

# Kew Holdings Ltd v Donald Insall Associates Ltd: There's no arguing until you pay-up

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This case confirmed that the Claimant's proceedings be stayed until it paid sums due pursuant to an Order enforcing an adjudicator's award (the "Enforcement Order"). The Claimant was also required to pay sums into Court by way of security for costs.

## The Setting

The Claimant, Kew Holdings Ltd ("KH"), owns the long leasehold interest in The King's Observatory (the "Property"). KH had no other assets. The Defendant, Donald Insall Associates Ltd ("DIA"), is an architectural firm hired by KH to provide architectural services for the refurbishment of the Property.

## Background

In 2018, a dispute arose over unpaid fees which were due to DIA. DIA referred the dispute to adjudication and obtained an award for its unpaid fees, interest and adjudicator fees. KH did not pay the sums awarded. DIA then brought proceedings to enforce the award and was granted summary judgement, in February 2019. Again, KH failed to pay the judgement sum. The Court then granted an interim charging order, in March 2019, and then a final charging order, in May 2019, over the Property for the outstanding sum (totalling £268,488.05 plus £5,000 of costs). In September 2019, DIA commenced proceedings for an order of sale of the Property so as to realise the outstanding sums. KH opposes the order for sale on the basis that it has a claim against DIA for professional negligence and breach of contract, which claim amounts to an equitable set-off. In March 2020, KH commenced proceedings in this regard for approximately £2 million.

## The Issues

The Court had to decide whether:

1. To strike out of KH's claim against DIA unless KH pays DIA the sums awarded by the Enforcement Order;
2. To stay KH's claim against DIA unless and until KH pays DIA the sums awarded by the Enforcement Order; KH make a payment into Court, failing which KH's claim should be struck out; and
3. To require KH to make a payment into court for security of the Defendant's costs in the proceedings.

## The Decision

In respect of strike-out, the DIA argued that KH should not be allowed to start a fresh *claim* unless/until it paid the outstanding sums. Quite rightly, the Court noted that KH would not be able to start a further adjudication, without payment, nor rely on a subsequent 'true value' adjudication. However, these issues did not arise since the Court had already enforced the outstanding adjudication award with summary judgment, which was different to *S&T v Grove*, where it was at the point of starting proceedings to enforce that the paying party started court proceedings. The Court confirmed that adjudication proceedings are subordinate to payment provisions in the Housing Grants, Construction and Regeneration Act 1996 ("HCGRA"), but not subordinate to the right to bring legal/Court proceedings. The Court stated that "A party's right to access to justice is not unfettered but clear words would be required to make it subordinate to the payment provisions in the HCGRA."

In respect of a stay, KH had already accepted that proceedings should be stayed, with which the Court agreed. Clearly the Court was also unamused by the Claimant's "*deliberate and persistent breach*" of the Enforcement Order and KH's "*unreasonable and oppressive behaviour*" by issuing proceedings before making payment. In these circumstances, the Court ordered a stay of KH's proceedings "*unless and until*" the judgment had been satisfied. However, in the absence of clearer words in HCGRA for a strike-out, the Court believed that KH should be entitled to pursue its claim after payment.

In relation to the application for security for costs, KH stated that the Property was enough to satisfy security, but the relevant question was whether the Claimant would be able meet the costs order in the normal time-frame of 14-28 days. That was not the case since, based on a valuation report, the Property would be on the market for 12-18 months in order to achieve its reported value of £10million. The director of KH also offered a personal guarantee which was deemed inadequate, despite a large surplus of assets, since those assets were located in a foreign jurisdiction and were not liquid enough to provide the proper security for costs in the normal 14-28 days. The Court specifically noted that the director "*was of very substantial means*" and could have obtained a loan in order to make the payment into court. Given the

Claimant's previous disregard for the Court's orders, security for costs was granted with the sum of £600,000 to be paid into Court within 14 days.

### Implications

This case sends the clear message that the "pay now, argue later" principle of the HCGRA holds true, but confirms that "*the Court must very much have in mind a party's right to access to justice and to issue and pursue proceedings.*" The Court had to carefully balance the circumstances of the Claimant's "*oppressive and unreasonable*" behaviour with its right to access justice, ensured that the important policy of promoting cashflow in the construction industry remained at the forefront of the Court's decision.

### Authors



**Mark Roach**

London - Walbrook  
+44 (0)20 7894 6314  
[mroach@dacbeachcroft.com](mailto:mroach@dacbeachcroft.com)



**Morgan Raines**

London - Walbrook  
+44(0)20 7894 6591  
[mraines@dacbeachcroft.com](mailto:mraines@dacbeachcroft.com)