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Construction Law Update

Adjudication Enforcement and Stays of Execution

In the case of *WRW Construction Limited v Datblygau Davies Developments Limited*, the Technology and Construction Court (QBD) (the "**TCC**") considered the issue of enforcement of an adjudicator's decision on a final account valuation and the appropriateness of a stay of execution.

Background

WRW Construction Limited ("**WRW**") and Datblygau Davies Developments Limited ("**DDDL**") entered into a contract for WRW to design and build nine dwellings for a contract sum of £2.2m (the "**Contract**").

In total, there were three adjudications between the parties. In particular, the second adjudication decision dated December 2018 decided that the Contract was validly terminated by DDDL in mid-2018. DDDL commenced the third adjudication seeking a valuation of the post-termination final account.

In the TCC's view, the adjudicator was in effect seeking to award a payment to WRW from DDDL in the sum of £568,597.32, although this was expressed as a negative sum owing from WRW (the "**Decision**"). However, on the TCC's analysis, WRW (i.e. the Responding Party) had clearly accepted during the adjudication that the adjudicator did not have jurisdiction to order a payment of money from DDDL to WRW.

The case before the TCC was an application under CPR Part 24 for summary enforcement of the Decision. In particular, WRW sought an order that DDDL pay to it £568,597.32 (plus VAT) in accordance with the Decision, or as a debt or, alternatively, judgment for damages in the same sum. DDDL sought to defend the Part 24 application and, if judgment was granted, sought a stay of execution.

The Issues before the TCC

For a Part 24 application to succeed, the TCC must be satisfied that there is no reasonably arguable defence to the claim (i.e. *"a defence with a real as opposed to a fanciful prospect of success"*). The burden of proving the lack of a reasonably arguable defence rested upon WRW, the Claimant.

The parties agreed that the sole issue for the TCC to determine was whether, in light of the valuation exercise undertaken by the adjudicator, WRW was entitled to be paid the sums claimed in accordance with that valuation.

The Application for Summary Judgment

Counsel for DDDL contended that the TCC could not make an order for payment on the basis of the Decision as that was impermissible without a valid order for payment from the adjudicator and, in the absence of the same, an immediate order for payment would involve the TCC making a final determination on the merits of the post-termination valuation account which would bar any attempts to reclaim overpayments in subsequent litigation.

Accordingly, Counsel for DDDL submitted that, because the Decision had expressed the sum owing from WRW as a negative sum, before the TCC could order payment of the sum due to WRW, there had to be another adjudication and a valid order for payment from the adjudicator before the decision could be enforced.

The TCC accepted that the adjudicator did not have jurisdiction to award a sum to WRW as the Responding Party to the adjudication. However, that was not relevant. Rather, the issue before the TCC was whether or not, on the basis of a valid, binding valuation of the post-termination account, enforcement of the valid award could include an order for payment of the sum due as a consequence of the binding valuation.

The TCC held that there was no bar to it making an order for payment on that basis. Indeed, the TCC noted that it would be *"contrary to principle and established authority"* for it to effectively force a party (which had the benefit of an award in its favour) to have to commence a further adjudication to obtain an order for payment from the adjudicator before returning to the Court for further enforcement proceedings. The TCC further noted that *"there is no authority which relates directly to the issue of the enforcement of a valuation in favour of the responding party to an adjudication final account valuation exercise"*.

Counsel for DDDL's alternative argument was based upon the doctrine of merger. However, the TCC was not persuaded that order for payment of the sums following from the adjudicator's valuation would cause the doctrine of merger to apply; in this regard, the TCC cited the temporary binding nature of an adjudication award in its reasoning.

Accordingly, there was no reasonably arguable defence to WRW's claim and so WRW's application for summary judgment succeeded.

Stay of Execution

The TCC first set out the guidelines for the discretionary grant of a stay of execution in *Wimbledon Construction Co v Vago*, and which were developed further in *Broseley London v Prime Asset Management*; in particular, the focus placed upon the claimant's financial position and the circumstances thereof.

In this regard, DDDL served two reports from an independent accountancy expert as evidence to support the position that there was a real risk of the WRW's] future inability to repay the judgment sum in the event that proceedings are commenced by DDDL. However, based upon the information presented to the TCC, there was no evidence to suggest that WRW was in an unhealthy financial position and, more importantly, there was no evidence to demonstrate that there was any real risk that monies would not be repaid to DDDL if and when a Court so ordered.

In the circumstances, the TCC preferred the financial evidence adduced by WRW as more realistic than DDDL's expert reports, which were seemingly based upon no more than *"informed speculation"*.

In any event, the TCC would have refused the application for a stay because DDDL had not yet commenced any proceedings to re-open the adjudicator's valuation, despite having had ample time to do so.

On that basis, DDDL's application for a stay was refused.

Analysis

This case reinforces the TCC's robust approach to the enforcement of adjudicators' decisions. Although the TCC accepted that the adjudicator did not have jurisdiction to award a sum to WRW as the Responding Party to the adjudication, the TCC proceeded to make an order for payment flowing from the adjudicator's valuation.

The case also emphasises the *"special circumstances"* that must be demonstrated in relation to the discretionary grant of a stay of execution. Namely, the party that seeks to demonstrate that there is a real risk that another party will be unable to pay the judgment sum (in the event of future further proceedings) will need to submit strong evidence in support of that argument.

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