



## LEGAL BRIEFING

### *JPA Design & Build Ltd v Sentosa (UK) Ltd; and Sentosa (UK) Ltd v JPA Design & Build Ltd*

[2009] EWHC 2312, Justice Coulson

#### **The Facts**

On 19 September 2007 Sentosa (UK) Limited ("Sentosa") engaged JPA Design & Build Limited ("JPA") to design and construct a new medical centre. The contract was a JCT Design & Build Form, 2005 Edition, 2007 Revision and included detailed adjudication provisions (the "Contract").

Clause 4.6 of the Contract provided that Sentosa would make an advance payment to JPA of £300,000. Following the Contract being entered into, JPA sent Sentosa's quantity surveyor a breakdown of the start-up costs for the purposes of the advance payment which came to £252,000 i.e. less than the £300,000 identified in the contract. This £252,000.00 was paid as soon as it was invoiced. However, contrary to the agreement between the parties (which envisaged the reimbursement of the advance payment at the final account stage), £252,000 was then deducted from JPA's interim valuation number 2 in November 2007. JPA made no complaint about this at the time.

The parties' relationship deteriorated and the Contract was terminated in April 2009. At the time of the hearing JPA's final account had still not been submitted.

The case involved the results of two adjudications. The decision of the first adjudication, by Mr Bingham, concluded that JPA were entitled, pursuant to clause 4.6 of the Contract, to an immediate payment of the advance payment of £300,000 together with interest. However, he also concluded that the valuation of interim valuation 12 (at £0.00) by Sentosa's representatives was "fair and reasonable."

In the second adjudication, with Mr Alway acting as adjudicator, Sentosa sought a declaration that it was entitled to liquidated damages, although it did not seek payment of those. The liquidated damages were quantified as £180,000. However, the adjudicator commented that Sentosa was not entitled to deduct the sum of £180,000 from JPA (although it was entitled to claim them) as a result of a failure to issue a valid withholding notice.

#### **The Issues**

1. Were Sentosa entitled to set off the £180,000 in liquidated damages against the £300,000 advance payment?
2. Were Sentosa entitled to a stay of the Judgment?

#### **The Decision**

In relation to the first issue, Mr Justice Coulson held that Sentosa were entitled to set off the £180,000 in liquidated damages against the £300,000 advance payment. Coulson observed that the vast majority of the cases dealing with set off against an adjudicator's decision concerned the situation where the adjudicator has awarded one side some money but where it is said logically to follow from his decision that the other side would be entitled to a separate sum.

Coulson referred to the case of Balfour Beatty Construction Limited v Serco Limited [2004] EWHC 333 where Jackson J had identified the relevant principles as follows:

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- (a) Where it follows logically from an adjudicator's decision that the employer is entitled to recover a specific sum by way of liquidated and ascertained damages, then the employer may set off that sum against monies payable to the contractor pursuant to the adjudicator's decision, provided the employer has given proper notice (in so far as required).
  - (b) Where the entitlement to liquidated and ascertained damages has not been determined either expressly or impliedly by the adjudicator's decision, then the question whether the employer is entitled to set-off liquidated and ascertained damages against sum awarded by the adjudicator will depend upon the terms of the contract and the circumstances of the case.

Coulson observed that, in this case, Sentosa's position was stronger than in Balfour Beatty as the adjudicator had actually decided that there was a clear entitlement to liquidated and ascertained damages in "clear and unequivocal terms". The fact that he had not ordered payment (because a withholding notice had not been issued) did not mean that the liquidated damages could not now be set off against the £300,000 advance payment. He observed that it is trite law that judgments or orders for payments can be set off against each other and that the Courts also had an equitable jurisdiction for the purposes of preventing absurdity or injustice.

In relation to the second issue, Coulson noted that RSC Order 47 grants the Court a wide discretion where there are "special circumstances" which render it inexpedient to enforce that Judgment and referred to the principals laid down in *Wimbledon Construction Co 2000 Limited v Derek Vego* [2005] EWHC 1086. In particular, the Judge looked at the financial position of the Claimant at the time the contract was entered into and whether its financial position subsequently was due to the employer's failure to pay the advance payment.

Coulson rejected the argument that the JPA's financial position had not significantly altered during the last 2 years. He noted that, at the time of the Contract, JPA were making a modest profit on a modest turnover. They had since increased their turnover six fold but made a significant loss in the year up to 31 August 2008.

Coulson dismissed the idea that the worsening of JPA's financial position was Sentosa's responsibility. £300,000.00 would make little difference to JPA's overall position in his view as it must be paid back to Sentosa and JPA's overall indebtedness would therefore remain at £700,000.00. He also concluded that JPA had delayed submitting their Final Account and should not therefore be able to rely on their own delays in submitting their final account, to claim the £300,000.00 advance payment back.

Accordingly, given JPA's dreadful financial position and Sentosa's contractual right to repayment of the advance payment, Coulson considered it would be wholly unjust and inequitable if the Judgment sum was not subject to a stay of execution.

#### **Comment**

It is not surprising that set off was allowed in the circumstances given that the second adjudicator's decision was made in such clear and unequivocal terms. The availability of set off in such situations could, be argued to, encourage serial or tactical adjudications to avoid payments being made. However, Mr Justice Coulson expressly discouraged this at the end of his Judgment observing that in circumstances where every possible feature of a building case were in play (i.e. defects, delays, valuation disputes and termination/repudiation) he did not consider that serial adjudications were the best method of achieving a comprehensive and binding resolution of the disputes between the parties.

Claire King  
November 2009

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