Neutral Citation Number: [2023] EWHC 1042 (TCC)

Case No: HT-2023-000066

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Rolls Building
Fetter Lane
London, EC4A 1NL

05/05/2023

Before :

MRS JUSTICE JOANNA SMITH DBE

- -

Between :

FK CONSTRUCTION LIMITED

Claimant

- and -

ISG RETAIL LIMITED

Defendant

- -
- -

Mek Mesfin (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Simon Hale (instructed by **Mantle Law (UK) LLP**) for the **Defendant**

Hearing date: 19 April 2023

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APPROVED JUDGMENT

This judgment was handed down remotely by email at 10.00 am on Friday 5 May 2023 by circulation to the parties or their representatives and released to the National Archives.

Mrs Justice Joanna Smith:

1. By its application notice dated 8 March 2023, the Claimant ("**FK**") seeks summary judgment to enforce the adjudication decision of Mr Allan Wood dated 27 February 2023, directing the Defendant ("**ISG**") to pay £1,691,679.94 plus interest and costs.

2. ISG resists enforcement 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.

BACKGROUND

3. ISG is the main contractor in relation to a project in Avonmouth in Bristol (referred to by the parties as **Project Barberry**). The employer is RB Avonmouth Developments Limited.

4. On or around 28 September 2021, ISG engaged FK on a bespoke ISG sub-contract in relation to roofing and cladding works on Project Barberry for the contract sum of £3,400,000 ("**the Sub-Contract**"). Pursuant to the Sub-Contract, FK issued its Application For Payment 16 ("**AFP 16**") on 27 September 2022 in the amount of £1,691,679.94. ISG failed to issue a Payment Notice ("**PN**") in respect of AFP 16 but it submitted a Pay Less Notice ("**PLN**") on 28 October 2022. No payment was made by ISG in relation to AFP 16.

5. Clause 30(2) of the Sub-Contract provides that any dispute or difference arising under the Sub-Contract may be referred to adjudication in accordance with the Scheme for Construction Contracts (England and Wales) Regulations 1998 ("**the Scheme**"). As required by section 108 of the Housing Grants Construction and Regeneration Act 1996, as amended[1], ("**the 1996 Act**"), clause 30(4) provides that the decision of the adjudicator "shall be binding until the dispute or difference is finally determined by legal proceedings in the English Courts"[2].

The Wood Decision

6. By a Notice of Adjudication dated 19 January 2023, FK referred to adjudication a dispute as to the validity of ISG's PLN in response to AFP 16 relating to the period September 2022. Mr Wood was appointed adjudicator and issued his decision on 27 February 2023 ("**the Wood Decision**"). In summary, he determined that (i) AFP 16 was a valid notice complying with section 110A(3) and given pursuant to section 110A(2) of the 1996 Act; (ii) ISG did not issue a PN in respect of AFP 16; and that (iii) ISG's PLN was out of time and thus invalid. He directed ISG to pay FK £1,691,679.94 plus VAT and interest (at a daily rate of £289.67 from 25 October 2022 to the date of the decision in the sum of £36,208.75 and ongoing at such daily rate until payment) within 7 days of the date of his decision. He also directed ISG to pay his fees and expenses in the sum of £8,120 plus VAT.

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1 See the Local Democracy, Economic Development and Construction Act 2009.

2 See also 23(2) of the Scheme.

7. ISG did not comply with the Wood Decision causing FK to issue these proceedings for the sum of £1,691,679.94 plus interest on 8 March 2023. It is accepted by FK in its Particulars of Claim that, despite Mr Wood's findings, there is no VAT applicable to AFP 16 and, accordingly, it makes no claim to VAT in these proceedings.

Other Adjudication Decisions relating to Project Barberry

8. The Wood Decision is not the only adjudication decision concerning these parties arising in respect of Project Barberry. Three other adjudication decisions were referred to in the context of the hearing and may be summarised as follows:

    a. The **Shawyer Decision** of 17 November 2022: this concerned FK's AFP 14 for the period July 2022 and thus preceded the Wood Decision. The Shawyer Decision determined that AFP 14 was valid, that a PLN served by ISG was invalid and that ISG must pay to FK the sum of £1,489,651.32 plus VAT together with interest. ISG has not paid this sum, but it has issued Part 8 proceedings ("**the Barberry Part 8 Proceedings**") alleging breach of natural justice and contending that AFP 14 did not constitute a valid payee's notice or default payment notice because it was not a notification given "in accordance with the contract" as required by section 110B(4) of the 1996 Act ("**the s.110B(4) Issue**"). The Barberry Part 8 Proceedings are due to be heard on 13 and 14 June 2023 and are listed to be heard together with another set of Part 8 proceedings on another project involving the same parties to which I shall return in a moment. It is common ground that the s.110B(4) Issue also arises in connection with the Wood Decision.

    b. The **Ribbands Decision** of 7 March 2023: this concerned FK's AFP 13 for the period June 2022. The Ribbands Decision determined that ISG had failed to issue either a valid PN or a valid PLN in respect of AFP 13 and accordingly that ISG must pay £1,558,641.17 plus VAT together with interest. However, this decision was made subject to the operative parts of the Shawyer and Wood Decisions not being complied with and "if not paid, subsequently declared unenforceable by the English Courts". It is common ground that the Ribbands Decision is therefore conditional upon the outcome of the Barberry Part 8 Proceedings.

    c. The **Molloy Decision** of 14 April 2023: this decision only became available very shortly before the hearing and after preparation of the skeleton arguments. It concerned a request by ISG for a gross valuation of the Sub-Contract as at 28 February 2023. The Molloy Decision determined a gross valuation of £3,736,679.72 and split the costs of the adjudication between the parties, with ISG to pay 60% and FK to pay 40%. Taken at face value, and given that ISG has already paid £2,829,941.55 in respect of the Sub-Contract works, this would suggest that FK's further entitlement from ISG is £906,738.20. The timing of the Molloy Decision led to both parties making new submissions at the hearing which had not been entirely foreshadowed in their skeleton arguments.

9. Pausing there, Mr Simon Hale, acting on behalf of ISG, made various points in his written skeleton argument in relation to the background context to the Wood Decision, including as to the "smash and grab" nature of the adjudications to which I

have referred, the duplicative effect of the Shawyer, Wood and Ribbands Decisions (recognised in the Ribbands Decision) and the potential for FK to make a substantial windfall if all 3 decisions were to be enforced. He also pointed to the fact that in approximately 8 weeks' time the court will be called upon to determine the s.110B(4) Issue which, if ISG succeeds on that issue, will likely render all of these decisions unenforceable.

10. However, save that these matters are said to be relevant to the exercise of the court's discretion (to which I shall return later), Mr Hale did not contend that they were in themselves sufficient grounds on which to defeat enforcement proceedings in respect of the Wood Decision.

Project Triathlon

11. In addition to Project Barberry, FK and ISG are also engaged on another project, referred to as **Project Triathlon**, which relates to works for a new logistics and distribution facility in Essex. ISG has been employed on Project Triathlon by DHL Real Estate (UK) Limited and has itself engaged FK on a materially similar set of bespoke ISG sub-contract terms to those used on Project Barberry ("**the Triathlon Sub-Contract**"). However, Project Triathlon is taking place in a different location from Project Barberry, involves different works and a different ultimate employer.

12. Three adjudication decisions in respect of Project Triathlon (together "**the Triathlon Decisions**") were referred to by the parties at the hearing:

    a. The **Aeberli Decision** of 20 March 2023, pursuant to which it was decided that ISG was entitled to terminate FK's employment under the Triathlon Sub-Contract (which it did by notice on 7 October 2022) and that ISG was entitled to be indemnified by FK in the sum of £763,428.28. FK says that it intends to challenge the Aeberli Decision on jurisdictional grounds by way of Part 8 proceedings but it has not yet issued any such proceedings.

    b. The **Ribbands (Triathlon) Decision** of 30 March 2023 which decided (amongst other things) that ISG was entitled to the sum of £105,011.53 payable by FK to ISG by 12 April 2023. FK accepts that this decision is enforceable but has not yet paid the sum due.

    c. The **Jensen Decision** of 5 April 2023 which decided that FK was entitled to a payment of £801,819.13 from ISG by 12 April 2023. ISG has not yet made any payment pursuant to this decision. No jurisdictional challenges were made to the adjudicator and none has been intimated subsequently.

13. It was common ground at the hearing that the net effect of the Triathlon Decisions, taken at face value, is that FK owes to ISG a figure of £66,620.68 in respect of the Triathlon Sub-Contract works.

14. Part 8 proceedings in relation to Project Triathlon have also been commenced by ISG and (owing to the materially identical nature of the sub-contract terms) are due to be heard at the same time as the Barberry Part 8 Proceedings.

THE APPLICATION

15. FK contends that ISG has no real prospect of successfully defending the claim to enforce the Wood Decision because the claim is for enforcement of a valid adjudication decision which is binding by reason of the provisions of section 23(2) of the Scheme. FK says that there is no other compelling reason why the case should be disposed of at trial.

16. ISG makes no arguments on natural justice or jurisdiction and it does not contest the enforcement of the Wood decision. However, it contends that it has a valid "set off" which the court should take into account in the exercise of its discretion.

17. The parties both served witness statements in connection with application, which I bear in mind in arriving at my determination.

The Applicable Legal Principles

18. The applicable legal principles relating to adjudication enforcement are well established and not in dispute. They were recently set out by O'Farrell J in *BexHeat Ltd v Essex Services Group Ltd* [2022] EWHC 936 (TCC) at [35]-[38] and there is no need to repeat them here. Suffice to say that the courts take a robust approach to adjudication enforcement and there are only limited circumstances in which the court will refuse an application for summary judgment.

19. One such circumstance (the only one relevant in the context of this application) may be where it is appropriate in the court's discretion to permit a set off or withholding.

20. I was referred to various authorities on the subject of set off, and can summarise the principles they expound in the following way:

    a. The general position is that adjudicators' decisions which direct the payment of money by one party to the other are to be enforced summarily and expeditiously unless there is a valid jurisdictional or natural justice ground which renders enforcement inappropriate. No set off or withholding against payment of that amount should generally be permitted (*YCMS Ltd v Grabiner* [2009] EWHC 127 (TCC) at [63] and *Thameside Construction Co Ltd v Stevens* [2013] EWHC 2071 per Akenhead J at [24(c)]). As Jackson J observed in *Interserve Industrial Services Ltd v Cleveland Bridge UK Ltd* [2006] EWHC 741 (TCC), a case in which he held that there was no entitlement on the facts to a set off, at [43]:

> "…Where parties to a construction contract engage in successive adjudications, each focused upon the parties' current rights and remedies, in my view the correct approach is as follows. At the end of each adjudication, absent special circumstances, the losing party must comply with the adjudicator's decision. He cannot withhold payment on the ground of his anticipated recovery in a future adjudication based upon different issues…".

    b. The rationale for the approach taken by Jackson J in *Interserve* may be found in [46] of his judgment, where he observed that the "bizarre consequence" of

the argument that set offs were appropriate where there was a series of consecutive adjudications between the same parties would be that:

> "no adjudicator's decision is implemented; each award simply takes its place in the running balance between the parties. Such an outcome is plainly contrary to the policy of the 1996 Act".

c. There are, however, at least three limited exceptions to this general position:

i. a first, "relatively rare", exception will be where there is a specified contractual right to set off which does not offend against the statutory requirement[3] for immediate enforcement of an adjudicator's decision (*Thameside* at [24(d)]). This exception will be rare because, as Mantell LJ made clear in *Ferson Contractors Ltd v Levolux AT Ltd* [2003] BLR 118 at [30], the contract must be construed so as to give effect to the intention of Parliament (as set out in the 1996 Act) rather than to defeat it; if the set off provision offends the requirement for immediate enforcement of the adjudicator's decision it should be struck down as unenforceable (see also *BexHeat* at [69]);

ii. a second exception may arise where it follows logically from an adjudicator's decision that the adjudicator is permitting a set off to be made against the sum otherwise decided to be payable (see *Thameside* at [24(e)] and *Balfour Beatty Construction v Serco Limited* [2004] EWHC 3336 (TCC) per Jackson J at [53]). This will require an analysis of the decision itself (see *Thameside* at [16] and [24(d)]), but if an adjudicator has decided that a certain sum must be paid by one party to another, it is difficult to see how there could be room for an allowable set off (see the analysis in *Thameside* at [23] of *Squibb Group Ltd v Vertase FLI Ltd* [2012] BLR 408). However, where an adjudicator is simply declaring that an overall amount is due or is due for certification, rather than directing that a balance should actually be paid, a legitimate set off or withholding may be justified when that amount falls due for payment or certification in the future (*Thameside* at [24(d)]);

iii. a third exception may arise in an appropriate case and at the discretion of the court, where there are two valid and enforceable adjudication decisions involving the same parties whose effect is that monies are owed by each party to the other (*HS Works Ltd v Enterprise Managed Services Ltd* [2009] EWHC 729 (TCC) per Akenhead J at [40]; and *JPA Design* and *Build Limited v Sentosa (UK) Limited* [2009] EWHC 2312 (TCC)).

21. In this case, ISG seeks only to rely upon the third exception. In the circumstances, I need to look more closely at the decisions in *HS Works* and *Sentosa*.

22. *HS Works* involved two adjudication decisions made respectively in February and March 2009, a year or so after completion of the works or termination of the contract.

[3] See section 108 of the 1996 Act and 30.1 of the Scheme.

In the first adjudication, the adjudicator decided that approximately £1.8m should be paid by Enterprise in respect of contra-charges. In the second adjudication the adjudicator decided and declared that the proper valuation of the contract works allowing for contra-charges was approximately £23m. Akenhead J recorded that "[t]he effect of this Second Decision could mean that all or part of the sum decided to be due under the First Decision should be repaid, if paid at all". Each party issued proceedings in relation to the adjudication decision in its favour alleging invalidity on grounds of jurisdiction or natural justice and each party then issued a summary judgment application. The court directed that these applications should be heard together.

23. Against that background, the first issue for the court was how it should deal with two adjudication enforcements which decided different things but which might or did impact upon each other. Akenhead J referred (at [39]) to the passage in *Interserve* at [43] to which I have already made reference above. He noted that in *Interserve* the sum due under the later adjudication had not fallen due for payment, albeit that the later decision had been issued during the course of the proceedings for the enforcement of the earlier decision.

24. Akenhead J also referred to *YCMS,* a case in which he had followed the approach adumbrated by Jackson J in *Interserve* and rejected the submission that what was referred to as a third adjudication decision should be set off against the decision under consideration in circumstances where it had been issued "relatively recently" and where a jurisdictional challenge had been taken at the third adjudication and might subsequently be maintained in any enforcement proceedings. In *YCMS*, Akenhead J observed that he:

> "did not consider that the fact that a Third Decision has been reached which on its face allows to the defendants a net recovery is a special circumstance which justifies departing from the general rule that valid adjudicator's decisions should be enforced promptly. Things might be different if there were effectively simultaneous adjudications and decisions".

25. Having considered these two cases, Akenhead J observed in *HS Works* (at [39]) that *YCMS* was a similar situation to that in *Interserve* "with the added complication that it was unclear whether the later decision was valid or likely to be challenged as invalid". He went on to point out that "[i]n neither case had the defendant sought to enforce the later decision by separate proceedings".

26. Against that background, Akenhead J formulated the following steps (at [40]) which, in his view, needed to be considered before making a decision to permit a set off:

> "(a) First, it is necessary to determine at the time when the court is considering the issue whether both decisions are valid; if not or if it cannot be determined whether each is valid, it is unnecessary to consider the next steps.
>
> (b) If both are valid, it is then necessary to consider if, both are capable of being enforced or given effect to; if one or other is not so capable, the question of set off does not arise.

> (c) If it is clear that both are so capable, the court should enforce or give effect to them both, provided that separate proceedings have been brought by each party to enforce each decision. The court has no reason to favour one side or the other if each has a valid and enforceable decision in its favour.
>
> (d) How each decision is enforced is a matter for the court. It may be wholly inappropriate to permit a set off of a second financial decision as such in circumstances where the First Decision was predicated upon a basis that there could be no set off".

27. Akenhead J went on to determine that both the first and second adjudication decisions in *HS Works* were valid and enforceable and, furthermore, that although in the second adjudication the adjudicator "only made a declaration as to the net value of the final account" (as opposed to any directive decision as to payment by one party to another), nevertheless, section 108 of the 1996 Act requires the contract between the parties to be read as requiring the parties "to comply with and abide by the valid decision of the adjudicator" such that even where a decision was declaratory "it must still be complied with by the parties". Against that background, Akenhead J held that the parties were bound to comply with the decision in the second adjudication, that there had been no attempt to raise any additional claims in that adjudication and that "[i]t follows that, if the parties are to give effect to Mr Smith's decision, as they are required to do contractually, as soon as the sum payable pursuant to [the first] decision is paid [by Enterprise], a balance will then be due back to Enterprise". Akenhead J determined (at [63]) that accordingly:

> "(a) Both adjudicators' decisions are valid and enforceable.
>
> (b) The parties and the court are required to give effect to both decisions."

28. Akenhead J then observed that the court was left in "a difficult position as to how to deal procedurally with what has happened", a difficulty which he then resolved (at [65]) by the exercise of his discretion as to "how any order or orders on judgments should be drawn". In this case, the "pragmatic" approach was to draw the orders so as to reflect the net effect of the judgment because:

> "it would be pointless, at least administratively, for Enterprise to hand over the net sum (allowing for the belated payment) due pursuant to the First Adjudication decision to be followed by HSW having to hand back all or the bulk of what had just been paid to it to Enterprise".

29. Pausing there, in my judgment it is important that, unlike *Interserve* and *YCMS*, the facts of *HS Works* involved a determination as to the validity and enforceability of the two adjudication decisions with which the court was dealing "simultaneously" and in respect of which a set off was ultimately ordered. The parties were required to give effect to both decisions and so the pragmatic approach was to provide for a set off in the ultimate orders made by the court.

30. The facts of *Sentosa*, in which Coulson J (as he then was) also decided that a set off was appropriate, were in many ways similar. Again the court was dealing together with two sets of enforcement proceedings in respect of two separate adjudication

decisions. It was accepted that a first adjudication decision for a payment of £300,000 was valid and enforceable, but it was contended that a second adjudication decision determining an entitlement to claim £180,000 by way of liquidated and ascertained damages should be set off against the first adjudication decision. Although the set off was disputed, there was no issue as to the validity or enforceability of the second adjudication decision (beyond an issue as to whether the enforcement proceedings could be defended by raising a claim for a full entitlement to an extension of time – an argument that was swiftly rejected by the Judge).

31. In the circumstances, the court was left with two valid adjudication decisions, one requiring payment of a sum of money and one permitting a party to make a claim for a sum of money. The Judge held that, simply having regard to the equitable jurisdiction to the effect that judgments or orders *for payment* can be set off against each other, there was no reason not to order a set off. He also held that, in any event and on the particular facts of the case, such a result would be consistent with the second exception to which I have referred, expounded by Jackson J in *Balfour Beatty* at [53]. Indeed on the facts of *Sentosa*, the position was even stronger than postulated in *Balfour Beatty* because the second adjudicator had decided that there was an entitlement to liquidated and ascertained damages in clear and unequivocal terms. Although *HS Works* does not appear to have been cited in *Sentosa*, I can see nothing in the case which suggests that it is in any way inconsistent with the decision in *HS Works*; aside from the fact that the second exception applied, the two adjudication decisions in *Sentosa* were valid and enforceable, separate proceedings had been brought in respect of each decision and a set off was accordingly appropriate.

THE PROPOSED SET OFF IN THIS CASE

32. ISG invites the court to exercise its discretion and to order a set off in this case of (i) the gross valuation of FK's works identified in the Molloy Decision; and/or (ii) the net sum of £66,620.68, due from FK to ISG further to the Triathlon Decisions, against the sum arrived at in the Wood Decision. Mr Hale realistically accepted in his oral submissions that by reason of the relatively low value of the net sum due to ISG on the Triathlon Decisions, his primary case must be directed towards the Molloy Decision.

33. The effect of a 'set off' involving the Wood Decision and the Molloy Decision (taking both at face value), would be to ensure that ISG makes no over-payment having regard to the gross valuation arrived at in the Molloy Decision of £3,736,679.72[4]. By my calculations (and in circumstances where ISG has already paid £2,829,941.55),

[4] Although couched in terms of a 'set off', ISG's proposal is not really for a set off (in the sense of a balancing between a sum owed by one party against a sum owed by another), but rather for a withholding of part of the amount that it owes FK pursuant to the Wood Decision. ISG effectively invites the court to accept that the figure identified in the Wood Decision overstates the position having regard to the Molloy Decision, such that it should be reduced accordingly.

enforcing the Wood Decision would result in an overpayment to FK of £784,941.70[5], a sum which ISG contends would therefore become immediately repayable to it.

34. Accordingly, I understand ISG to be inviting the court to enforce the Wood Decision only up to the value of £906,738.20 (thereby reflecting the Molloy Decision) and further to deduct from that figure the sum of £66,620.68 reflecting the net sum due to it pursuant to the Triathlon Decisions, to arrive at a figure of £840,117.52.

35. However, having considered the authorities with care, I do not consider this to be an appropriate case in which to exercise my discretion to order a set off (or withholding) either in respect of the Molloy Decision or the Triathlon Decisions.

36. It is not in dispute that set off provisions in the Sub-Contract cannot be construed so as to be consistent with the intent of the 1996 Act and further that there is nothing in the Wood Decision which predicates the potential for a set off. On the contrary, the Wood Decision makes plain that the adjudicator intended the sum of £1,691,679.94 to be payable within 7 days of the decision. On a proper reading of the Wood Decision, the adjudicator did not intend there to be any set off or withholding in respect of that award. Furthermore, there is nothing in the Molloy Decision which alters that position. This is not an auspicious start to ISG's campaign to persuade the court of its entitlement to a set off or withholding. However, I must next turn to consider the steps identified by Akenhead J in *HS Works*. It is common ground that this is a necessary exercise for the purposes of determining this application.

The Molloy Decision

37. Applying the guidance given by Akenhead J at [40] in *HS Works*:

    a. **Validity**: In my judgment, ISG falls at the first hurdle of validity. I cannot determine on this application whether the Molloy Decision was valid and I was not asked to do so. Unlike *HS Works*, where the court had before it two sets of enforcement proceedings which it heard together, determining that each adjudication decision under consideration was valid and enforceable, I am concerned only with enforcement proceedings in relation to the Wood Decision. As is clear from the evidence, FK raised a jurisdictional challenge at the Molloy adjudication, which I was not invited to determine on this application[6], but which I understand it intends to pursue before the court (and given the timing of the Molloy Decision it is unsurprising that it has yet to take any steps in this regard). Whilst adjudicators' decisions will usually be enforced by the courts, that enforcement policy only applies to decisions that the adjudicator was authorised to reach (i.e. they were not vitiated by some material failure to comply with basic concepts of fairness). Accordingly, as is

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5 GV of £3,736,679.72 - £2,829,941.55 = £906, 738.20 (i.e. the sum that remains owing to FK from ISG pursuant to the Molloy Decision). Deducting this figure of £906,738.20 from the figure due pursuant to the Wood Decision (of £1,691,679.94) leaves £784,941.70. I note that during the hearing a figure of £888,000 odd was identified by Mr Hale, but as things stand I cannot see how this had been arrived at. In any event, in light of my decision, the exact figure is of no real importance.

6 It is difficult to see how FK's jurisdictional challenge to the Molloy Decision could sensibly have been determined in the time allotted for the hearing (as Mr Hale acknowledged) and in circumstances where neither party's skeleton arguments addressed the point in any detail. In any event, it was Mr Hale's contention that there was no need for the court to determine the jurisdictional issue.

clear from *Coulson on Construction Adjudication (2018 4th Ed)* at 14.04 and from *Alstom Signalling Ltd v Jarvis Facilities Ltd* [2004] EWHC 1285 (TCC) per HHJ Humphrey Lloyd QC at [19], any right of enforcement of an adjudicator's decision is always qualified or contingent upon the validity of the decision itself. There is nothing in the 1996 Act which requires a party who wishes to challenge a decision of an adjudicator to comply with it before being able to advance its case. In all the circumstances, I cannot determine on this application that the Molloy Decision was valid and so there can be no question of any set off, or withholding. I expressly reject Mr Hale's submission that the potential for a jurisdictional challenge in due course does not preclude a set off, a submission which to my mind runs entirely contrary to the principles articulated by Akenhead J in *HS Works* at [40]; the clear rationale for those principles being the existence of certainty in respect of each party's financial entitlements pursuant to two adjudication decisions with which the court is dealing "simultaneously".

b. **Enforceability/Effect**: the second matter identified by Akenhead J for consideration is whether both decisions are "capable of being enforced or given effect to". Given my decision on validity, it is not strictly necessary for me to consider this (or indeed any of the other steps), but where I have heard full argument on it, I shall do so as briefly as possible. In *HS Works*, Akenhead J held that the second adjudication decision was enforceable, declaring after hearing the arguments that the proper valuation of the sub-contract works allowing for contra charges was capable of being enforced. He went on separately to consider the effect of the second adjudication decision finding, as I have said, that the parties were required by statute to comply with the "valid decision of any adjudicator" and that this must apply to the second adjudication decision such that if the parties were to give effect to it, a balancing payment would immediately be due. Similarly in *Sentosa*, the second adjudication was found to be enforceable by the court (see [25]). In this case, however, the court has not yet heard argument as to whether the Molloy Decision is enforceable and cannot determine the point for reasons already given. Equally it cannot give effect to a decision that is not yet enforceable. In all the circumstances, there is no need for me to consider further the arguments made by the parties as to the difference between a net and a gross valuation and whether the Wood Decision is "irreconcilable" with the Molloy Decision.

c. **Separate Proceedings**: it is common ground that there are no separate proceedings in respect of the Molloy Decision and so no scope for the court to determine (based on a properly articulated and pleaded case) whether the Molloy Decision is valid and enforceable and thus no scope for the court to enforce and/or give effect to the Molloy Decision. Once again, that seems to me to be an end to the matter. Mr Hale pointed out that, given the timescales, it has not been realistically practical to commence proceedings in time for this hearing. However, even had proceedings been urgently commenced, the court would not have been dealing with the two adjudication decisions simultaneously and is unlikely to have been in a position to determine (at today's hearing) whether the Molloy Decision is valid and enforceable. In my judgment, the existence of separate proceedings brought by each party to

enforce each adjudication decision and determined together by the court was a key factor underlying Akenhead J's willingness to contemplate the exercise of the court's discretion in favour of a set off in *HS Works*. A similar situation existed in *Sentosa* (aside from the fact that there the argument for a set off also benefitted from the applicability of the second exception). In *HS Works*, Akenhead J expressly distinguished both *Interserve* and *YCMS* on the grounds that in neither case had the defendant sought to enforce the later adjudication decision by separate proceedings. Where separate proceedings have been brought and determined by the court at the same time, the questions of validity and enforceability can be properly addressed, leaving the court (if appropriate) to exercise its discretion as to how best to deal procedurally with the outcome. To my mind that is an entirely different situation from the one that arises in this case.

d. **Discretion:** In light of the analysis set out above, I reject the suggestion that I have any discretion to permit a set off or withholding – the facts of this case simply do not bring it within the territory of the exception envisaged in *HS Works*. However, even if I am wrong about that, I would not have been prepared to exercise my discretion in ISG's favour in this case, not least because (i) there is no suggestion in the Wood Decision that there might be a set off or withholding against the sum due; (ii) no payments are due or flowing from the Molloy Decision and ISG did not seek to allege any overpayment in the context of that adjudication, including in relation to amounts due and owing from previous adjudication awards; and (iii) in my judgment, an order in the terms sought by Mr Hale in this case would plainly undermine the policy of enforcement of adjudicators' decisions as developed and applied in the TCC over the last 20 years. It would also risk undermining the purpose of the 1996 Act. I accept Mr Mesfin's submission that the exercise of the court's discretion should not be used to frustrate the purpose of the 1996 Act or the Scheme, which were intended to provide for the expeditious treatment of disputes on an interim basis to secure cash flow pending final resolution of any issues between the parties.

38. For the sake of completeness, I add that Mr Hale suggested that it was relevant to the exercise of my discretion that FK had pursued a purely tactical campaign of serial "smash and grab" adjudications for the same (duplicative) sum of money and that such conduct was patently far removed from the legitimate aim (as encouraged by the 1996 Act) of facilitating cash flow in construction projects. He pointed, as I have said, to the imminent hearing of the Barberry Part 8 Proceedings and their potential to overturn reasoning in the Shawyer Decision which was followed in the Wood and Ribbands Decisions. He also made the overarching point that the court should not permit FK to enforce an adjudication decision which will permit it to benefit from a substantial overpayment.

39. In my judgment, however, none of these submissions takes matters any further and I did not understand them to be advanced as stand-alone impediments to enforcement. The court is being invited to enforce only one of the adjudication decisions made in respect of the Barberry Project, such that the question of duplication of value does not arise. Furthermore, the fact that the basis for an adjudicator's decision is to be challenged in other proceedings is of itself seldom, if ever, a ground for resisting

enforcement (*J&B Hopkins v Trant Engineering Ltd* [2020] EWHC 1305 (TCC) at [16], citing *PBS v Bester* [2018] EWHC 1127 (TCC)). Indeed the court has already rejected ISG's request to delay this hearing pending the outcome of the Barberry Part 8 Proceedings. In her order of 31 March 2023, O'Farrell J recorded her reasons as follows:

> "The court's starting point is that adjudicator's decisions should be enforced subject to any issues of jurisdiction, breach of the rules of natural justice or other exceptional circumstances. The existence of the Part 8 claim for declaratory relief…is not a ground for delaying the determination of an adjudication enforcement claim, particularly where the Part 8 claim has been listed for a later date and would involve material delay to the Part 7 claim".

40. Whilst I echo the observations of Coulson J (as he then was) in *JPA Design and Build Limited v Sentosa (UK) Limited* [2009] EWHC 2312 (TCC) at [51] to the effect that serial (and obviously tactical) adjudications are unlikely to represent the most efficient means of achieving a comprehensive and binding resolution of the numerous disputes between the parties (much less of dealing with them in a cost-effective way), the various adjudications in this case provide no basis for deviating from the well-established law and practice that, in general, valid adjudicators' decisions are to be enforced without set off or withholding[7].

41. Indeed in my judgment it is important that parties are not encouraged to raise arguments over potential set off and withholding as a means of seeking to defeat (or mitigate the effects of) otherwise legitimate enforcement proceedings, save in the very limited circumstances identified by the exceptions to which I have referred. In *HS Works*, Akenhead J was prepared to exercise his discretion to permit a set off only in narrow factual circumstances, defined by the steps he identified in [40]; a similar situation pertained in *Sentosa*. Mr Hale described these steps as a "useful framework" but sought to suggest that the court could ignore (or moderate) them on grounds of unconscionability – in other words where (as here) the facts suggest that enforcement of a first adjudication decision is likely to result in the accrual of an early windfall to one party or another by reason of the terms of a second adjudication decision.

42. However, I consider that such an approach would not only be inconsistent with existing authority, but it would also undermine the "pay now, argue later" purpose of the 1996 Act, which is unconcerned with the potential for an immediate windfall. As Stuart-Smith J observed in *PBS v Bester,* it is "routine to enforce decisions that require substantial allocations of cash to one party or another in the knowledge that it may prove to be merely an interim measure".

43. It follows that I reject Mr Hale's submission that a refusal to have regard to the Molloy Decision at this enforcement hearing would be "unconscionable and wrong". To my mind there is nothing unconscionable or wrong in enforcing a valid adjudication decision (in the form of the Wood Decision) which is binding on the

[7] For completeness I should add that it is FK's case that ISG's strategy under both the Barberry and Triathlon Projects has been to avoid making any further payments to FK for as long as possible and that FK has had no option other than to refer outstanding disputes to adjudication. However, there is no need for me to arrive at any view as to the respective merits of the parties' opposing submissions as to the approach that has been taken by FK in respect of referring disputes to adjudication.

parties. Furthermore, the facts of this case are far removed from those in *HS Works* and *Sentosa*. In my judgment those facts do not begin to justify the exercise of the discretionary approach adopted by Akenhead J in *HS Works*. I can see no "clear parallel" between the facts of *HS Works* and this case, notwithstanding Mr Hale's valiant attempts to persuade me otherwise.

The Triathlon Decisions

44. It is common ground that the impact of the Triathlon Decisions, even if accepted as a valid set off, is limited to a relatively small sum. In the circumstances, the parties did not spend a great deal of time on this point in their oral submissions and I can address it swiftly.

45. I reject the submission that it would be appropriate to apply the net result of the Triathlon Decisions to the Wood Decision by way of set off for the following reasons (which again draw on the steps identified in *HS Works* at [40]):

    a. The Aeberli Decision is subject to jurisdictional challenges by FK which cannot be determined by this court. Indeed, although Mr Aeberli reached a non-binding decision that he had jurisdiction to hear ISG's claim, he also made it clear that "it might be that on reflection ISG will consider it best, given the sums involved, to restart this Adjudication to avoid any jurisdictional uncertainty and potential wasted costs". ISG chose not to take this advice and it is perhaps unsurprising that FK's evidence confirms that it now intends to challenge the Aeberli Decision by way of Part 8 proceedings. In the circumstances, I cannot determine that the Aeberli Decision is valid or enforceable and neither can it be given effect to by way of set off. This is enough to put an end to the set off argument arising in respect of the Triathlon Decisions because it wipes out the small credit on ISG's side of the balance.

    b. No separate proceedings have been issued in respect of any of the Triathlon Decisions.

    c. As I have already said, there is nothing in the Wood Decision which was predicated on the basis that there could be a set off.

    d. Finally, and as an entirely stand-alone point, it is accepted on both sides that the suggestion that an adjudication decision in relation to one construction project can be set off against an adjudication decision in relation to another construction project is entirely novel. ISG points to the fact that the two sub-contracts contain a cross-contract set off provision, but reliance upon this would appear to offend against the statutory requirement for immediate enforcement of an adjudicator's award. Further and in any event, it is common ground that both *HS Works* and *Sentosa* (which did not concern contractual set off provisions) were concerned with adjudication decisions arising in connection with the same project. This is a point of some interest, but given the conclusions I have already reached, I do not need to determine it on this application.

CONCLUSION

46. In its evidence for the application, there was some (rather oblique) suggestion from ISG that it harboured "growing concerns" over FK's financial position and, in particular, that FK would be unable to repay any over-payment made to it by ISG. The evidence relied upon in support of this proposition (in the form of a credit risk report) was wholly inadequate and, in the face of a robust response from FK[8], I did not understand ISG to pursue this suggestion at the hearing. Accordingly I need address it no further. There was no application by ISG for a stay of execution.

47. For the reasons set out above, I reject ISG's arguments on set off/withholding. ISG has no defence to the application for enforcement of the Wood Decision and FK is entitled to summary judgment in the sum of £1,691,679.94 plus interest. The parties are invited to prepare an agreed Order to be made by the court on hand down of this judgment.

[8] FK's evidence confirms a healthy order book and a financially robust company.