

**Case Comment: *RMC Building & Civil Engineering v. UK Construction Limited* [2016] EWHC 241 (Technology and Construction Court) by Andrew J. Heal of Heal & Co. LLP**

An interesting case that may be of interest to Ontario lawyers was released recently on February 3, 2016. In it, the UK Technology and Construction Court (TCC) enforced an adjudication award made less than three months earlier on November 18, 2015 in the United Kingdom.

This case appears to be a recent example of an expedited enforcement of an adjudicator's award, the kind of summary and statutory adjudication process that our profession, and the Construction Industry, might see arising from the submissions to the Reynolds and Vogel expert review of the Ontario *Construction Lien Act*. Their report is anticipated sometime around the end of March 2016.

The *RMC* case deals with the summary court enforcement (summary judgment) of a construction arbitrators' decision (a statutory adjudicator).

The context also involves prompt payment, and disputes about prompt payment, in the context of UK legislative scheme (*Housing Grants, Construction and Regeneration Act, 1996*). The Act in question appears to require prompt payment after a payment application, absent a "pay less notice".

The usual disputed facts and arguments that often arise in construction contract payment disputes would be familiar to an Ontario lawyer.

A ground works subcontract was awarded to RMC by the main contractor UKC to supply ground works and drainage to a public housing project. In the UK.

The contract was a lump sum for certain works, with other works by unit price.

The contractor UKC raised the following reasons the November 2015 adjudication award should not be recognized by the court:

- There was an "agreement" between the parties but there was no jurisdiction to appoint an adjudicator under the Act, because the "Letter of Appointment" from UKC to RMC (as subcontractor) proposed a different body to nominate the adjudicator.
- There was lengthy back and forth about reducing the disputed draw no. 8 (£216,000) which UKC claimed was withdrawn/reduced to about £85,000.
- UKC sought to introduce this evidence (over RMC's objection) as evidence of an agreement or "compromise" that the agreed draw should be £85,000 only; or
- Alternatively UKC argued this was evidence draw No. 8 was withdrawn, therefore there was no "dispute" to adjudicate.

RMC said it was seeking to negotiate a without prejudice compromise interim payment figure. The UKC representative said he was not trying to negotiate, but to establish the "true value of the RMC account" a presumably "with prejudice" effort.

For the TCC, this effort as a whole bore the hallmarks of without prejudice settlement discussions that were privileged and therefore inadmissible. Also, the emails or documents before the court demonstrated that *no reliance, let alone detrimental reliance, by UKC* on RMC's position.

For the TCC, it appears that the real problem was that no timely "pay less notice" was sent, and therefore the Act operated to make the amount due and owing. As a result, there was ample evidence for the adjudicator to find that £216,000 was overdue and thus owing to RMC.

As support for its final argument, UKC argued that there was some evidence to show that RMC's own quantity survey showed *less* completed work than billed for. As a consequence, RMC might be overpaid if the adjudicator's award were confirmed. Moreover, the early nature of this application post adjudication, but pre-pleadings of companion disputes, meant that UKC had not even delivered a defence pleaded (of presumably, set off among other things).

UKC asked the TCC to "stay judgment now" to avoid what it argued would likely be "windfall" to RMC since the UKC defence was not "decidedly weak": The TCC rejected this argument, partly on the lack of actual evidence of financial hardship to UKC, but more directly on policy grounds:

"The provisions introduced by the Act and the Scheme are all about maintaining cash flow. That purpose is not achieved by simply giving judgment for a sum and then staying its enforcement: interest is often no compensation for a lack of cash flow."

In the result, the court affirmed the adjudicator's award and ordered payment.

This could be regarded as an example of the kind of summary resolution that the *Construction Lien Act* was intended to provide, and might better provide with proposed legislative changes or reform that some are anticipating might follow the results of the expert review.