

# Novel argument failed to prevent enforcement of an adjudicator's decision

Published 28 August 2020

In *WRW Construction Ltd v Datblygau Davies Developments Ltd* [2020] EWHC 1965 (TCC) the court considered whether to enforce an adjudicator's award in circumstances where the adjudicator did not have jurisdiction to order payment of the award.

This case is notable for a novel defence put forward by the Defendant to resist enforcement. This was based on the "doctrine of merger". However, the Court found a way to enforce the Decision of the adjudicator and follow the policy decision that adjudicators' decisions should be recognised, where possible.

## Background

The parties had entered into an undated contract, incorporating the JCT 2011 Design and Build Conditions, for the Claimant to design and build nine dwellings in Twickenham, London, for a contract sum of £2.2 million.

Under a previous Adjudication decision, dated 7 December 2018 (the Second Adjudication), it had been determined that the contract had been validly terminated by the Defendant in mid-2018.

The Defendant then referred the valuation of the post-termination final account to adjudication (the Third Adjudication). The adjudicator found that sums were in fact due from the Defendant to the Claimant in the sum of £568,597.32. In the current application before the Court, the Claimant sought an order requiring the Defendant to make payment of the sum identified in the award.

The Defendant argued that it was not possible for the Court to make an order for payment on the basis of the award, without an order for payment from the adjudicator. It was the Defendant's position that this would involve the court making a final determination on the merits of the post-termination valuation account which would bar any attempt, by the Defendant, to reclaim overpayments in subsequent litigation.

If summary enforcement was granted, the Defendant applied for a stay of execution on the grounds that it intended to apply for recovery of overpayments made to the Claimant and the applicant was unlikely to be able to make such repayments. At the time of the hearing the Defendant had not issued such action.

## Judgment

The Court held that the Claimant's Application should be granted and the Defendant's request for a stay be denied.

It was held that (i) the Court had the requisite jurisdiction to order payment of the award (ii) whilst the adjudicator did not have jurisdiction to order a monetary sum to the Claimant, this was not a relevant issue (iii) the issue was whether the court could include an order for payment of the sum due.

The Court found that the principles in *Aspect Contracts (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38 applied and there was no bar to the court enforcing a temporarily binding valuation in an adjudication award, by making an order for payment of the monies due as a result of that valuation. Furthermore, that it would be contrary to principle and established authority for the Court to force a party who already had the benefit of an award in its favour to have to commence a further fourth adjudication for the propose of obtaining an order for payment from the adjudicator, before any enforcement action could be taken.

The Court also considered a novel argument by the Defendant, the Doctrine of Merger. As part of the analysis the Court stated that an adjudicator's award was not a judicial decision, it was temporary in nature. If a Court made an order enforcing such an award, the only cause of action that could 'merge' was the cause of action based upon the contractual obligation on both parties to comply with the adjudicator's award. If the Defendant subsequently wished to reclaim monies paid out as a result of the award being enforced, it would be relying on a different cause of action. Put another way, the Defendant's cause of action to seek repayment of any overpaid sums would not merge in the Claimant's cause of action to be paid sums due to it based on the temporarily binding valuation by the adjudicator in the Third Adjudication.

Any order for payment of those sums would not cause the Doctrine of Merger to apply and/or would not amount to a final determination by the Court of the value of the post-termination account.

In circumstances where the adjudicator's valuation was only of temporarily binding effect, any sums paid on the basis of that valuation could only be paid on a similarly temporarily binding basis so as to preserve cash flow, which is the main purpose of the construction adjudication process.

When dealing with the issue of a stay of execution, the Court followed *Wimbledon Construction Co 2000 Ltd v Vago [2005] EWHC 1086 (TCC)* which established that the burden of proving the existence of factors supporting the grant of a stay of execution was on the Defendant. Based upon the financial evidence presented by the Defendant, the Court held that (i) there was no evidence to demonstrate that the Claimant was not in a relatively healthy financial position; and (ii) nor was there any real risk that monies would not be repaid to the Defendant if subsequently ordered to do so. Finally the Court noted Defendant had not yet commenced any proceedings to re-open the valuation.

## Authors



**Mark Roach**

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



**Chris Lewis**

*London - Walbrook*  
+44 (0)20 7894 6054  
[chlewis@dacbeachcroft.com](mailto:chlewis@dacbeachcroft.com)