

# ALERTER

## The Notified Sum as a shield *and* a sword?

Noel Dilworth



The TCC has recognised that enforcement of an adjudication award raised by way of a counterclaim is, in certain circumstances, permissible. In a judgment handed down on 18 June 2025, *VMA Services Limited v Project One London Limited* [2025] EWHC 1815 (TCC), the High Court (Adrian Williamson KC) determined that enforcement would be available to a Claimant sub-contractor in whose favour an award based on a Notified Sum had been the subject of an adjudication.

What was unusual about the adjudication in this case, however, was that the sub-contractor had not been the original referring party. It was the sub-contractor's counterclaim raised in response to the referral that the adjudicator upheld. The Judge, in turn, enforced that award, confirming that the adjudicator had had the power to grant an award on the counterclaim. It marks the latest decision in a line of case-law emphasising the power of the principle of subjugation, by which a construction party's right, under s.108 of the Housing Grants and Construction Regeneration Act 1996 as amended ("HGCRA"), to refer any dispute to adjudication is subjugated to the immediate obligation, under s.111 of the HGCRA, to pay a notified sum.

The facts were not in dispute. The Parties had entered into a contract on 16 October 2023, incorporating the JCT Design and Build Sub-Contract Agreement Conditions 2016 for the design and installation of mechanical works in Cheyne Walk, London. The Contract contained the usual provisions for interim payments. The Claimant sub-contractor ("VMA") had submitted an application for payment on 21 June 2024 for works completed up and including 30 June 2024, leaving a payment due of £106,434.88 (the "Notified Sum"). The Principal Contractor ("POL") served no Payment Notice or Pay Less Notice.

VMA had not referred the failure to pay the Notified Sum by the time that, on 16 December 2024, POL served notice of its intention to refer a dispute in relation to the true value of works in the period up to 30 June 2024. It was in response to the referral of POL's true value adjudication that VMA raised the point that POL had not paid the Notified Sum, in accordance with s.111 of HGCRA. In a decision issued on 10 February 2025, the Adjudicator agreed, holding that POL was not entitled to pursue a true value adjudication. It was prevented from doing so by reason of its failure to pay the Notified Sum. Accordingly, the Adjudicator made an award in VMA's favour in respect of the Notified Sum.

The failure to pay a notified sum triggers a right on the part of the contractor to seek an expedited remedy in adjudication (persistently referred to in the authorities as a "smash and grab" adjudication, despite the absence of any violence or physical damage).

The real birth of the principle of subjugation can be traced to the judgment of Jackson LJ in *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWCA Civ 2448. Paragraphs 87 and 107 of his judgment are key:

“ 87. If the employer has served no such notice, then the contractor's interim application dictates what the employer must pay... I

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*agree... that [the contractual provisions] and section 111 do impose those obligations on the employer, although it is the statute which is operative. The contractual provisions are a mere aide memoire. Also, I would characterise the employer's payment obligation as "immediate" rather than "primary"....*

*...107... Both the HGCRA and the Amended Act create a hierarchy of obligations, as discussed earlier. The immediate statutory obligation is to pay the notified sum as set out in section 111... As a matter of statutory construction and under the terms of this contract, the adjudication provisions are subordinate to the payment provisions in section 111. Section 111 (unlike the adjudication provisions of the Act) is of direct effect. It requires payment of a specific sum within a short period of time. The Act has created both the prompt payment regime and the adjudication regime. The Act cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime. Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation.* ”

In *M Davenport Builders Ltd v Greer* [2019] EWHC 318 (TCC), Stuart-Smith J (as he then was) held, in particular, at para 37, that the failure to issue a Pay Less notice leaves the employer with no defence to the contractor's entitlement to the notified sum and prevents it from even "commencing" a true value adjudication.

Thus, in *Bexheat Ltd v Essex Services Group Ltd* [2022] EWHC 936 (TCC), O'Farrell J drew together the threads of the principle:

- “ Thus, it is now clear that:
- (i) *where a valid application for payment has been made, an employer who fails to issue a valid Payment Notice or Pay Less Notice must pay the 'notified sum' in accordance with s 111 of the 1996 Act;*
  - (ii) *s 111 of the 1996 Act creates an immediate obligation to pay the 'notified sum';*
  - (iii) *an employer is entitled to exercise its right to adjudicate pursuant to s 108*

*of the 1996 Act to establish the 'true valuation' of the work, potentially requiring repayment of the 'notified sum' by the contractor;*

(iv) *the entitlement to commence a 'true value' adjudication under s 108 is subjugated to the immediate payment obligation in s 111;*

(v) *unless and until an employer has complied with its immediate payment obligation under s 111, it is not entitled to commence, or rely on, a 'true value' adjudication under s 108.* ”

In *AM Construction v Darul Amaan Trust* [2022] EWHC 1478 (TCC), Roger ter Haar KC determined that no antecedent adjudication award was required to entitle a contractor to resist a referral for an adjudication. In *Henry Construction Projects Limited v Alu-Fix (UK) Limited* [2023] EWHC 2010 (TCC), DJ Baldwin went as far as to hold that a referral started at a time when a notified sum remained outstanding was a nullity, even if the notified sum was paid before the referral fruited in an adjudication. There was, however, no reported case in which the defence available to a contractor based on non-payment of a notified sum also served simultaneously as a counterclaim for the notified sum (which had not itself previously been the subject of an adjudication).

Thus, when it came before Adrian Williamson KC, the Notified Sum still not having been paid, the question was not so much whether the adjudicator was wrong to dismiss POL's application for true value adjudication in circumstances where it had not paid the notified sum. The adjudicator plainly had that power and, on his findings (not materially disputed), had no realistic option but to dismiss the principal claim for a true value adjudication. Rather, the live question was whether the adjudicator had had the jurisdiction to make an award on VMA's counterclaim for payment of the Notified Sum (and, in turn, whether the Court had that power, even if the adjudicator did not).

The basis for his conclusion that the adjudicator did have that power was narrow. At paragraphs 22-23, he rejected the contention that paragraph 20(b) of the Scheme for Construction Contracts 1998 – which empowers the adjudicator to “decide that any of the parties to the dispute is liable to make a payment” – did not, of itself, provide the necessary basis for such a power. He viewed the tension with the dicta at paragraph 44 of the judgment of Lord Briggs JSC in

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*Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, (2020) 190 Con LR 1 as impossible to resolve.

Rather, the route by which he reached the position that the adjudicator enjoyed such a jurisdiction was that, where there was a determination that a particular sum was “immediately due” to a respondent, different considerations apply (paragraph 26). Thus, by analogy with the decision of Andrew Singer KC in *WRW Construction Limited v Datblygau Davies Developments Limited* [2020] EWHC 1965 (TCC), in which it was determined that a further adjudication award would not be required, he accepted that the findings in the live adjudication made a further adjudication otiose. He accepted the argument that paragraph 23(2) of the Scheme, in particular, rendered the making of a further referral to vindicate the liability on the Notified Sum an arid exercise, with an effect that was quite contrary to the policy of the HGCR and the

Scheme, to improve cash flow and encourage the rapid, but temporary resolution of disputes (paragraph 27).

The general advice for industry parties remains the same. For employers, early identification of points of criticism is strongly recommended and, so far as is practicable, including reference to them in any Payment Notice or Pay Less Notice. If no such notice is served, the consistent message from the Courts is to “pay now, argue later.” For contractors, swift justice is available, whether as a standalone referral (in the politest and least violent way possible, “smashing” and “grabbing”) or, subject to any appellate decision to the contrary, by way of defence and counterclaim in response to any referral (e.g. for true value) by an employer.

Noel Dilworth acted on behalf of the successful claimant contractor in *VMA Services Limited v Project One London Limited* [2025] EWHC 1815 (TCC).

## ABOUT THE AUTHORS



### Noel Dilworth ✉

Noel Dilworth is recommended as a leading junior in the field of Product Liability, his practice spanning the range from health & safety, environmental and regulatory aspects of product liabilities to consumer claims in group litigation or unitary actions. He regularly advises or represents companies in the pharmaceutical, energy, transport and medical sectors.

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