cycle, taking advantage of the provisions of clause 2 of the Sub-Contract, which enables either party to claim/receive a payment in its favour. Whilst it may well be right that ISG could seek to so utilise this clause of the Sub-Contract, I do not consider that they are obliged to do so. The effect of Aspect v Higgins, it seems to me, is that the Court should put right the temporarily binding error perpetrated by the Adjudicator. As Lord Mance explained, once it is determined by a court that an adjudicator's decision involved the payment of more than was actually due in accordance with the parties' substantive rights, the adjudicator's decision ceases, retrospectively, to bind.

[1] FK are seeking permission to appeal against my Judgment of 14th June 2023 but, for present purposes, this Judgment must be assumed to be final and correct.

20. Secondly, they submit that the Wood Decision was founded not only upon Mr Wood's conclusions as to the effect of section 110B of the Act but also his assessments of arguments about estoppel and the like, which arguments are unaffected by my Judgment of 14th June. This is a bad point. Of course, if Mr Wood had decided in favour of FK on the basis of estoppel arguments, and this enabled them to argue that his decision survived my Judgment, that would be a reasonable basis upon which to maintain the enforcement of the Wood Decision. However, it is apparent from a perusal of the Wood Decision, that the estoppel arguments were raised by ISG and rejected by Mr Wood. ISG's case, which I accept, is that they can now show the Wood Decision was wrong, even assuming he was right to reach the conclusions which he did on estoppel.

21. Thirdly, FK point to yet another Adjudicator's Decision, that of Mr Ribbands dated 7th March 2023. It is apparent from Mr Ribbands' Decision that he was aware of the Molloy, Shawyer and Wood Adjudications. He therefore framed his Decision as follows, he being concerned with Application for Payment 13:

> "*85 I therefore decide that;*
> *1. ISG has failed to issue a valid payment notice and/or pay less notice in respect of Application Nr 13 (AFP 13);*
> *2. ISG is to pay FK the sum of £1,558,641.17 plus VAT as applicable subject to the operative part of Mr Shawyer's decision at paragraph 7.4 and/or the operative part of Mr Wood's decision at C. (page 13) not being complied with and, if not paid, subsequently declared unenforceable by the English Courts or the Parties agreeing that each aforementioned decision is not binding on them*."

22. FK submit that the Wood Decision has now been "declared unenforceable by the English Courts", so that ISG's obligation to pay FK the sum of £1,558,641.17 plus VAT has become operative, thus cancelling out any obligation on the part of FK to repay the sums awarded by Mr Wood.

23. I do not agree with this submission. First of all, I think the effect of Aspect v Higgins is that sums paid under the Wood Decision fall to be repaid once the dispute referred to Mr Wood has been finally determined in a contrary manner. It is not, then, appropriate to open up all the other disputes between these parties as a basis for avoiding that repayment. Secondly, as ISG point out, the formula used by Mr Ribbands dealt with the position where the sums awarded by Mr Wood were "not paid". However, in fact, these sums have been paid, and so this formula has no application.

24. For these reasons, it seems to me that ISG are entitled to the declarations they seek in respect of, and summary judgment for the repayment of, the sum of £1,751,063.70.

25. As a result of the above conclusions, it is now unnecessary to grant ISG any relief in respect of the Molloy Decision. Prior to the amendments referred to above, ISG had sought to argue that the Molloy Decision should be enforced and that this Decision placed a ceiling upon the overall sums which FK could presently recover. However, in the light of my conclusions in relation to the Wood Decision, ISG submit that the Molloy Decision becomes "otiose" and that no relief is required in respect thereof. This seems to be to be correct: the order for repayment set out above now renders unnecessary the grant of any relief in regard to the Molloy Decision.

26. Subject to the insertion of a small amount of text to clarify the inter-relationship between the Molloy and Wood Decisions, the Judgment above essentially replicates the draft Judgment circulated by the Court in the usual way on 21st July 2023. As is customary, the Court asked the parties to make suggestions for the correction of errors. ISG duly did this, by providing a small number of suggested typographical corrections on 24th July 2023.

27. However, on that same date, FK provided an 11 page Note of what were said to be "Substantive errors in [the] draft judgment".

28. On receipt of this document, I sent an email to the parties in the following terms:

> " *Thank you for the various proposed corrections. I have seen that FK in their Note ask me to "reconsider the Judgment so as to avoid falling into error", and have addressed extensive written submissions to this end.*
>
> *Although FK do not refer to the relevant jurisprudence in their Note of today's date, I have refreshed my memory as to the approach taken by the courts as summarised by Fraser, J, as he then was, in Gosvenor London Ltd v Aygun Aluminium UK Ltd [2018] EWHC 227 (TCC); [2018] Bus L.R. 1439, TCC, at paras 46–52, and have also looked at the White Book para 40.2.4.*
> *I note in particular his observation that:*
> *"Very careful consideration must be given to such applications, and litigants should not be given the ability to have a second bite at the cherry. The distribution of a draft judgment under CPR Part 40 should not be seen (as it seems to be, by many legal advisers currently) simply as an open invitation to embark upon an additional round of the litigation, remedying lacunae in their own evidence and raising further arguments. If a matter could have been raised at the first hearing, then it should be."*
>
> *However, in view of the application made by FK, and mindful of the approach taken in Gosvenor (see Judgment at para 45), I propose to take the following course;*
>
> 1. *The Judgment will not be handed down on Wednesday 26th July, as originally proposed.*
> 2. *ISG are to serve any submissions in response to the FK Note of 24th July by 1630 on Thursday 27th July.*
> 3. *There is to be a further hearing to enable the parties to make oral submissions as to the need for me to reconsider, or otherwise, the draft Judgment…*
>
> *I have, of course, not reached any conclusions as to the matters set out in FK's Note, and the above procedure will allow both parties to ventilate matters as they see fit.*"

29. ISG duly served submissions in response and a hearing took place on 31st July 2023. At that hearing, Counsel agreed that the approach set out in Gosvenor was the correct one, albeit Mr Hickey KC, for FK, also referred me to Note 40.2.8 in the White Book in relation to "Clarifying or amplifying reasons".

30. In advance of that hearing, I had asked Counsel to address me on the following points:

> "*1. The threshold criteria for reopening a draft Judgment.*

2. Where the points raised in FK 's Note of Corrections etc were dealt with in the skeleton argument for the hearing on 14 July and/or in oral argument."

(as noted above, item 1 in this email was largely agreed between the parties).

31. As regards item 2, I pressed Mr Hickey KC at the hearing on 31 July 2023 as to where the matters he sought to raise before me had been dealt with in his written and oral arguments presented at the hearing on 14th July 2023. I am afraid that I did not regard his response to this question as convincing. It seems to me that FK have, unfortunately, sought to "embark upon an additional round of the litigation, remedying lacunae in their own evidence and raising further arguments", the very practice deprecated in Gosvenor.

32. That, it seems to me, is sufficient to dispose of FK's application to reconsider the draft Judgment. If further points occur to a party upon receipt of the draft Judgment, that may be a matter to be raised before the Court of Appeal but it is not a basis for the Judge to reopen the draft Judgment.

33. Having said that, it may be helpful for me to deal briefly with the matters raised. These were, in summary:
    a. I overlooked the fact that ISG were still seeking to enforce the Molloy Decision, which placed a cap upon what ISG could recover in respect of the Wood Decision;
    b. FK were entitled to a determination of the "true value" of their work to date, in consequence of which the Wood Overpayment was not in fact an overpayment at all or, at least, not to the extent alleged by ISG;
    c. I had not taken into account various contentions set out in FK's Defence, which had been served following the amendments made by ISG and referred to above;
    d. In the passage dealing with estoppel (see paragraph 20 above) I had confused ISG's estoppel case before Mr Wood with that advanced by FK before him;
    e. I had not given proper effect to the Ribbands Decision.

34. In my view, there is no merit in any of these points:
    a. The Wood Decision has rendered enforcement of the Molloy Decision otiose. In my draft Judgment, for this reason, I made little reference to the Molloy Decision, but have added a small amount of text into the final Judgment to explain this;
    b. This argument falls outside the proper scope of the present proceedings. For the reasons set out at paragraphs 14 to 17 above, ISG are entitled to recover the Wood Overpayment because the temporarily binding effect of his incorrect decision must yield to the final effect of the (ex hypothesi) correct Judgment. All the other disputes between the parties fall outside the four corners of the present proceedings;
    c. It is not appropriate to invite the Court, after receipt of a draft Judgment, to work its way through a 64 paragraph Defence to seek to find possible grounds to refuse Summary Judgment;
    d. Having been referred to the Wood Decision (see paragraph 56 thereof in particular, which in turn refers to paragraph 46 of FK's Reply in the Adjudication), I ama satisfied that there was no confusion. The estoppel case advanced before Mr Wood was raised by ISG. FK did not put forward an estoppel case, but simply set out an argument as to the proper construction of clause 2 of the Sub-Contract. On this FK succeeded before Mr Wood, but I held in my Judgment in the Shawyer Proceedings that this was incorrect;
    e. I have dealt with the Ribbands decision at paragraphs 21-23 above.