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Case No: HT-2018-000066

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**TECHNOLOGY AND CONSTRUCTION COURT**

The Rolls Building, Fetter Lane  
London, EC4 1NL

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**Before:**

**MR ALEXANDER NISSEN QC**

**Between:**

**M I ELECTRICAL SOLUTIONS LIMITED**

**Claimant**

**- and -**

**ELEMENTS (EUROPE) LIMITED**

**Defendant**

**L. ZVESPER for the Claimant**  
**M. STEPHENS for the Defendant**

**Approved Judgment**

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1<sup>st</sup> Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.  
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE  
Email: [info@martenwalshcherer.com](mailto:info@martenwalshcherer.com)  
Web: [www.martenwalshcherer.com](http://www.martenwalshcherer.com)

Approved Judgment**MR NISSEN QC:**

1. The Claimant is a mechanical and electrical sub-contractor. The Defendant is a contractor. The parties entered into a sub-contract on or around 7<sup>th</sup> August 2017 in respect of the supply and installation of mechanical and electrical works in apartment modules which were being constructed by the Defendant on a project known as Orchard Village. Works were undertaken on the Defendant's standard conditions. This is an application by way of summary judgment to enforce the decision of an adjudicator, Mr. Robert Hogarth, dated 26<sup>th</sup> February 2018. The decision, which was in the Claimant's favour, was that the Defendant should pay the sum of £179,931.57 to the Claimant. Since then the Defendant has made part payment of the sum ordered, leaving the balance of £168,452.33 unpaid and that is the sum which is currently pursued in the summary judgment application. In addition, the Claimant claims interest and the adjudicator's fees.
2. Directions were given in respect of these enforcement proceedings by Fraser J. in an order dated 9<sup>th</sup> March 2018. He made provision for an oral hearing which has taken place today. In that hearing the Claimant has been represented by Mr. Zvesper of Counsel and the Defendant by Mr. Stephens of Counsel. The test for summary judgment is well known and provided for in CPR 24 and is helpfully set out in Mr. Zvesper's skeleton argument. The court may award summary judgment where:

“(a) it considers that -- ... (ii) that defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial.”
3. There is no defence raised relating to the adjudicator's jurisdiction and there is also no complaint that he acted in breach of natural justice. Instead the sole issue before the Court concerns the ability of the Defendant to set off a cross-claim against the adjudicator's decision. The cross-claim is supported by evidence from Mr. Woods and Mr. Underwood. There is also a report from Mr. Paul Bradley of Troup Bywaters & Anders, the well known mechanical and electrical consultants. All three pieces of evidence are relied on to support a contention that the Claimant's works were defective. The defects complained of are identified in a series of non-performance reports. The rectification of those defects has been costed by the Defendant in the sum of £168,452.33, that being the sum unpaid. Mr. Bradley himself was not able to provide his own independent costing.
4. This being a summary judgment application, I am not required to determine the substantive merits of this defects counterclaim. There is an issue, of course, about responsibility for defects and in particular whether the allegedly defective works complained of were even carried out by the Claimant at all. But that is for another day. What the Claimant submits is that for legal reasons, which are expressed in a variety of different ways, the Defendant is simply not entitled in law to set off its purported cross-claim against the adjudicator's decision. Counsel for the Claimant has put his case in three ways. Firstly, the provisions of the contract which permit set off must be construed in accordance with the Housing Grants (Construction and Regeneration) Act 1996 so that they are not intended to provide a defence to enforcement of an adjudicator's decision and, if they cannot be so construed, should be struck out. Secondly, the requirements of clause 10.2 have not been met, so the

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Defendant is unable to rely on it and, conjoined with that, the requirements of clause 5.5 have not been met so the Defendant is unable to rely on that provision also. Thirdly, and in any case, the adjudicator had already decided that the Defendant was not entitled to rely on a defence of set-off in respect of defective work and, on enforcement, of that decision the court should not go behind that finding.

5. By way of defence Mr. Stephens submits that the defence of set-off was effectively left open in adjudication and, therefore, can now be made having regard to the proper construction of clause 5.5 and clause 10.2.
6. I propose to deal with the three issues identified by Mr. Zvesper albeit in a different order, starting in fact with the third point, that being: was the cross-claim a matter about which the adjudicator made a decision? If so, it seems to me that the parties are contractually bound by the decision since, as I have said, there are no complaints that he either lacked jurisdiction or acted in breach of natural justice in making that decision. This is a Scheme adjudication, so the parties have agreed that the adjudicator's decision will be binding upon them until the matter is finally determined in litigation or arbitration. In order to reach a conclusion on the issue it is necessary to explain in a little more detail the nature of the dispute referred.
7. The notice of adjudication was a claim for payment based on applications which were made on 1<sup>st</sup> and 28<sup>th</sup> November giving a first evaluation of £179,000 odd. It was said that the document issued was a Pay Less notice purporting to show overpayment of £38,000 odd. It was said therefore that there existed a difference between the parties as the Claimant's entitlement to be paid the sum of £179,000 odd and the order sought was for immediate payment of that sum together with interest. In his decision the Adjudicator set out the background and described, at paragraph 7.2, the issue of a timely Pay Less notice. He said:

*"The dispute referred to me turns on the narrow issue whether Elements' Pay Less notice is effective to entitle them to have made no further payment to MIES after the final date for payment, which was on 26 December 2017."*

8. He set out the respective submissions and, at paragraph 7.6, identified that the material differences in valuation for the purposes of his decision were the two items headed "Delay Overhead" and "Delay Labour" at the bottom of the table which he had previously set out, those two items amounting to a deduction of £184,000. He said these items were included in a letter dated 22<sup>nd</sup> December 2017 containing only minimal supporting detail:

*"Overhead weekly £60,000 x 40% for Orchard section of factory 50% delay x 4 weeks", and "Labour cost £6,800 x 10 modules per week x 50% delay x 4 weeks."*

9. He then went on to say at paragraph 8:

*"Calculation of those sums does produce the figures respectively of £48,000 and £136,000. So far as MIES could infer what Elements was claiming, it is necessary that MIES had caused over a period of 4 weeks, 50% delay to Elements'*

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*factory production, with the cost consequences as alleged. The natural inference is that Elements was complaining of loss of productivity which had already occurred as at 22 December 2017 and not future delay or loss of productivity.”*

10. In paragraph 11 the Adjudicator concluded that the Pay Less notice satisfied the limited criteria set out by Coulson J. in *Windglass Windows v Capital Skyline Construction Ltd.*
11. In paragraph 12 of his decision the Adjudicator said that under the wide powers contained in the Scheme he was both allowed and required to reach a decision upon the substantive merits of the referred dispute. In other words, his decision was not being confined to the procedural compliance by Elements with the Pay Less notice requirements but also extended to a substantive determination of the claims identified within it. He therefore said he necessarily had to reach a decision on the substantive merits of Elements’ Pay Less notice, and describes, at paragraph 12, that as being “the crux of the dispute” between the parties.
12. He noted, at paragraph 14, that the substance of the Pay Less notice defence was not amplified in the response to MIES, and at paragraph 16 records that MIES had pushed Elements on that and had said squarely:

*“...it remains for Elements to have demonstrated that the deductions it has made have substance.”*

13. At paragraph 18, he said:

*“In my view the onus was on Elements to demonstrate on the balance of probability that it had suffered delays through MIES’ performance of the Sub-Contract. It has been completely silent on this aspect. ... On the evidence presented to me I cannot reasonably conclude other than that Elements has in this Adjudication wholly failed to demonstrate there is any merit in its Pay Less notice of 22 December 2017.”*

14. Thus, the Adjudicator decided that the ground for non-payment which had been specified in what was a valid Pay Less notice, namely an allegation of delay, was not, substantively, a good ground for non-payment. He then turned to the question of defects. In paragraph 19 he said:

*“So far as Elements did file any evidence about possible breaches of the Sub-contract by MIES, this was summarised by Elements in paragraph 3.10 of its Response to the Referral Notice as follows:*

*‘In the unlikely event that the Adjudicator finds that Elements’ Payless [sic] Notice is not valid in some way and that a sum is due to MIES, then Elements is entitled to set off from sums due to MIES costs that it has incurred in removing, dismantling, reassembling and reinstating the sub-contract work, pursuant to clause 10.2 of the contract ...*

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*Elements has since the initiation of this Adjudication (underlining my own) discovered significant and extensive faults with the works of MIES which are extensive in nature and quantum and likely to exceed any sum that the Adjudicator might decide in such circumstances is due to MIES'.*"

15. At paragraph 20, he went on to say:

*"I have not attempted to form any view on the merits of what Elements submitted about these 'significant and extensive faults', the discovery of which post dated the start of this Adjudication and therefore necessarily the service of the disputed Pay Less notice. For the reasons that follow I am not required to take these later issues into account, whatever their merits might be."*

16. At paragraph 20.2 he said:

*"The parties dispute whether Elements' costs of rectifying the 'significant and extensive faults' could properly be deducted/set off by Elements pursuant to paragraph 10.2 of the contract conditions. I see no reason in principle why they could not be deducted under that paragraph, subject to any arguments MIES might have about mitigation. However even assuming Elements might have a set off for the 'faults', those 'faults' were unknown by Elements at 22 December 2017 and were not the subject of their Pay Less notice."*

17. Finally, at paragraph 20.4 he said:

*"Elements has not sought to prove the merits of the disputed Pay Less notice and has instead sought to sow at least the germ of a possibility that there may be faults in the Sub-Contract Works which will be costly to remedy. Those faults, to the extent that they can be proven to derive from MIES' works, were not the subject of Elements' Pay Less notice."*

18. Having reached the conclusion that, whatever the merits of the defects, they could not amount to a defence to the claim in the adjudication, he ordered payment of £179,931.57 plus interest. Mr. Stephens relies on the observations of the Adjudicator why the cross-payment for defective work could not be deducted. He submits that the Adjudicator could have declared an amount due to the Claimant but not directed payment, and thus the prospect of set-off was left open. I am unable to accept that submission. In the first place the Adjudicator did what he was required to do. He determined the dispute as to whether the Claimant was entitled to payment. It would have been wrong to leave open the Defendant's entitlement to set-off. In my judgment it was a necessary ingredient of the Adjudicator's decision to award payment that the Defendant was not entitled, in law, to cross-claim for the defects

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because that cross-claim had not been the subject of inclusion within the Pay Less notice. The time at which to raise defective works in defence of a cross-claim to a claim for payment is in the Pay Less notice.

19. I therefore conclude that it is simply not open to the Defendant to run the point by way of a defence in these proceedings that the existence of defects constitutes a defence to the Claimant's claim. That point was determined by the Adjudicator. For these purposes it makes no difference if the clause relied on was clause 5.5 or clause 10.2, the former not having been referred to the Adjudicator. The substantive point decided by the Adjudicator was that only points included in the Pay Less notice are capable of being relied on as a defence and the cross-claim for defects was not included. As Mr. Zvesper pointed out in his skeleton argument, no Part 8 claim has been issued and the Defendant has not sought to establish the criteria in *Hutton Construction v Wilson Properties* are met to enable any issue of substantive law on the merits to be finally determined as part of this hearing.
20. Strictly, therefore, that is an end to the matter. What the Defendant nonetheless invites me to do is to construe the two set-off clauses relied on in a manner which subsequently permits set-off against the Adjudicator's decision. Clause 5.5 is in the following terms:
 

*“The Contractor shall be entitled to set-off any liability which the Sub-Contractor has to the Contractor against any liability which the Contractor has to the Sub-Contractor, whether such liability is present or future, liquidated or unliquidated, under the Sub-Contract or any other contract between the parties or other cause of action.”*
21. Clause 10.2 says:
 

*“The Contractor shall be entitled to set-off from sums due to the Sub-Contractor any costs which the Contractor may incur in removing, dismantling, reassembling and reinstating the Sub-Contract works. ... The Sub-Contractor's liability under this clause shall be in addition to and not in lieu of any liabilities in contract, tort or otherwise whether express or implied under common law or statute.”*
22. The former clause is described by Mr. Stephens in his skeleton argument as a “trump card” of such clarity that it would permit a set-off to be made against an adjudication award, and the latter is said by him to be equally clear and, again, permits a contractual entitlement to set-off against an Adjudicator's decision.
23. There are a number of authorities in this area, the first and principal one being *Ferson v Levolut* [2003] EWCA Civ. 11 and I refer, without citing for the purposes of this judgment, to paragraphs 22, 29 and 30 of the Judgment of Mantell L.J. My attention has also been drawn to *McLean v The Albany*. I do not want to cite paragraphs extensively from the judgment but paragraph 30 of that decision is relevant. I was also referred to *Verry v Camden* [2006] EWHC 761, a decision of Ramsey J. and in particular paragraphs 24, 25, 27, 28, 30, 32; the case of *Rok Building v Celtic Composting* [2009] EWHC 2664, a decision of Akenhead J. at paragraph 17; and a

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case relied on by the Defendant, *Naylor Construction Services Ltd v. Acoustafom Ltd*. [2010] All ER (D) 138 and, in particular paragraph 53 which I will read out;

*“Mr. Mantle, in my judgment correctly, acknowledged that there is a strong line of authority to the effect that it is often difficult for a responding party to establish that something is capable of being set off against the sum which an Adjudicator has decided should be paid to a referring party.”*

24. Then, at paragraph 58 of that case, the learned judge cites two principles which were established from *Balfour Beatty v Serco* and *Ledwood v Whessoe*, the first of which is ‘if it follows logically’ from the Adjudicator’s decision that the defendant is entitled to recover a specific sum that is an exception to the general rule precluding set off against an adjudicator’s decision, and, secondly, ‘if is the natural corollary of the Adjudicator’s decision’ that the defendant is entitled to recover a specific sum then that is equally an exception to the general rule.
25. In paragraph 59 His Honour Judge Grant goes on to say:
 

*“The difficulty for the Defendant in this case is that it concedes that the head of claim the Claimant seeks to set off was ‘not properly formulated’ at the time of the adjudication. It is thus at the very least difficult, if not in fact impossible, for a defendant in such circumstances to set off an un-particularised cross-claim against the amount which the Adjudicator has decided the defendant should pay to the claimant.”*
26. At paragraph 60 he refers to *William Verry* and says the same considerations in that case apply to one that was not properly formulated at the time of the adjudication, that being an observation which, in my judgment, is apposite to the present case. For those reasons, the submission that it was permissible to set off a cross-claim that was not properly formulated at the adjudication stage failed.
27. The last decision in the sequence which was relied on is *Thameside Construction Co Ltd v Stevens* [2013] EWHC 2071, Akenhead J. and, in particular, the summary which cites authorities including *Rok* at paragraph 20 and *Squibb Group Ltd. v. Vertase FLI Ltd*. [2012] EWHC 1958, paragraph 23 and, then, the drawing of the threads together in paragraph 24. Mr. Stephens says that *Naylor* was not referenced in that case, and I ought to therefore treat Mr. Justice Akenhead’s summary of the law with caution. But in my judgment, it fairly summarises the position set out in *Naylor* without reference to it.
28. Taking all of these authorities together in short order, they all, in my judgment, point in the same direction, as Mr. Stephens accepted. Looking at *Naylor*, the cross-claim for defects does not follow logically from the Adjudicator’s decision and is not a natural corollary of the Adjudicator’s decision. So those two exceptions do not apply. The critical point from paragraph 30 of *Ferson v Levolux* was that the contractual provisions which permitted set-off must either be consistent with the policy of the Act or must be struck down as inconsistent with its policy. In other words, the clauses

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that permit set-off as a matter of contract have to be read as only permitting it subject to the effect of the Act or they would otherwise not be in compliance with the policy of the Act and would therefore be struck down. That is, for a defendant, Hobson's Choice as neither of those affords a defence to a claim for summary judgment.

29. I accept Mr. Zvesper's submission that clause 5.5 is part of the payment mechanism itself and is therefore internal to the Claimant's process. So, it is effectively saying that these are things which can be set off provided that you serve a notice in accordance with the rest of clause 5, in order for reliance to be placed upon it. Although Mr. Stephens points out that clause 5.5 does not cross-refer to any of the other sub-clauses in clause 5, in my judgment it has to be read alongside the compendious provisions in clause 5, and it is not therefore to the point that clause 5.5 does not cross-refer.
30. For my part I would seek to construe both clauses 5.5 and 10.2 as consistent with the Act so that they fulfil some contractual purpose, and the way that can be done is by reading them as simply not applying to monies due by reason of an adjudicator's decision.
31. Another way of achieving the same result is to construe the provision incorporated by paragraph 23 of the Scheme, whereby the parties agreed to the binding effect of the Adjudicator's decision, to mean that it is binding irrespective of any other contractual obligations. In other words, the decision should be complied with without recourse to set-off other than that which connects with or flows from the Adjudicator's decision. If I am wrong to construe clauses 5.5 and 10.2 in that way it seems to me that the clauses would be inconsistent with the policy of the Act and become entirely unenforceable.
32. Mr. Stephens relies on *Parsons Plastic v Purac Ltd* [2002] BLR 334. He submits that the present case is one of the rare cases with which that authority is identified. He rightly and fairly accepts the tension between the court's desire to enforce adjudication decisions by reason of the policy that lays behind the Act and, as he graphically described it, the matter as it stood on the ground. He accepts fairly that there is only a narrow class of case which would permit him to rely on the type of provision which was accepted in *Parsons Plastics* as being an exception to the general rule. In *Parsons*, which is of course a Court of Appeal authority, at paragraph 14 Pill L.J. said he had not found the question an easy one. He said:

*"When parties provide in this context a specific procedure by which a claim to withhold payment is to be notified (and detailed), it cannot readily be concluded that the effect of a general clause, such as Clause 31, is to make the procedure unnecessary.*

*15. I have, however, come to the conclusion that failure to give a notice under Clause 17(g) is not fatal to the respondents' right to set-off. Clauses 17f and 17g must be read together, 17g providing a mechanism whereby the respondents can exercise the right conferred in 17f. .... It is open to the respondents to set off against the adjudicator's decision any other claim they have against the appellants which had not*

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*been determined by the adjudicator. The adjudicator's decision cannot be re-litigated in other proceedings but, on the wording of this sub-contract, can be made subject to set-off and counterclaim."*

33. In my judgment Mr. Zvesper is right to submit that this case was distinguished by the Court of Appeal in *Ferson v Levolux* because it did not consider what impact section 108 HGCRA might have on its proper construction. That material ground of distinction applies here too.
34. There is at least one further point of distinction. That is that, in this case, as I have already decided, the Adjudicator had determined the question, and therefore the rationale at paragraph 15 falls away. Mr. Zvesper also relies on a yet further distinction between that case and this, namely that in *Parsons Plastic* the adjudicator's decision was not temporary, but I do not need to decide that point. What is abundantly clear from all the cases which follow subsequent to *Parsons Plastic* is that it has been distinguished in all cases in which the Act is applicable. It is in that context that Mr. Justice Coulson described *Parsons Plastic* as a rare exception.
35. Although Mr. Stephens did not press the matter forcefully in oral argument, his last effective throw of the dice by way of defence to these enforcement proceedings was that it is arguable that the Adjudicator fell into error in awarding payment of a sum rather than directing that a sum was payable in accordance with the contract and that this distinction is well established by the authorities. Here, the adjudicator did what he was both asked and entitled to do. He was asked to order a payment and he did so. Even if he made an error in doing that his decision is to be enforced.
36. In the light of my two earlier decisions it is not therefore necessary for me to address Mr. Zvesper's third argument that the requirements of clause 10.2 have not been substantively met, though I do accept the submission that the requirements of clause 5.5 were not met because the requirement, in that context, as I have construed it, is that the Pay Less notice should have been served identifying the set-off relied upon, and that was not the case here.
37. In my judgment, for all those reasons, this is a case suitable for summary judgment, and I therefore enforce the decision to the extent of the balance which is due and owing, namely £168,452.33, and interest which will be the subject of discussions in a moment.

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