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CIARB
CONSTRUCTION LAW CASE UPDATE
30 MARCH 2021

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Adjudication and payment under hybrid contracts (*CSL v MW*)

First instance: [2019] EWHC 2547 (TCC)
Appeal: [2020] EWCA Civ 331 (CA)

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Construction law update

30 March 2021

Payment notices under hybrid contracts (*CSL v MW*)

1. What is a hybrid contract?
2. Summary of the facts in *CSL v MW*
3. The issue for the Court at first instance
4. The Court of Appeal decision
5. Lessons learned

1. What is a hybrid contract? Construction operations

- Section 105(1) of the Housing Grants, Construction and Regeneration Act 1996 ("**the Construction Act**"):

(1) In this Part "construction operations" means, subject as follows, operations of any of the following descriptions

(a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land (whether permanent or not);

(b) construction, alteration, repair, maintenance, extension, demolition or dismantling of any works forming, or to form, part of the land, including (without prejudice to the foregoing) walls, roadworks, power lines, electronic communications apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipe-lines, reservoirs, water-mains, wells, sewers, industrial plant and installations for purposes of land drainage, coast protection or defence;

(c) installation in any building or structure of fittings forming part of the land, including (without prejudice to the foregoing) systems of heating, lighting, air-conditioning, ventilation, power supply, drainage sanitation, water supply or fire protection, or security or communications systems;

(d) external or internal cleaning of buildings and structures, so far as carried out in the course of their construction, alteration, repair, extension or restoration;

(e) Operations which form an integral part of, or are preparatory to, or are for rendering complete, such operations as are previously described in this subsection, including site clearance, earth-moving, excavation, tunnelling and boring, laying of foundations, erection, maintenance or dismantling of scaffolding, site restoration, landscaping and the provision of roadways and other access works;

(f) Painting or decorating the internal or external surfaces of any building or structure.

1. What is a hybrid contract? Non-construction operations

- Section 105(2) of the Act ("non-construction" operations):

(2) The following operations are not construction operations within the meaning of this Part—

(a) drilling for, or extraction of, oil or natural gas;

(b) extraction (whether by underground or surface working) of minerals; tunnelling or boring, or construction of underground works, for this purpose;

(c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is—

(i) nuclear processing, power generation, or water or effluent treatment, or

(ii) the production, transmission, processing or bulk storage (other than warehousing) of chemicals, pharmaceuticals, oil, gas, steel or food and drink;

(d) manufacture or delivery to site of—

(i) building or engineering components or equipment,

(ii) materials, plant or machinery, or

(iii) components for systems of heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply or fire protection, or for security or communications systems,

except under a contract which also provides for their installation;

(e) the making, installation and repair of artistic works, being sculptures, murals and other works which are wholly artistic in nature.

1. What is a hybrid contract?
The 1996 Act and hybrid contracts

- Section 104(5) of the Act provides:

"Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations"

i.e. the Act also applies to "hybrid" contracts (sort of…)

2. Summary of the facts in *CSL v MW*

Brief summary of the facts in *CSL v MW*

- MW was main contractor engaged to design and build a power plant.
- MW engaged CSL as subcontractor to design and construct civil, structural and architectural works.
- The sub-contract was therefore a "hybrid" contract.
- The payment provisions in the contract complied with the mandatory provisions of the Act relating to payment.
- The payment provisions applied equally to construction and non-construction operations.
- The parties only identified a single figure in their applications for payment and payment notices.
- Adjudication clause gave an adjudication jurisdiction to deal with disputes insofar as the Act allowed him.

2. Summary of the facts in *CSL v MW*

- The Adjudication:
  - A dispute arose over an interim application for payment.
  - CSL referred the dispute to adjudication under the Act.
  - MW challenged the adjudicator's jurisdiction on the basis that the dispute as referred did not distinguish between construction and non-construction operations.
  - CSL withdrew its claim.
- The Part 8 Claim:
  - CSL subsequently issued a fresh application for payment.
  - The application allocated a sum for construction operations only.
  - MW served a payment notice which did not.
  - CSL commenced Part 8 proceedings seeking payment of the sum allocated to construction operations.
  - CSL claimed that MW's payment notice was not valid because it did not allocate a sum for construction operations only.

2. Summary of the facts in *CSL v MW*

Section 104(5) of the Act:

"*Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations*"

2. The issue for the Court at first instance
CSL v MW [2019] EWHC 2547 (TCC)

The issue for the Court:

In the case of a hybrid contract, whether a valid payment notice is required to identify separately the sum due in respect of construction operations only, along with the basis on which that sum has been calculated.

Mrs Justice O'Farrell decided it was not required.

3. The issue for Court at first instance
O'Farrell J - *CSL v MW* [2019] EWHC 2547 (TCC)

Mrs Justice O'Farrell at paragraph [56]:

"In my judgment where, as here, a hybrid contract contains a payment scheme that complies with, or mirrors, the relevant provisions of the Act for both construction and non-construction operations, a payment notice that does not separately state the sums due in respect of the construction operations is capable of constituting a valid notice for the purposes of sections 110A and 111 of the Act"

3. Mrs Justice O'Farrell J decision - *CSL v MW* [2019] EWHC 2547 (TCC)

- Mrs Justice O'Farrell gave four reasons at paragraphs [57] to [60]:

(1) The words of sections 111 (requirement to pay notified sum) and 110A (payment notices: contractual requirements) do not stipulate separate identification of the sums due in respect of construction operations [57].

(2) Although the Act applies only to construction operations, there is nothing to prevent the parties agreeing that their Act-compliant contract terms will extend to the excluded operations [58].

(3) Where the contract terms do so extend to excluded operations, there is no difficulty in principle applying s 111, because the statutory entitlement and the contractual entitlement operate in tandem [59].

(4) The parties agreeing to extend their Act-compliant contract terms to excluded operations does not undermine the purpose of the statutory payment provisions, instead the cash flow benefits simply extend to the excluded operations [60].

4. The Court of Appeal decision
Coulson LJ – *CSL v MW* [2020] EWCA Civ 331 (CA)

On appeal:

- CSL argued that the judge had erred in her interpretation of the Act.
- It said that the words "*only in so far as it relates to construction operations*" in Section 104(5) should be "read in" to all the later sections of the Act including those relating to payment notices.

However, Coulson LJ agreed with Mrs Justice O'Farrell.

"Finally, I am in no doubt that requiring parties to a hybrid contract to deal separately with construction and non-construction operations for every interim payment application, in circumstances where they have agreed one set of payment terms for both types of operation which comply with the Act, would create additional layers of complexity and cost" [63]

5. Lessons learned from *CSL v MW*

- It all depends on the terms of the contract.
- However, absent terms to the contrary, there is (potentially) a greater burden on payees (subcontractors / contractors) under hybrid contracts to separate out sums relating to construction operations.
- No such burden on the employer.
- Less scope for smash and grab adjudications.
- Parties to hybrid contracts should seek to agree appropriate payment provisions.
- Part 8 may not be suitable for determining payment notice disputes under hybrid contracts.

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Insolvency and adjudication (*Bresco* and *John Doyle*)

James Frampton

CIArb case law update

30 March 2021

Introduction

I will discuss 3 topics arising from the Supreme Court decision in *Bresco*:

1. The history of *Bresco* from first instance until the Supreme Court.
2. Enforcement following *Bresco* (*John Doyle*).
3. Set-off in adjudication.

Bresco – the facts

- Lonsdale engaged Bresco to perform electrical installations at a site in St James' Square.
- December 2014 – Bresco left the site.
- March 2015 – Bresco went into creditors' voluntary liquidation.
- 18 June 2018 – Bresco served a notice of adjudication seeking c.£219,000 for the value of work done and loss of profits.
- 26 June 2018 – Lonsdale issued Part 8 proceedings for a declaration that the adjudicator lacked jurisdiction and an injunction restraining the adjudication.

Bresco – first instance [2018] EWHC 2043 (TCC)

Fraser J granted an injunction preventing the continuation of the adjudication by *Bresco* because the adjudicator lacked jurisdiction as there was now single dispute or claim under the insolvency rules:

> "53. I therefore conclude that, as at the date of the liquidation, and as a direct result of what occurs upon the appointment of the liquidator and the operation of the Insolvency Rules, the disputes between Lonsdale and Bresco that consist of claims and cross-claims between them become replaced with a single debt. That is thereafter the dispute, namely the result of the account that the 2016 Rules require to be taken to determine the balance payable in which direction.
>
> …
>
> 73. … there is but a single claim now in existence so far as enforcement by either party is concerned. How much that is, and in which direction, must be - indeed, can only be - ascertained after taking the account of the mutual dealings of Lonsdale and Bresco required by the Insolvency Rules. …
>
> …
>
> 76. This therefore means that the adjudicator in this case does not have jurisdiction to determine the dispute referred to him. The dispute referred to him included both money claims and cross claims, and an analysis of how much was owed to Bresco…."

Bresco – Court of Appeal [2019] EWCA Civ 27

Coulson LJ held that the adjudicator had jurisdiction but still upheld the injunction on the grounds that the adjudication was an exercise in futility:

"45. ... a decision of an adjudicator in favour of a company in liquidation, like Bresco, would not ordinarily be enforced by the court. ... in my view, judgment in favour of a company in insolvent liquidation (and no stay), in circumstances where there is a cross-claim, will only be granted in an exceptional case. …

46. As a result of this ... a reference to adjudication of a claim by a contractor in insolvent liquidation, in circumstances where there is a cross-claim, would be incapable of enforcement and therefore 'an exercise in futility'."

Bresco – Supreme Court [2020] UKSC 25

Lord Briggs:

1. Rejected Fraser J's analysis that an adjudicator lacked jurisdiction once a party entered liquidation because, while there is a single netting off exercise in insolvency, the individual claims/disputes still existed for some purposes:

> "47. …the existence of a cross-claim operating by way of insolvency set-off does not mean that the underlying disputes about the company's claim under the construction contract and (if disputed) the cross-claim simply melt away so as to render them incapable of adjudication. The submission that they are replaced by a dispute in the insolvency is wrong…"

Bresco – Supreme Court [2020] UKSC 25

2. Rejected Coulson LJ's analysis that an adjudication by a company in liquidation was futile [at 71]:

> "Construction adjudication, on the application of the liquidator, is not incompatible with the insolvency process. It is not an exercise in futility, either generally or merely because there are cross-claims falling within insolvency set-off, and there is no reason why the existence of such cross-claims can constitute a basis for denying to the company the right to submit disputes to adjudication which Parliament has chosen to confer. "

Bresco – Supreme Court [2020] UKSC 25

Lord Briggs relied on the following reasons:

a. If there is a statutory and/or contractual right to adjudicate, a Court should only exceptionally grant an injunction to restrain the use of a contractual or statutory right.

b. Adjudication often gives a speedy and cost-effective final resolution of a dispute. "*Dispute resolution is therefore an end in its own right, even where summary enforcement may be inappropriate or for some reason unavailable*".

c. Adjudication is not incompatible with with the insolvency process. Adjudication of disputed construction claims can assist insolvency practitioners and parties in liquidation to resolve the overall account.

Bresco – Supreme Court [2020] UKSC 25

3. Made clear that parties in liquidation could still face difficulties on enforcement [at 64 to 67]:

"64. …The reasons why summary enforcement will frequently be unavailable are set out in detail in Bouygues… the court is well-placed to deal with those difficulties at the summary judgment stage, simply by refusing it in an appropriate case as a matter of discretion, or by granting it, but with a stay of execution….

65. …it will not be in every case that summary enforcement will be inappropriate. There may be no dispute about the cross-claim, and the claim may be found to exist in a larger amount, so that there is no reason not to give summary judgment for the company for the balance in its favour. Or the disputed cross-claim may be found to be of no substance. …

67. The proper answer to all these issues about enforcement is that they can be dealt with, as Chadwick LJ suggested, at the enforcement stage, if there is one. In many cases the liquidator will not seek to enforce the adjudicator's decision summarily. In others the liquidator may offer appropriate undertakings, such as to ring-fence any enforcement proceeds: see the discussion of undertakings in the Meadowside case.… Where there remains a real risk that the summary enforcement of an adjudication decision will deprive the respondent of its right to have recourse to the company's claim as security (pro tanto) for its cross-claim, then the court will be astute to refuse summary judgment."

Subsequent cases on enforcement

Since *Bresco*, 2 cases have revisited the question of when a decision in favour of an insolvent party will be enforced:

1. *John Doyle Construction Limited (in liquidation) v Erith Contractors Limited* [2020] EWHC 2451 (TCC)

2. *Styles & Wood (In Administration) v Ce Gif Trustees* [2020] EWHC 2694 (TCC)*

(*the neutral citation is incorrect, the hearing was in the CLCC)

John Doyle – the facts

- C carried out landscaping works for D for London Olympics.
- C entered administration in 2012 and liquidation in 2013.
- Adjudicator's decision in 2018 awarding C around £1.2 million on final account.
- Adjudicator dismissed D's defence that sums were due to it under another contract.
- C offered security in form of (so-called) letter of credit and ATE insurance policy via a third party (not the liquidators).

John Doyle – Relevant factors on whether to enforce

Relevant principles to be applied in deciding on whether to enforce are [at 54]:

"1. Whether the dispute in respect of which the adjudicator has issued a decision is one in respect of the whole of the parties' financial dealings under the construction contract in question, or simply one element of it.

2. Whether there are mutual dealings between the parties that are outside the construction contract under which the adjudicator has resolved the particular dispute.

3. Whether there are other defences available to the defendant that were not deployed in the adjudication.

4. Whether the liquidator is prepared to offer appropriate undertakings, such as ring- fencing the enforcement proceeds, and/or where there is other security available.

5. Whether there is a real risk that the summary enforcement of an adjudication decision will deprive the paying party of security for its cross-claim."

[NB. a cross-claim includes final resolution of the dispute referred to adjudication]

John Doyle – circumstances in which a decision will be enforced

"62. I therefore conclude that the circumstances where summary judgment would be available to a company in liquidation who seeks to enforce an adjudicator's award in its favour are as follows:

1. The decision of the adjudicator would have to resolve (or take into account) all the different elements of the overall financial dispute between the parties to the construction contract. Where, as here, the dispute referred was the valuation of the referring party's final account, summary judgment will potentially be available (dependent upon the other considerations below). If the dispute referred is a more narrowly defined one, such as the valuation of a single component part of an interim payment, or one single head of claim, then it will not.

2. Mutual dealings on other contracts, or other defences, if they have not been taken into account by the adjudicator, will be taken into account by the court on the summary judgment application. I draw this conclusion from what Lord Briggs says at [65], where he stated "there may be no dispute about the cross-claim, and the claim may be found to exist in a larger amount, so that there is no reason not to give summary judgment for the company for the balance in its favour."

3. There is no "real risk" that summary enforcement of the adjudicator's decision would deprive the paying party of security for its cross-claim."

John Doyle – the judgment

Fraser J held that the security offered by John Doyle was insufficient and therefore refused to enforce the adjudicator's decision because:

a) The purported letter of credit was in fact a letter of intent; and

b) The ATE insurance was subject to exceptions and the risk of being avoided.

Styles & Wood – the facts

1. C in administration (not liquidation).

2. C's administrator offered undertakings to (a) ring-fence principal sum, and (b) provide an ATE policy covering at least £200,000 of potential arbitration costs for D.

3. D alleged its costs in an arbitration would be c.£800,000 so ATE policy was insufficient.

Styles & Wood – the decision

HHJ Parfitt granted summary judgment, without a stay, on conditions that: (a) sums paid over are ring-fenced until the conclusion of any appeal process from the arbitrator's award, and (b) ATE policy at the level of £200,000.

Summary of position on enforcement

Looking again at the 3 factors in Bresco at [62]:

1. "The decision of the adjudicator would have to resolve (or take into account) all the different elements of the overall financial dispute between the parties to the construction contract." **Uncontroversial, save for set-off?**

2. "Mutual dealings on other contracts, or other defences, if they have not been taken into account by the adjudicator, will be taken into account by the court on the summary judgment application." **Unclear how will be applied in practice.**

3. "There is no "real risk" that summary enforcement of the adjudicator's decision would deprive the paying party of security for its cross-claim." **Guidance in *John Doyle*, *Styles & Wood* as well as *Meadowside Building Developments Ltd (in liquidation) v 12-18 Hill Street Management Co Ltd* [2019] EWHC 2651 (TCC).**

Types of set-off

1. Set-off under the construction contract.

2. Set-off under *another* construction contract.

3. Set-off for a non-construction claim.

Set-off under the construction contract in an adjudication

Set-off under the construction contract:

- Should be available as a defence to a true value claim for payment (subject to pay less notice). *Bresco* at [44]:

  "However narrowly the referring party chooses to confine the reference, a claim submitted to adjudication will nonetheless confer jurisdiction to determine everything which may be advanced against it by way of defence, and this will necessarily include every cross-claim which amounts to (or is pleaded as) a set-off. This much was common ground, but it is supported by authority.

  See also *Global Switch Estates v Sudlows Ltd* [2020] EWHC 3314 (TCC).

- Must be taken into account if the referring party is in liquidation in order to resolve the overall financial dispute under the contract.

Set-off under *another* construction contract in an adjudication

Set-off under another construction contract:

- Suggestion in *Bresco* that would be available as a defence [at 62]:

  "Even if [the disputes] arise under more than one construction contract, the adjudicator will be better placed than most liquidators to resolve them. The Scheme contains provision whereby that may be achieved by consent, and the need to take cross-claims into account as defences (by way of set-off) may well mean that there is in reality one single dispute within Akenhead J's helpful rule of thumb in the Witney Town Council case." [See also 63]

- *John Doyle* suggests not [at 64]:

  "… adjudicators, who may find themselves asked by responding parties to become embroiled in matters outside the construction contract, and even potentially outside their expertise. Orthodoxy would suggest that they ought to resist becoming involved in this way. They are appointed to resolve the dispute under the construction contract. Absent specific agreement from the parties for the adjudicator also to consider and resolve matters outside the construction contract, they would have no jurisdiction to do so. Such matters would be a matter for the court on the summary judgment application."

Set-off under *another* construction contract in an adjudication

- **Does the principle in Bresco only apply where the referring party is in liquidation?** [at 46]:

  "it appears that a dispute about a cross-claim relied on as a set-off by way of defence to the claim referred will be part of the dispute raised by the reference, because the claim cannot be decided without consideration of the cross-claim by way of defence."

- What is the impact of a set-off clause in the first contract?

- What is the impact of included a set off under another contract in a pay less notice under the first contract?

Set-off unrelated to a construction contract

Set-off unrelated to a construction contract (i.e. a personal injury claim):

- Suggestion in *Bresco* [at 63] that may be a defence if the referring party is in liquidation, or at least may prevent the adjudicator ordering payment:

> "It is true that the effect of insolvency set-off may mean that cross-claims raise issues wholly outwith the purview of one or more construction contracts, such as the apportionment of liability for personal injuries, or liability under mutual dealings between the same parties in some other commercial field. In such a case the adjudicator will need to have regard to them, if they amount to a defence to the disputed construction claim being referred, but may have simply to make a declaration as to the value of the claim, leaving the unrelated cross-claim to be resolved by some other means. That is a remedy well within the adjudicator's powers. Nonetheless the adjudicator's resolution of the construction dispute referred by the liquidator may be of real utility to the conduct of the process of set-off within the insolvency process as a whole."

- Unlikely to be a common law or equitable set-off if not in liquidation.

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True value adjudications – where are we now?

Harry Smith

March 2021

True value adjudications

The issue:

Can an employer avoid the outcome of a 'smash and grab' adjudication by relying on the decision of a subsequent 'true value' adjudication?

Facts of *S&T v Grove*:

- Grove engaged S&T to construct a new hotel at Heathrow under a JCT DB 2011 contract with bespoke amendments
- S&T made interim application for £14m. Grove issued a pay less notice showing a sum due of £1.4m. Adjudicator decided that pay less notice was invalid and ordered Grove to pay the £14m applied for.
- On enforcement, Grove argued it was entitled, in principle, to commence a further adjudication seeking a decision as to the true value of the interim application.

Coulson J in the High Court at [102]:

"**The employer has to pay the sum stated as due, and could thereafter, if they wished, raise the question of the true valuation in a subsequent adjudication.**"

At [122]:

"**following payment of the sum stated as due, the employer should be able to commence an adjudication as to the true value of the interim application.**"

At [141]:

"**…the adjudications will still be dealt with, by adjudicators and by the courts, in strict sequence. The second adjudication cannot act as some sort of Trojan Horse to avoid paying the sum stated as due. I have made that crystal clear.**"

True value adjudications

Sir Rupert Jackson in the Court of Appeal at [107]:

> **"Both the HGCRA and the Amended Act create a hierarchy of obligations… The immediate statutory obligation is to pay the notified sum as set out in section 111. … As a matter of statutory construction and under the terms of this contract, the adjudication provisions are subordinate to the payment provisions in section 111. ... both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation."**

A convincing analysis?

Cf. Dyson LJ in *Connex SE v Building Services Group* [2005] 1 WLR 3323 at [38-40]:

> **"The phrase "at any time" means exactly what it says. It would have been possible to restrict the time within which an adjudication could be commenced…but that was not done. It is clear from Hansard that the question of the time for referring a dispute to adjudication was carefully considered, and that it was decided not to provide any time limit… there is nothing in the Act which indicates that the words "at any time" should be construed as bearing other than their literal and ordinary meaning"**

True value adjudications

Stuart-Smith J in *M Davenport Builders Ltd v Greer* [2019] EWHC 318 (TCC) at [35]:

> "**it should now be taken as established that an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication.**"

Cf. "**embarking upon**" in *S&T v Grove* at [107]

True value adjudications

Stuart-Smith J in *M Davenport Builders Ltd v Greer* [2019] EWHC 318 (TCC) at [37]:

> **"The decisions of Coulson J and the Court of Appeal in *Grove* are clear and unequivocal in stating that the employer must make payment in accordance with the contract or in accordance with section 111 of the Amended Act before it can *commence* a 'true value' adjudication. That does not mean that the Court will always restrain the commencement or progress of a true value adjudication commenced before the employer has discharged his immediate obligation... It is not necessary for me to decide whether or in what circumstances the Court may restrain the subsequent true value adjudication and, in these circumstances, it would be positively unhelpful for me to suggest examples or criteria and I do not do so."**

True value adjudications

Roger ter Haar QC sitting as a Deputy High Court Judge in *Broseley London Ltd v Prime Asset Management Ltd* [2020] EWHC 944 (TCC) at [46]:

> **"...Whilst the S&T decision does not expressly concern the present situation, where what is suggested as the possible subject of an as yet unstarted adjudication is the determination of a notional final account where the amount of that final account would be dependent on the validity of Decision No. 1, the ability to mount such an adjudication following upon Decision No. 3 attacking the validity of that Decision without prior payment of the amount awarded in Decision No. 1 would be a remarkable intrusion into the principle established in S&T: it would permit the adjudication system to trump the prompt payment regime, which is exactly what the Court of Appeal said in paragraph [107] of that case would not be permitted to happen."**

True value adjudications

When will the court exercise its discretion to restrain a true value adjudication, applying *Davenport*?

In *Bresco* (EWCA), Coulson LJ held at [55] that *Twintec v Volkerfitzpatrick* [2014] BLR 150 is authority that:

> "**the court will grant…an injunction if the court concludes that the nascent adjudication is a futile exercise. This is an important power in the context of adjudication…**"

Does this principle stand after Lord Briggs' judgment? See e.g. [59]:

> "**…it would ordinarily be entirely inappropriate for the court to interfere with the exercise of that statutory and contractual right.**"

True value adjudications
Kew Holdings Ltd v Donald Insall Associates Ltd [2020] EWHC 1862 (TCC)

- Dispute about refurbishment of a private home.
- DIA obtained an adjudicator's decision in its favour (£208k) and summary judgment enforcing the decision in February 2019. Kew failed to pay.
- In March 2020 Kew commenced proceedings against KIA for professional negligence and breach of contract (£2m).
- DIA applied to strike out, alternatively stay, the proceedings unless payment of the judgment sum was made within 7 days.
- O'Farrell refused to strike out but granted the stay.

True value adjudications
Kew Holdings Ltd v Donald Insall Associates Ltd [2020] EWHC 1862 (TCC)

DIA's key submission (see [18-19]):

"…the claim has been wrongly commenced without having discharged the payment required by the adjudicator's decision and without having complied with the Court's Order dated 5 February 2019. This constitutes an abuse of process and is contrary to law. …

…a paying party is not entitled to commence a fresh claim seeking the determination of the parties' true entitlements unless and until it has first discharged its obligation to pay the amounts determined as payable in a prior adjudication. Reliance is placed on the decisions in S&T (UK) Ltd v Grove Development Ltd [2018] EWCA Civ 2448 (CA) and M Davenport Builders Ltd v Greer [2019] EWHC 318 (TCC) …"

True value adjudications
Kew Holdings Ltd v Donald Insall Associates Ltd [2020] EWHC 1862 (TCC)

O'Farrell J at [22-23]:

> **"It is clear from the above authorities that the Claimant would not be entitled to start a further adjudication in respect of the Defendant's fees (on substantive issues not yet determined) without paying the outstanding adjudication award. Further, the Claimant would not be entitled to rely on any subsequent 'true value' adjudication as a defence to the enforcement of the outstanding adjudication award. However, those issues do not arise in this case because the Court has already enforced the outstanding adjudication award by giving summary judgment in favour of the Defendant.**
>
> **…Unlike the adjudication provisions, which are subordinate to the payment provisions in the HGCRA, the right to bring legal proceedings to determine rights and obligations and seek remedies is more fundamental. The right of access to swift justice was guaranteed by Magna Carta and is enshrined in the Human Rights Act 1996, which gives effect to the Convention rights, including Article 6, the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. A party's right to access to justice is not unfettered but clear words would be required to make it subordinate to the payment provisions in the HCGRA."**

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Thank you for listening!

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