



Neutral Citation Number: [2021] EWHC 428 (TCC)

Case No: HT-2020-000452

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (QBD)**

Royal Courts of Justice  
Rolls Building  
London, EC4A 1NL

Date: Friday 26<sup>th</sup> February 2021

**Before :**

**MR ROGER TER HAAR QC**  
**Sitting as a Deputy High Court Judge**

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**Between:**

**PHELAN CONSTRUCTION LIMITED**  
**Claimant**

**- and -**

**ELLIOTS CONSTRUCTION LIMITED**  
**Defendant**

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**John Steel** (instructed by **Birketts**) for the **Claimant**  
**Mark Forman** (Partner in **MSB solicitors**) for the **Defendant**

Hearing date: 11 February 2021

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**Approved Judgment**

**Covid-19 Protocol: This judgment will handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10.30am on Friday 26<sup>th</sup> February 2021.**

**Mr Roger ter Haar QC :**

1. There is before me an application on the part of the Claimant (“Phelan”) to enforce an Adjudication Decision issued by Mr Simon Whitfield on 23 October 2020 in which he ordered the Defendant (“Elliot”) to pay Phelan £28,093.25 plus VAT. He also ordered Elliot to satisfy his fees of £11,850.00.
2. It will be apparent that this is some way away from being in the upper financial range of claims which this division of the High Court has to consider.
3. Mr Whitfield’s Decision is concise but full in the sense that he carefully considered the issues presented to him and reached cogent and justifiable conclusions on those issues.
4. Before me, no arguments were presented to suggest there was any jurisdictional ground of challenge to his Decision or any suggestion of the other category of challenge with which this Court is familiar, namely breach of natural justice.
5. Mr Steel, appearing for Phelan, of course went first in making submissions. It is fair to say that he had to cover a lot of territory since at that stage Elliot’s position was not crystal clear. Mr Steel’s submissions were a model of helpful submissions.
6. Mr Forman appeared for Elliot in front of me. His submissions were refreshingly brief and pointed. His submissions were both in writing, in the form of his skeleton argument, and oral.
7. As I have already recorded, I did not understand him to suggest that he had any jurisdictional or natural justice objections to the validity of the Decision.
8. In his written submissions, I understood Mr Forman’s principal submission to be that because Phelan is now the subject of a CVA it would be wrong to grant summary judgment for the entirety of the amount awarded by the Adjudicator. In paragraphs 23 and 24 of his skeleton argument he submitted:

“23. Accordingly Elliot says that summary judgment should not be granted for any monies at all as to do so would place Elliot in the manifestly unjust position wherein Phelan retain contractually payable retentions and Elliot make no payment in circumstances where Phelan unjustly retain the retentions.

“24. Accordingly, Elliot says that summary judgment should not be granted for any monies equal to the retentions and the sum already paid towards the adjudicator’s costs.”

9. I approach the application for summary judgment before me upon the basis that the Decision is valid and binding, given the absence of anything to suggest that that approach is wrong.
10. This requires me to consider what the Defendant's position is. Mr Forman seemed to me to put forward a very simple position: whilst on the one hand there is a valid Adjudicator's Decision, on the other hand there are two retentions already due in the sum of about £18,000 which Phelan should have paid to Elliots – and a further sum is due soon. This is, in effect, an application for stay of execution.
11. In the event a considerable body of documentation was filed with the Court and a substantial volume of authorities filed.
12. I have no difficulty in deciding that Phelan should have summary judgment for £28,093.25 plus VAT plus also the amount of the Adjudicator's fees which Elliots has not discharged – there appears to be a small disagreement about this figure, but I am sure this can be resolved: if not, I will determine the difference.
13. The real question is whether there should be a stay of execution in respect of that judgment to the extent of retentions which should have been released, but which have not been paid. I understand these to amount to £18,021.29 on two contracts.
14. The principles to be applied in respect of a requested stay of execution of a judgment in adjudication enforcement proceedings were discussed by His Honour Judge Coulson Q.C. (as he then was) in *Wimbledon Construction Company 2000 Limited v Vago* [2005] EWHC 1086 (TCC). At paragraph 26 of that judgment, the learned judge said this:

“In a number of the authorities which I have cited above the point has been taken that each case must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in enforcement adjudication proceedings. Those principles can be set out as follows:

“(a) Adjudication proceedings (whether pursuant to the 1996 Act or the consequent amendments to the standard forms of building and engineering contracts) designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

“(b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

“(c) In an application to stay the execution of summary judgment arising out of an Adjudicator’s decision, the Court must exercise its discretion under Order 47 with consideration a) and b) firmly in mind...

“(d) The probability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay ...

“(e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted ....

“(f) Even if the evidence of the claimant’s present financial position suggested that it is probable that it would be unable to repay the judgment debt when it fell due, that would not usually justify the grant of a stay if:

“(i) The claimant’s financial position is the same or similar to its financial position at the time that the relevant contract was made ...; or

“(ii) The claimant’s financial position is due, either wholly, or in significant part, to the defendant’s failure to pay those sums which were awarded by the adjudicator ....”

15. In this case Phelan is the subject of a CVA, but the cases show that it is important to pay close attention to the terms of such a CVA when a stay is sought. Here the assumptions of those agreeing the CVA, as made clear in the CVA itself, are that (a) Phelan had financial difficulties unconnected with the contract with Elliots; (b) that, if given time, Phelan would be able to trade out of cash flow difficulties; and (c) that, accordingly, Phelan should continue to trade.
16. I also had evidence before me as to Phelan’s current asset position.
17. On that evidence I am satisfied that if Phelan is in due course required to repay a sum equivalent to the amount awarded by the Adjudicator following further proceedings it is more likely than not to be able to repay any monies paid to Elliots pursuant to this judgment.

18. Accordingly, applying the principles in *Wimbledon Construction Company 2000 Limited v Vago*, this is not a case calling for any extensive stay of execution.
19. However, the cases cited to me all discussed rather different cases to this. Here the amount awarded by the Adjudicator was relatively modest, and there appear to be sums to be taken into account on the other side of the ledger when a final account is taken.
20. In my judgment the right result is that Phelan should have summary judgment for the sums claimed (subject to checking what Elliots has already paid to the Adjudicator). However there should be a stay of execution as to £18,021.29 of the amount otherwise payable. That stay will remain in force for three months from the day on which this judgment is deemed to have been handed down.
21. I am conscious that this judgment is short on legal analysis and discussion of authority, despite the considerable erudition displayed by Mr Steel in his full and helpful submissions. In my view this case calls out for a common sense approach, which accords with the authorities cited. The stay for a limited time which I grant will allow the parties to discuss a final solution.
22. By way of summary of my reasons for this decision:
  - (1) The Adjudicator made a Decision to which there is no realistic challenge;
  - (2) There are retentions which have fallen due for release;
  - (3) Phelan have not put forward any reason why those retentions should not now be released;
  - (4) It is sensible for attempts be made to resolve the position between the parties before Phelan takes any formal steps to enforce the judgment;
  - (5) So a stay limited in time will be granted, but only to the extent set out above;
  - (6) If no agreement can be reached in the period of the stay, the usual consequences of an adjudicator's decision should follow as to the whole of the amount for which I have given summary judgment (i.e. the whole of the amounts due, subject to checking exactly what Elliots have already paid).
23. I invite submissions from the parties as to the appropriate form of order.