

A significant stay on 'smash and grab' adjudication

Jamil Sanaullah explores the established case law, as well as a recent decision, which provides helpful guidance on the circumstances in which the court will grant a stay of enforcement of an adjudication award

The construction industry has a strict and unique payment regime which is implied into contracts by statute to provide for regular and interim payment on a project. Complementing that payment regime is a unique dispute resolution forum, adjudication, which is designed to provide an expedited and provisionally-binding decision to enforce these payment terms.

The policy aim of 'pay first, argue later' has consistently been supported by the courts with respect to the payment regime and adjudication. This has often been to the benefit of contractors (helping them to obtain interim payment swiftly and maintain cash flow), but to the detriment of the developers who are generally required to pay an adverse payment award before disputing the decision, even where they consider that amounts claimed by a contractor are inflated and do not reflect the 'true value' of works.

Payment procedure

Payment terms in a construction contract must be compliant with the statutory requirements set out in the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009 and supplemented by the Scheme for Construction Contracts 1998.

The strict application of the statutory provisions has led many contractors to take advantage of a procedural error by the developers to obtain a 'smash-and-grab' adjudication award for payment applications that are often for inflated amounts and do not reflect a true valuation of the sums due.



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Pay first, argue later

The leading case on challenging an adjudication award is *S&T (UK) Limited v Grove Developments Limited* [2018], which concerned a disputed payment application of £14m relating to a hotel development for which the initial contract sum amounted to £26m. The contractor issued its interim payment application, and while the developer issued a notice certifying the lower sum they believed was due, a subsequent adjudication decided that the developer's notice did not comply with the procedural requirements and therefore the £14m sum claimed by the contractor

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was due and payable. Although the High Court and Court of Appeal ultimately confirmed that the developer's notice was valid and therefore the contractor was not entitled to the £14m claimed, the court maintained that in enforcing an adjudication award, it will generally focus on procedural compliance over the true value of the payment. This is reflected by the court's commentary that a payer must pay the amounts claimed and awarded by an adjudicator before they can commence a true value adjudication and reclaim any overpayment.

A commercial approach?

The court's decision in *S&T* achieved the policy aim of adjudication providing a binding decision in the short-term, allowing the contractor to obtain payment and maintain cash flow. However, the decision may leave developers short-changed. There is no set-off in favour of a developer even if a true value assessment clearly shows that the amounts awarded to a contractor are inflated: a developer will have to pay a contractor's claimed amount first and then reclaim any amounts assessed as overpaid in a true value adjudication. This may be a commercial barrier for some developers who simply cannot afford to make the initial adjudication award payment to a contractor, and then pay the expert or legal costs required to pursue and enforce a true value adjudication award.

Even if a developer is successful in obtaining a true value adjudication award in its favour, they then have to recover the sums from the contractor. The fear for developers is that a contractor may be insolvent or in such a perilous financial position by the time a true value adjudication award is obtained, that the contractor will be unable to make the repayment. It is therefore in the interest of a developer to persuade a court to stay the enforcement of a contractor's successful adjudication award so that it can obtain a true value adjudication award, with the intention of neutralising the amount of the contractor's award. However, the courts have confirmed that a stay of enforcement will only be granted in exceptional circumstances.

It is against this backdrop that the judgment in *JRT Developments Ltd v TW Dixon (Developments) Limited* [2020] is significant in granting a stay of enforcement of an adjudicator's award, on the basis

of the contractor's inability to repay any sums ordered and on the principles of manifest injustice based upon the facts in hand.

JRT v TWD

Background to the dispute

TWD engaged JRT under a JCT contract to build houses and carry out infrastructure work on TWD's farmland. Unusually, the employer and contractor also entered into a commercial agreement specifying a profit share of the property sales split evenly between JRT and TWD. The works were financed by the Homes and Communities Agency (HCA).

The JCT contained standard payment provisions requiring an architect or contract administrator to issue an interim payment certificate setting out the sums due. No architect or contract administrator was appointed, and the parties did not follow the payment procedure in the JCT contract. Instead, JRT issued valuations to the HCA to certify and issue funds to TWD, who would pay JRT following receipt of an invoice.

The relationship between the parties broke down during the course of the project due to cost overruns, delays and alleged duplicate payment claims by JRT. JRT terminated the contract, with both parties alleging the other was guilty of repudiating the contract.

JRT subsequently issued various payment valuation documents over a four-month period, with neither of the requests referring to the JCT contract or the commercial agreement. The final payment request was subsequently purported by JRT to be a formal payment application under the statutory payment regime.

TWD corresponded with JRT on the valuations throughout this period, believing the parties were engaging in the usual discussions they held for payment requests during the project. TWD, however, did not issue a pay less notice in compliance with the statutory regime to prevent the payment application amounts becoming due.

As soon as the payment application became due, JRT referred the case to adjudication and succeeded in obtaining an adjudication award for £952,579 plus VAT with respect to their payment application. JRT issued proceedings in court to enforce the adjudicator's decision.

TWD defended these proceedings by seeking a stay, and commenced separate proceedings for a declaration that JRT's payment notice was invalid and instead that sums were due to TWD.

The judgment and guidance

The court agreed with TWD's submissions and granted a stay of enforcement of the adjudication award in JRT's favour, based on the following criteria established in case law:

- The 'probable inability' of the claimant to repay the judgment sum unless:
 - the claimant's financial position is the same, or similar, to its position at the time of the relevant contract; or
 - the claimant's financial position is due to the defendant's failure to pay the sums in question (*Wimbledon Construction Company 2000 Limited v Vago* [2005]).

- Where there is 'manifest injustice', including where the defendant cannot afford to pay the adjudication award or afford the legal costs to carry out a proper valuation of the final account sums due (*Galliford Try Building Ltd v Estura Ltd* [2015]).

In concluding that there was a 'probable inability' that JRT would be able to repay a judgment sum to TWD, the court reviewed JRT's weak balance sheet and profit and loss account, and accepted TWD's evidence of JRT's poor credit rating and recent significant

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indebtedness to creditors. In establishing that JRT's financial position was not due to TWD's failure to pay the adjudication sum and their financial position was the same or similar as at the time of the contract, the court provided significant guidance:

- No evidence was given by JRT of it having lost business as a result of the non-payment of the adjudication sum;
- JRT's financial difficulty related to loans taken out a long time before the adjudication award and other reasons unrelated to the project;
- JRT's inability to repay the adjudication sum would be the same even if TWD paid the adjudication sum following the adjudication; and
- JRT's own evidence indicated they would only be paid in line with the amounts funded by the HCA to TWD. As the disputed payment application amount went above the specified funding, JRT should have no expectation of this payment amount and TWD's failure to make this payment having a significant effect on their financial status.

The decision that it would be manifestly unjust not to grant a stay of enforcement is perhaps the most interesting element of the court's judgment, as it focused on TWD's financial means to appeal an adjudication award ordered against them. TWD successfully persuaded the court that payment of the adjudication sum would immediately make them insolvent and thereby deny them the opportunity to commence a true value assessment.

Furthermore, while the court avoided delving into a true value assessment of JRT's payment notice (which is the subject of separate proceedings), it did consider that some of the payments claimed by JRT appeared to be without merit. This included a significant amount of Community Infrastructure Levy for which the local council confirmed they received no payments from JRT.

Finally, the court assessed that JRT's conduct accentuated the perception of manifest injustice on the part of TWD. Examples included the fact that the statutory payment regime was not

relied on throughout the project by JRT until after the termination of the contract, and the fact that this was not a standard employer-contractor relationship (as implied by JRT's share of the development profits and family connections).

In addition, the court summarised in obiter the following additional criteria established in case law that may also justify the grant of a stay of enforcement in other applicable cases:

- If there is evidence of a real risk that the claimant will dissipate any adjudication sums paid so it cannot be later repaid (*Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018]).
- If the claimant is insolvent (*Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2000]).
- If the defendant has diligently pursued its counter-claim in court and subject to a review of the conduct of that claim (*Broseley London Limited v Prime Asset Management Limited* [2020]).
- As further guidance, the recent judgment of *John Doyle Construction Ltd v Erith Contractors Ltd (Rev 1)* [2020] clarified that a stay of enforcement would be granted if the claimant is insolvent, unless the adjudication deals with all the outstanding matters between the parties and the insolvent claimant can offer security for the sums it is to be paid. ■

Practical guidance for developers

The reasons provided by the court in *TWD v JRT* to justify granting a stay on the basis of a claimant's inability to pay and circumstances of manifest injustice offer useful guidance to developers certifying payment. On a practical level, developers should:

- Ensure they understand the payment provisions in their contract and statute.
- Not take for granted that another party might follow a different payment procedure: the statutory payment regime will always be applicable and can be relied on at any time.
- Remember that a payment application that appears inflated can still be valid if compliant with procedure (eg if the developer does not issue a pay less notice on time).
- If required by the contract, ensure that a contract administrator is appointed to certify payments.
- As far as possible, keep an arm's length relationship with the contractor.
- Ensure that covenant checks are taken out on contractors at the point of contract and (where possible) during the contract.
- If at the receiving end of an adjudication referral, adverse award, enforcement stage or any other stage in the legal process, seek legal advice to protect their position.

Bouygues UK Ltd v Dahl-Jensen UK Ltd

[2000] EWCA Civ 507

Broseley London Ltd v

Prime Asset Management Ltd

[2020] EWHC 944 (TCC)

Galliford Try Building Ltd v

Estura Ltd

[2015] EWHC 412 (TCC)

Gosvenor London Ltd v

Aygun Aluminium UK Ltd

[2018] EWCA Civ 2695;

[2019] EWHC 3619 (TCC)

John Doyle Construction Ltd v

Erith Contractors Ltd (Rev 1)

[2020] EWHC 2451 (TCC)

JRT Developments Ltd v

TW Dixon (Developments) Ltd

[2020] 10 WLUK 106

S&T (UK) Ltd v

Grove Developments Ltd

[2018] EWCA Civ 2448

Wimbledon Construction Company 2000 Ltd v

Derek Vago

[2005] EWHC 1086 (TCC)