

Risk of dissipation - upheld as a principle for granting a stay of execution

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The recent Court of Appeal decision in *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] EWCA Civ 2695 has upheld the first instance decision which permitted a stay of execution to be granted against the enforcement of an adjudicator's decision on the basis that there was a real risk the assets would be dissipated before the substantive dispute could be determined.

Facts of the case

Gosvenor London Ltd (“Gosvenor”) had carried out cladding works on a large building project in Southampton for Aygun Aluminium UK Ltd (“Aygun”). The project was delayed and a dispute arose over the sums due to Gosvenor. Gosvenor referred the dispute to adjudication and the adjudicator found that £553,000 was due from Aygun to Gosvenor. Aygun did not pay and Gosvenor issued an application for summary judgment to enforce the adjudicator's award. In resisting the application Aygun raised allegations of fraud and asserted that Gosvenor had stolen work records, intimidated its staff and would take any steps it could to avoid repaying the adjudicator's award following a trial of the matter. Aygun also relied on discrepancies in Gosvenor's company accounts as showing a real risk of dissipation.

Principles for granting a stay of execution

The principles for granting a stay of execution against the enforcement of an adjudicator's decision were set out in *Wimbledon Construction v Vago* [2005] EWHC 1086 (TCC). The question of whether a stay should be granted is always a matter for the court's discretion which should be deployed using the following principles as guidance:

- Adjudication is designed to be a quick and inexpensive method of arriving at a temporary result;
- Adjudicator's decisions are intended to be enforced summarily and the successful party should not generally be kept out of its money;
- The Court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind;
- The probable inability of the claimant to repay the judgment sum at the end of the substantive trial may constitute special circumstances under Order 47;
- If the claimant is in insolvent liquidation or insolvent then a stay of execution will usually be granted;
- However, 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 sum when it fell due, that would not usually justify the grant of a stay if:
 - The claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made; or
 - 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.

There is a new principle (g) in Fraser J's decision at first instance:

- *“If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purposes of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay.”*

The Court of Appeal's decision

Gosvenor appealed on the basis that (i) Aygun's allegations of fraud could be have deployed as a defence in the adjudication, but were not, so they could not be considered as a defence to the application for summary judgment (*SG South Ltd* [2009] EWHC 2645 (TCC), approved by the CoA in *Speymill* [2010] EWCA Civ. 120); and (ii) the judge was wrong to find that the evidence before him gave rise to an inference that Gosvenor would organise its affairs to dissipate funds.

The court dismissed the appeal, finding that:

- The court at summary judgment is entitled to weigh up evidence which demonstrates a real risk of dissipation whether it was presented to the adjudicator or not. The assessment of the risk of dissipation will not have been undertaken before, because such a risk will not have been an issue in the adjudication, which will have concerned whether or to

what extent the payer was liable to the payee; and

- The right to draw adverse inferences from the lack of evidence put forward by Gosvenor did not have the effect of reversing the burden of proof such that the party resisting a stay would be required to demonstrate why the stay should not be imposed. Fraser J's reasoning was entirely in line with the judgment in *Holyoake & Another v Candy & Others* [2017] EWCA Civ 92 which found that the court is entitled to draw adverse inferences in the absence of rebuttal evidence where the applicant had adduced prima facie evidence in support of its case (in *Holyoake* for a freezing order). The Court of Appeal found that applying the test for a freezing injunction in the face of a properly pleaded case in fraud, supported by detailed witness evidence, and unsatisfactory or unexplained statutory accounts, Fraser J was entitled to and was correct to draw adverse inferences from Gosvenor's refusal to respond to the evidence.

Comment

It is now clear that Fraser's J's principle (g) has been ratified as a valid reason for imposing a stay of execution following a successful application to enforce an adjudicator's award.

It is also clear that in circumstances where a respondent fails to put in evidence against a properly pleaded application on the basis of fraud, the court is permitted to draw adverse inferences from the lack of rebuttal.

Thirdly, it is clear that the court can consider evidence of fraud that was not, but could have been, deployed in the adjudication because the court will be assessing a different question for the purpose of a stay.

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