

# FK Construction Limited v ISG Retail Limited

## Judgment handed down

1. By an adjudicator's decision dated 27 February 2023, Mr Allan Wood decided that ISG's pay less notice in response to FK's application for payment 16 was invalid and therefore a sum of £1,691,679.94 plus interest was due and owing to FK (the "**Wood Decision**"). ISG did not comply with the Wood Decision. FK issued enforcement proceedings.

2. ISG sought to resist enforcement of the Wood Decision not on the basis of conventional arguments relating to jurisdiction or natural justice, but rather "*purely on the grounds that this is a case in which it is said that the court has a discretion to order a set off or withholding against the adjudicator's award by reason of other adjudication decisions affecting the same parties.*"[1]

3. After setting out the well-known principles applicable to adjudication enforcement,[2] Joanna Smith J summarised the various authorities addressing the ability to set off against an adjudicator's decision. She noted that whilst the general position is that where parties to a construction contract engage in successive adjudications, at the end of each adjudication, absent special circumstances, the losing party must comply with the adjudicator's decision and cannot withhold payment on the ground of his anticipated recovery in a future adjudication, there are limited exceptions.[3]

4. The exception said to be relevant in this case was where a party sought to set off one adjudicator's decision against another. The parties had been busy in various disputes and there were six other adjudication decisions before the Court – three relating to the same project as the Wood Decision (known as Barberry) and three related to a different project under a different contract (known as Triathlon). As to those decisions relating to project Barberry, ISG's case focused on one decision, namely that of Mr Matthew Molloy of 14 April 2023 (the "**Molloy Decision**") reached only days before the hearing and against which FK had maintained jurisdictional challenges. The Molloy Decision concerned a request by ISG for a gross valuation of the works as at 28 February 2023.

5. Joanna Smith J set out the steps set out by Akenhead J at paragraph [40] of HS Works Ltd v Enterprise Managed Services Ltd [2009] EWHC 729 (TCC). Applying the guidance from HS Works to the Molloy Decision, the court decided that ISG was not permitted to resist enforcement of the Wood Decision.[4]

a) First, ISG failed at the first hurdle because the court was not able – on enforcement proceedings relating to the Wood Decision – to determine the validity of the Molloy Decision.

b) Secondly, the court considered that it was not able to give effect to a decision which was not yet enforceable.

c) Thirdly, ISG had not issued separate proceedings in relation to the Molloy Decision.

d) Fourthly, the Court rejected the suggestion that it had any discretion to permit a set off or withholding. The facts of the case were not within the territory of the exception envisaged in HS Works.

6. As to the decisions relating to project Triathlon, in light of the fact that even if they had been set off, their

financial impact was relatively limited, the parties and the court dealt with them briefly. The court nevertheless rejected the submission that it would be appropriate to apply the net effect of the Triathlon decisions to the Wood Decision. This was again because the steps identified in [HS Works](#) were not satisfied.[5] In light of her earlier conclusions, Joanna Smith J did not need to determine the interesting point of whether an adjudication decision in relation to one construction contract can be set off against an adjudication decision in relation to another construction contract, which remains open.

[1] Paragraph [2]

[2] Paragraph [18]

[3] Paragraph [20]

[4] Paragraph [37]

[5] Paragraph [45]

[Mek Mesfin](#) (instructed by Addleshaw Goddard) acted for the Claimant, and [Simon Hale](#) (instructed by Mantle Law) acted for the Defendant.

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