

# RMC Building & Civil Engineering Limited v UK Construction Limited [2016] EWHC 241 (TCC)

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## Executive Summary

Mr Justice Edwards-Stuart decided that a payee's default notice had not been withdrawn after the final date for its payment as part of ongoing negotiations. As the payer had not served a payment or pay less notice, the sum was due. The Judge dismissed all of the jurisdictional challenges and refused to stay all or part of the enforcement. Such applications would only be granted in exceptional circumstances. This decision is a further example of the principle of "pay now, argue later". It is an important reminder that paying parties should always serve notices in each payment cycle.

## Facts

UKC engaged RMC to complete ground works and drainage for a housing project. A lump sum was agreed for certain works, with other works to be measured and priced at rates to be agreed.

On 6 May 2015, RMC submitted its eighth interim application for payment ("Application 8"), in the amount of almost £250,000. No payment notice or pay less notice was served by UKC in that payment cycle. RMC claimed that it was entitled to the amount stated as due in Application 8.

UKC (who paid a small amount on account of Application 8) relied on negotiations between the parties and argued that RMC had withdrawn Application 8 before the final date for UKC to serve a pay less notice.

RMC referred the dispute to adjudication. The adjudicator dismissed the jurisdictional challenges of UKC and proceeded to make a decision in which he awarded RMC the outstanding balance of Application 8. UKC refused to pay and RMC brought enforcement proceedings.

## The Issues

### Payment Notices

The Judge noted that the negotiations on which UKC sought to rely in this regard were inadmissible as evidence. The negotiations should properly be considered as without prejudice communications aimed at resolving the dispute.

In any event, the final date for payment of Application 8 had passed by the earliest date it could have been withdrawn (according even to UKC's evidence). UKC had served no payer's notice or pay less notice, therefore the amount in RMC's default payment notice was the sum due. The Judge said that Application 8 could not be withdrawn or amended other than by binding agreement between the parties or by reliance by UKC, to its detriment, on a subsequent representation that RMC might accept less than that claimed in Application 8. There was no evidence before him to prove either.

### Jurisdiction of the Adjudicator

UKC also resisted enforcement on the grounds that the adjudicator lacked the proper jurisdiction.

They said that the adjudicator had no jurisdiction as Application 8 had been withdrawn by RMC, and there was no dispute. This challenge fell away in light of the Judge's decision that Application 8 had not been withdrawn. The Judge also concluded that this was a question before the adjudicator that he was entitled to answer in any event.

The other challenge was that the adjudicator had exceeded his jurisdiction by awarding a sum in excess of the "cap" imposed by paragraph 2(4) of the Scheme. This provides that an interim payment should not be more than the difference between the contract price (where the contract price is the entire sum payable under the contract in respect of the work) and the aggregate sum of interim payments that have become due.

The Judge dismissed this argument on the grounds that UKC had not attempted to prove what the contract price was. Reliance by UKC on the figure referred to by RMC in its referral was doomed in circumstances where UKC had already certified a far greater amount as being the value of the work prior to Application 8.

### Stay of Enforcement

Having rejected UKC's challenges, Mr Justice Edwards-Stuart decided that there must be summary Judgment for RMC.

UKC argued that enforcement of that judgment should be stayed as it would be manifestly unjust not to do so, according to the principles in Galliford Try Building Limited v Estura [2015].

The Judge noted that it was incumbent on a party seeking such a stay to show either (a) that it would suffer severe financial hardship if required to pay the full amount or (b) that there is a real risk that it may be unable to recover any overpayment from the other party if the dispute is finally resolved in its favour

The Judge refused to impose a stay of the full amount, on the grounds that it would be unjust to RMC as UKC would then have no incentive to pursue diligently proceedings for a determination of the true amount due to RMC.

The Judge also refused to impose a stay of part of the amount. UKC had failed to put forward any evidence as to its financial situation, and the court would not make assumptions in its favour. There was also no evidence that RMC would be unable to repay any balance between the Judgment sum and its true entitlement on a final determination.

Judgment was given for the full amount of the adjudicator's award.

## Authors



**Mark Roach**

*London - Walbrook*

[mroach@dacbeachcroft.com](mailto:mroach@dacbeachcroft.com)