Neutral Citation Number: [2020] EWHC 2694 (TCC)

Case No: G20CL072

IN THE COUNTY COURT AT CENTRAL LONDON
TECHNOLOGY AND CONSTRUCTION LIST
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Thomas Moore Building
Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/09/2020

Before:

HIS HONOUR JUDGE PARFITT

- -

Between:

STYLES & WOOD (IN ADMINISTRATION) **Claimant**

- and -

GE CIF TRUSTEES **Defendant**

- -

- -

MR R HUSSAIN QC appeared on behalf of the **Claimant**
MR CRANGLE appeared on behalf of the **Defendant**

- -

APPROVED JUDGMENT

- -

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

JUDGE PARFITT :

1. This is my judgment in respect of a summary judgment application to enforce an adjudication award. The relevant background I am going to take by just pulling out some bits from the parties' skeletons.

2. The claimant is a building contractor who went into administration on 28 February 2020. The underlying dispute relates to a final account in relation to the development of a property in Manchester. The underlying works were conducted under a JCT intermediate building contract with a contractor's design 2011 addition. The claimant submitted a final account in the sum of just under £9 million. The QS valued the account in the sum of just over £5 million and there are various claims and cross-claims.

3. There was a dispute which was referred to adjudication under the relevant contractual provisions and the adjudication commenced on 14 February 2020. The main issues that were addressed in the adjudication, which I need to come back to later, were the valuation of various variations, a claim to entitlement for a fourth extension of time and loss and expenses said to have arisen out of delay. The adjudicator's decision was announced on 9 April 2020 and he decided that the claimant was entitled to a sum of just under £700,000 in addition to VAT and interest.

4. The claimant brought these proceedings to enforce the payment of that adjudication and the defendant has made it plain that it wants to bring proceedings for a final account and it does not accept the adjudicator's decision.

5. So far as the law is concerned I do not want to cite any more than is necessary and I think I can usefully just read out part of paragraphs 67 from Lord Briggs' speech in *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25.

6. Lord Briggs was discussing the difficulties of the enforcement of adjudication awards in circumstances where the recipient of the funds is insolvent which means that the award will become part of their assets to be distributed to creditors with the obvious risk to the paying party that they are then are deprived of a set off that would otherwise have been available to them, if it was not for the enforcement of the adjudication award. At 67 Lord Briggs says this:

> "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."

7. The present case is one where, firstly, the administrators have decided to proceed to enforce the adjudicator's decision and, secondly, the administrators have offered

undertakings although, as will become apparent shortly, the principal dispute before me is to the suitability of part of those undertakings. So the determinative issue addressed below is what undertakings are "appropriate" in this case.

8. It is worth emphasising that the key aspect in relation to whether or not to enforce is the protection of the right to set off. It is the prejudice to the payor created by a combination of insolvency and adjudication not being a determinative resolution of the parties' disputes from which protection is required.

9. I will just refer to the relevant parts of *Meadowside Building Developments Ltd (in liquidation) v 12-18 Hill Street Management Co Ltd* [2019] EWHC 2651 (TCC) a decision of Mr Constable QC sitting as a high court judge who said:

> "... a case is likely to be an exception to the ordinary position in circumstances where ...

and I will not read all of paragraph 87 but he refers to the need to provide satisfactory security and then:

> "Satisfactory security is provided both in respect of any sum awarded in the adjudication and successfully enforced ..."

and also security in relation to any adverse costs' order that might arise in the ensuing litigation or arbitration or here, arbitration which would be relevant. He says:

> "The extent to which any such costs' order is ordered to be met from the security will be a matter for the court insofar as it was not agreed."

10. Then the other case that I have been referred to is an application of *Meadowside*, *Balfour Beatty v Astec Products Ltd (in liquidation)* [2020] EWHC 796 (TCC) a decision of Waksman J, which was an injunction case to restrain enforcement and both counsel involved before me this afternoon were involved in that case and what I was particularly taken to in *Balfour Beatty v Astec* was how the security for costs' condition was dealt with.

11. In paragraph 25 Waksman J had identified that on the table was a security for costs of the putative litigation in the sum of £250,000. He decided that that was inadequate and that actually it should be --- given that there were three contractual disputes, it should be multiplied by three to get to £750,000, that being what he considered to be the appropriate security in that case. He said that the litigation would be a re-run at significant cost of at least the issues in the adjudication and of course there would be a right of the litigating party to seek further security if that sum was most likely to be expended.

12. I have to say I do not see the *Balfour Beatty* decision as anything other than application of the *Meadowside* principles and an illustration of how any judge looking at questions of security in any particular case, and most importantly the level of security, is always going to be sensitive to the particular facts and evidence before him when deciding what is appropriate. The 3 times more than offered approach in *Balfour Beatty* creates no guideline or precedent.

13. I am going to address the issues that were argued before me substantially in the structural approach taken very by Mr Hussain QC but I will also then pick up, as I go and at the end, some additional points that were made by Mr Crangle on behalf of the defendant to the application.

14. The main issue between the parties is whether or not the claimant's offer of an ATE policy covering, at the moment at least, £200,000 worth of potential arbitration costs that might be ordered in favour of the defendant is reasonable or not. In that context, Mr Hussain identified six points. I shall go through them and make my findings in relation to them as I go.

15. The first is that the mechanisms provided for under the relevant contract would lead to an arbitration process that is designed expressly within the applicable arbitral rules to be cost effective and flexible and one notes in particular that either party could make an application for a costs' capping order if it was considered to be appropriate and also that the arbitrator's powers to order costs are limited in an equivalent way to those that are familiar from normal civil litigation; potential costs recovery is of a reasonable amount in relation to costs reasonably incurred. I agree with the points that Mr Hussain made in that respect, that that is both relevant and material to the assessment of the level of costs' protection to be provided as a result of an application of the *Meadowside* principles in the present situation.

16. The second point is in relation to the work that has already been done. It is obvious and reflected in Waksman J's approach that there is a considerable difference in principle between the adjudication process and the arbitration process or litigation process. It is indeed necessary to re-run the points. Nothing that is said or done in the adjudication is either relevant of itself nor is it binding in terms of findings in the context of litigation or arbitration. But that does not seem to me to answer or to address the point that Mr Hussain is making on behalf of the claimant which is that there is a considerable amount of work that has already been done in the context of the adjudication which will not need to be re-done in the context of the arbitration, simply because the underlying factual material, the factual evidence that needs to be gathered, is at least equivalent even if, as Mr Crangle has emphasised, the arbitration will go further in terms of evidential scope than the adjudication.

17. It seems to me that Mr Hussain's point is a good one. The defendant in the adjudication put forward substantial expert analysis and evidence, both in relation to the delay issues and in relation to quantum issues. They spent in the broadest terms I think about £280,000 or so of costs. It seems to me that that cost is going to lead to a costs' saving so far as concerns the arbitration process even in circumstances where the evidential arbitration process is going to go further and involve additional costs than that in the adjudication. It is a very simple point; the evidence that is there already, is there already and it is also, Mr Hussain reminded me, not going to be the case that those adjudication costs will become recoverable costs in the context of an arbitration. That would cut across the principle that costs incurred in relation to the adjudication are not recoverable.

18. The defendant has substantial work product already in hand. It will at the very least be able to build on that and since the cost of it was so substantial, one assumes that that which they are building on will be equally substantial and of benefit insofar as running their proposed arbitration case.

19. Then Mr Hussain moved on to deal with the issues on the final account and identified that from at least the claimant's perspective those issues are relatively simple in the context of building arbitration disputes. The amounts may be in the sort of middle level, that is to say in the low millions --- there has been some suggestion that it is about one million between the parties but there is a different way of looking at it where the difference might be about £4 million, Mr Crangle says, if you look at the totality of the amounts that the parties would claim across the final account altogether. In any event, I agree that it is more realistic to look at the issues that underlie the amounts as being a useful pointer as to indicative costs, I would agree with Mr Hussain's categorisation of the various issues that I have been taken to as relatively simple in the context.

20. There is an extension of time issue in relation to 21 weeks. There were other extensions in the project but it does appear that it is going to be that fourth extension that is the likely battleground so far as the arbitration is concerned. Mr Hussain has been able to refer me in reply to an open draft notice of arbitration from the defendant, received yesterday I think, which only relied on and referred to that particular disputed delay: the same disputed delay that was addressed by the adjudicator. So, the delay issue that the defendant has already got lots of expert evidence about. Likewise, in relation to the variations, they also appear to be relatively limited and also evidential ground covered in the adjudication which means at least in initial preparation of evidence I can assume some saving. In respect of both issues at least some of the initial spade work and ground work has been done at considerable cost.

21. There are other potential issues in relation to expense and delay arising out of the prolongation of the project and various subcontractor costs and so on and again I agree with the categorisation by Mr Hussain that these things are not particularly complex or complicated and do not of themselves point to a likely high cost --- the need to incur high costs on the part of the defendant in order to be able to manage or run a fair and comprehensive final arbitration of the account.

22. Then there are bits of pieces of defects and snags which I have been taken to and illustrations of them and again (a) they are not particularly large in terms of amount and (b) the types of snagging do not look very difficult to resolve.

23. There was a slight issue between the parties as to whether or not the sampling exercise that was carried out by the adjudicator is of any relevance in the context of the arbitration and again I found Mr Hussain's submissions on this more convincing. Mr Hussain submitted, and I accept, that in the context of a lot of very minor items it is realistic and likely that an experienced arbitrator, bearing in mind the rules of the arbitration to be cost effective and to take such steps in terms of evidence and process to provide cost effective, flexible solutions to the parties' disputes, that the chances of the arbitrator obliging the parties or indeed allowing the parties to grind through every single individual item at disproportionate cost is, I would think in this day and age, vanishingly small and certainly not one that I need to take into account when I am looking at prospective costs' protection and the level that would be appropriate at this stage.

24. So I am going to turn to the actual estimate that is contained in the defendant's figures which is between £800,000 and £1 million worth of costs' protection they say they should get at this stage and the primary criticism that is made of that by Mr Hussain is that there is no proper breakdown or particularisation of how those costs are built up

and I think that is a good criticism. I find the sort of broad brush, "Well, these are the sort of costs we want to incur," type of approach that is set out in the defendant's solicitor's witness statement wholly unpersuasive in the context of what costs' breakdowns tend to look like now.

25. I well understand why Mr Hussain took the sort of forensic and adversarial approach he did in his submissions in saying, "Look, I am going to put a slight finger in the air but I am going to put some better figures around that by making assumptions about hourly rates and hours and see where I get to." Mr Crangle criticised that as being not based on any real analysis but that really was, I thought, a little bit rich on his part since the very premise on which Mr Hussain was having to do what he did was that the defendant's solicitor had exactly done that and not based his figures on any analysis at all; even less in fact than Mr Hussain had done who at least was trying to tie it down to the familiar recognition of hourly rates and hours. I would have expected at least the level of detail that one might find in a prospective costs budget for costs budgeting purposes.

26. I find that the costs' figure of £800,000 or anything close to that is completely unsustainable on the evidence that has been put forward. It is simply not persuasive that the costs would need to be at that level, not least because it does not take into account the evidential savings from what has already been done and it does not take into account in any meaningful way as far as I can see the actual scope of the potential arbitration and it is perhaps unfortunate that the draft arbitration notice, which has now been sent to the other side, did not itself form the platform and the basis for the costs' estimate because then it might have gained in credibility and had greater weight. In fact on the material that I have been referred to, as I have said, it is accurately summed up, I think, by Mr Hussain who said that it was neither serious nor substantial in terms of the type of evidence provided to support the £800,000 figure.

27. Mr Hussain did the best he could. He came up with a figure of about £333,000 and then he applied a conventional 60 per cent discount to get to the type of figure that might be recoverable with a successful costs' order in favour of the defendant. I can see how he got there. I think I do not need to place any great reliance on that but it is sufficient to show that the £200,000 figure that the claimant is offering through its ATE policy is one that is within the ballpark of a figure that would be or is likely to be appropriate bearing in mind the relevant factors as to how one might estimate the relevant costs. It also seems a figure that is more appropriate, given what I am told about the draft notice of arbitration and the type of issues that are going to be raised or are intended at the moment at least to be raised by the defendant in that arbitration.

28. That brings me quite briefly to the final two points made by Mr Hussain before I get on to the few other points of detail raised by Mr Crangle, and that is whether or not it is appropriate to look at the level of costs' protection to be provided as reduced by the likely amount to be recovered, so it will be the 60 per cent and it seems to me obvious that that must be right. No party is entitled in the context of security for costs' type orders to a complete indemnity in respect of their costs; it is always protection in relation to such costs' order as might be or is going to be ordered on the premise that the costs' protection becomes relevant.

29. Then, likewise, I have already commented in passing at the beginning of this judgment in relation to the decision of Waksman J and how I do not get any assistance from the

fact that Waksman J decided that the £750,000 was appropriate security in the case before him. That does not set any level or any tariff or any hurdle or even any figure that has any sort of magnetic attraction to it. Security for costs' figures are always going to be determined on the particular evidence before the court and the particular circumstances of the case.

30. Turning then to the other points that are made, Mr Crangle questions whether it will be appropriate to take into account any incremental increase that there might be in the context of security. That is certainly something that was referred to in the quotation I cited from *Meadowside*, the possibility of coming back for further security. It is certainly something that the court is very used to doing in the context of security for costs for litigation. I do not disagree that it is not entirely straight forward in the present context where you would not be going to the arbitral tribunal in relation to an increase in your security because the security is the condition upon which the adjudication award is being enforced but, given that the court imposes those conditions, Mr Hussain says in his skeleton (and I would agree) that there is no difficulty with the application being made back to the court to vary those conditions should it become appropriate and such variation could easily include an application for an increase in the security amount should circumstances make that appropriate.

31. It seems to me that where a court has made an order subject to these type of conditions, the ring-fencing and the security, it is always open to either party to come back should circumstances require it or justify it and ask for those conditions to be varied and certainly in the order that I am proposing to make it should be made express that there is permission to apply for a variation of the conditions.

32. There was an issue as to whether or not the ring-fencing that has been offered should extend to the appeal process. This is ring-fencing in respect of the adjudication sum. I agree with Mr Crangle that there is a slight lack of clarity in the undertaking that is offered relative to what it appeared to be saying at least in one part of the witness statement. I want the undertaking to include so far as the ring-fencing of the adjudication amount is concerned to cover the conclusion of the appeal process as well and of course it is a matter for the claimant as to whether they want to provide such an undertaking.

33. Then Mr Crangle also said that the ATE policy does not presently cover potential appeal costs. I have no difficulty with that. That is very much an example of something, it seems to me, that if that becomes relevant in any way and cannot be agreed between the parties, that then if necessary an application can be made back to this court in relation to making alternative or additional security for costs' provision arising out of any appeal. The costs of this potential appeal are to remote to require provision at this stage: it would not be fair to the claimant and is not necessary to provide appropriate protection to the defendant.

34. In conclusion, for all the reasons that I have given, and substantially in agreement with the points made by Mr Hussain, I will grant summary judgment and not impose a stay but on condition that the sums to be paid over are ring-fenced along the lines that have been offered but, in addition, making it clear that that ring-fencing is to continue until the conclusion of any appeal process from the arbitrator's award, I will accept the ATE policy, as amended, I think, during negotiations or at least exchanges of evidence, between the parties at the level of £200,000 and I will expressly state again that there

is permission to apply in relation to any variation of those conditions, that permission extending to either party.

This Judgment has been approved by HHJ Parfitt.