

Insights

STAYING ENFORCEMENT OF AN ADJUDICATOR'S DECISION

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SUMMARY

A party holding a favourable adjudication decision can apply to the court for summary judgment to enforce it but, in very limited circumstances, the losing party can also seek a stay of enforcement, according to the principles set down in *Wimbledon Construction Co 2000 Ltd v Vago [2005] EWHC 1086 (TCC)*. (For more information, see *Practice note, Adjudication: challenging and staying enforcement of the adjudicator's decision.*)

In this article, first published in PLC, Marcus Birch considers the decision in *Providence Building Services Ltd v Hexagon Housing Association Ltd*

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BACKGROUND

Hexagon had engaged Providence under a contract based on the JCT Design and Build Contract, 2016 Edition. Hexagon failed to pay sums notified as due by the Employer's Agent and Providence sought to terminate under clause 8.9.4, due to the repetition of a specified default. Providence brought a Part 8 claim for a declaration as to the validity of the termination. While the TCC found against Providence, the Court of Appeal decided the issue in its favour.

For more information, see:

- *Legal update, Contractor's termination under JCT clause 8.9.4 was valid (Court of Appeal).*
- *Article, Interpreting termination clauses: a recent example from the Court of Appeal.*
- *Practice note, Terminating a JCT building contract.*

Hexagon has appealed to the Supreme Court. In the meantime (and shortly following the Court of Appeal decision), Providence commenced an adjudication seeking determination of its final account, on the basis that the termination was lawful. It was awarded around £440,000.

Providence then sought to enforce the adjudicator's decision, and Hexagon sought a stay of enforcement on grounds that, given Providence's precarious financial position, any sum paid to Providence would be used to pay creditors, such that, if Hexagon prevailed in the Supreme Court, it would have no practical chance of recovering the sum.

THE PRINCIPLES

HHJ Parfitt summarised the principles deriving from CPR 83.7(4), *Wimbledon v Vago* and *Gosvenor London Ltd v Aygun Aluminium UK Ltd [2018] EWHC 227 (TCC)*, as follows:

- The court has discretion to grant a stay of a judgment if satisfied that there are special circumstances that render it inexpedient to enforce the judgment immediately.
- While in principle adjudication awards should be paid and claimants should not be kept out of their money, the fact that a claimant would probably be unable to repay the judgment sum may qualify as "special circumstances" such as to justify a stay.
- However, that would not be the case if either:
 - the claimant's financial status was broadly the same as at the time of contracting; or
 - the defendant's failure to pay the sums in issue had made a significant contribution to the claimant's financial position.

In short, in the judge's summation, in cases of an impecunious claimant, "a stay is likely to be given because to do otherwise will prevent the payor having a meaningful opportunity to get its money back", so subject to the two possibilities outlined in the third bullet point above, "generally, the risk of the payee's impecuniosity should lie with the payee".

APPLICATION TO THE FACTS

Providence argued that the court should exercise its discretion in favour of immediate payment on two grounds.

The first was that its financial difficulties were caused by the defendant, because in order to pursue its contractual entitlements it had been obliged to incur significant costs in two adjudications and related court proceedings. The judge disagreed. In his view, Providence had chosen to bring the final account adjudication knowing that Hexagon's appeal to the Supreme Court was pending, and therefore accepting the risk that the adjudication might be unraveled if Hexagon is successful in the Supreme Court. The irrecoverable costs of the legal proceedings were "objectively predictable consequences" of the legal action, and not to be attributed to the defendant.

Providence's second point was that the merits of its position on the termination point were sufficiently strong to operate in its favour. The judge rejected this. While Providence had been successful in the Court of Appeal, the Supreme Court's permission to appeal was sufficient evidence of the seriousness of the appeal, and of the chance that the adjudication decision would be unraveled.

The judge also considered the exceptions (referred to in the third bullet point above), namely that the financial position was the same as at the time of the contract, and whether the claimant's financial position was caused by the failure to pay. He found that the annual accounts showed that the claimant was substantially less well off than at the date of the contract, and that the costs of the dispute were not directly caused by Hexagon but by the termination of the contract and the inevitable disputes that followed. The exceptions therefore did not apply.

In exercising his discretion, HHJ Parfitt considered submissions on behalf of Providence to the effect that a stay would be unfair because it had been rendered financially vulnerable by the costs of the dispute and, if it is not paid the judgment sum, it could go bust and be unable to participate in the Supreme Court case.

The judge described that as a "a powerful plea to the court's instinct to protect the vulnerable", but was not convinced of the risk of insolvency and found no support in authority for the position that the potential loss should be allocated to the party who could most afford it. The judge was highly conscious of the risk that the adjudication award could be used by Providence to pay off current creditors and meet litigation costs, but then if Hexagon prevails in the Supreme Court, Providence would be insolvent and Hexagon would have no recourse, save as a creditor in the liquidation. In his view, that would be exactly the kind of manifest injustice that the *Wimbledon v Vago* principles are designed to avoid. It was also relevant that the case was due to be heard by the Supreme Court within two months of the proceedings before him, which reduced the impact of non-payment.

COMMENT

In cases like this, the courts must work with an exception within an exception. The principle is that adjudication decisions will be enforced without delay. The exception to this is that the enforcement will be stayed if the claimant would be unable to repay the amount if the underlying dispute is finally determined in the defendant's favour. The sub-exception to this is that no stay will be granted where either the defendant got what it contracted for, in the sense of an impecunious counterparty who would be unlikely to repay any sums it received, or the defendant caused the claimant's financial difficulties, for example, by repeated underpayment.

It is that sub-exception that Providence sought to rely on here. It failed because, as one would expect, the application of that sub-exception is narrow, and requires very specific facts. The impecuniosity of the payee is treated differently from the impecuniosity of the payer, because of the risk of the money disappearing from the scene entirely. As commented by HHJ Parfitt,

insolvency upsets the "pay now, argue later" principle because it removes the safety net provided by the future final resolution of the dispute. So, in cases where an immediate enforcement would in practice deprive the paying party of any future remedy, the courts are willing to stay enforcement. Whether they will do so will very much depend on the facts in each case.

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