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STAYS OF EXECUTION IN ADJUDICATION ENFORCEMENT: WHEN ARE THE MERITS OF THE UNDERLYING CLAIM RELEVANT?

Originally published in Thomson Reuters' Practical Law Blog, July 2021



The starting point, and usually the end point, in construction adjudication is that the court will enforce an adjudicator's decision however plainly wrong their decision was. That is, of course, unless they lacked jurisdiction to reach their decision or materially breached the rules of natural justice. That was Parliament's intention when it enacted the Construction Act 1996 and every construction lawyer is familiar with the tenet.

Predictably, one might think, there has been an ever-growing body of cases in which defendants, with no defence to enforcement, seek to stay execution under CPR 83.7(4) (formerly RSC Order 47).

This begs the question: when are the merits of the underlying claim relevant to an application to stay execution in adjudication enforcement proceedings?

Applications to stay execution

The principles that apply are well known. They were set out by Coulson J (as he then was) in *Wimbledon Construction Company 2000 Ltd v Vago* [2005] EWHC 1086 (TCC) at [26] and then supplemented by Fraser J in *Gosvenor London Ltd v Aygun UK Ltd* [2018] EWCA Civ 2695.

Those principles are not rehearsed here; save to say that the merits of the underlying claim are not said to be a relevant factor when deciding whether to grant a stay. Neither are they expressly excluded.

Quadro Services Ltd v FP McCann Ltd

In *Quadro Services Ltd v FP McCann Ltd* [2021] EWHC 1490 (TCC), the court grappled with the question head-on. In that case, the claimant had been awarded £1.6 million by way of damages by the adjudicator (nearly 25% of the contract value) for repudiatory breach of contract arising out of the defendant's early termination. The adjudicator had also concluded, somewhat conversely, that the same contract included an express term conferring a right on the part of the defendant to terminate for convenience.

The defendant was aggrieved by this outcome and commenced Part 7 proceedings to reverse the decision.

On enforcement, the defendant rightly accepted that judgment should be entered for the claimant, there being no apparent basis for challenging the validity of the adjudicator's decision. Instead, the defendant sought a stay of execution pending the outcome of the Part 7 proceedings. In support of that application, it appears to have made two principal submissions:

- The adjudicator's decision was likely to be reversed in the pending Part 7 proceedings.
- It was probable that the claimant would be unable to repay the judgment sum if ordered to do so at the end of the substantive trial.

As to the first submission, the defendant suggested that the merits of the underlying claim were a relevant factor in the exercise of the court's discretion to grant a stay. The more likely the decision is to be reversed, the more expedient it is to grant a stay.

Reliance was placed on [76] of Coulson J's judgment in *Equitix ESI CHP (Wrexham) Ltd v Bester Generacion UK Ltd* [2018] EWHC 177 (TCC), in which he said:

"In my view, the court is entitled to consider that there is a bona fide challenge to the result of the first adjudication, and therefore the whole premise of the decision in the second adjudication. That cannot of course prevent summary judgment to enforce the adjudicator's decision, but it is a relevant factor when considering a stay."

Veronique Buehrlen QC, sitting as a deputy High Court judge, accepted that it may be relevant for the court to note whether a challenge to the result of the adjudication is bona fide. She went on to say:

"However, that is not the same as submitting that the merits of the underlying claim are a relevant factor when deciding whether or not to grant a stay. There is certainly, as far as I am aware, no authority to support a general proposition that the merits of the underlying claim are a relevant factor when deciding whether or not to grant a stay in the context of adjudication enforcement."

Indeed, the authorities suggest the opposite. To take the merits into account as part of all the circumstances when deciding whether or not to grant a stay would be contrary to the purpose of the Construction Act 1996 (see Fraser J's judgment in *Trident Maintain Ltd v Falcon Investments* [2016] EWHC 3895 (TCC), Fraser J at [29]).

Although a stay had been granted in *Equitix*, it was decided on very different facts. By the time of the enforcement hearing, the claimant was "an SPV with no P" with no possible incentive to remain in existence for a minute longer than it needed to. Thus, if the defendant was ordered to pay the judgment sum (a hefty £10 million), the risk of it having overpaid and never being repaid was very real. The case was, in Coulson J's own words, "unusual" (see [71]).

Conclusion

As to the question: when are the merits of the underlying claim relevant to an application to stay execution in adjudication enforcement proceedings? The answer is seldom, if ever.

The appropriate guidance remains *Wimbledon v Vago and Gosvenor London v Aygun* and the cases that have followed.

That guidance includes the following principles which the judge in *Quadro Services* relied upon in her judgment:

- The evidential burden lies with the party applying for the stay and the burden is high.
- The party seeking the stay is not entitled to embark on a fishing expedition and demand access to confidential commercial information from the respondent.
- The question that the court must ask is not as to the financial position now or in the past of the company but when any final determination is likely to be made and any sum repaid.
- The exercise of the court's discretion is a balancing exercise. If the financial information made available by the claimant is unsatisfactory, that may lead to a refusal to enforce the adjudication decisions.

The defendant was unable to meet the evidential burden and thus, notwithstanding serious questions about the merits of the adjudicator's decision, its application for a stay of execution was dismissed.

