

## CONSTRUCTION ACT REVIEW

### Insolvency Update: Stay of Execution: *Galliford Try v Estura and Equitrix*

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#### Introduction

Where a claimant succeeds in obtaining judgment in court to enforce an adjudicator's decision, often on summary judgment, the respondent may apply for a stay of execution. This type of application is normally made where the defendant asserts it will in effect overturn the adjudicator's decision by taking the matter to final resolution in court or arbitration and that the claimant will be unable to repay the amount due under the judgment. Or the defendant may assert that it otherwise has a substantial claim against the claimant and that the claimant will be unable to repay the amount due under the judgment.

The case law available at the time was reviewed in Construction Act Review (CAR) in 2002<sup>1</sup> and a further comprehensive review of the extensive subsequent case law was undertaken in CAR in 2006.<sup>2</sup> The writer plans separately to provide an update on the case law since the last review in CAR, but in this article the writer addresses the particular type of stay application that was granted in the *Galliford Try v Estura* case.<sup>3</sup>

A stay of execution is now sought by relying on the Civil Procedure Rules (CPR), CPR 83.7(4), which came into force in 2014 and replaced RSC Ord. 47, which was the rule applicable at the time of the previous reviews in CAR. CPR 83.7(4) provides:

*"If the court is satisfied that–*

- (a) there are special circumstances which render it inexpedient to enforce the judgment or order; or*
- (b) the applicant is unable from<sup>4</sup> any reason to pay the money,*

*...the court may by order stay the execution of the judgment or order, either absolutely or for such period and subject to such conditions as the court thinks fit."*

The rules that the courts apply are accordingly in wide terms and the discretion is wide to allow for a wide range of differing facts.

The principles applied in the Technology and Construction Court (TCC) to applications for a stay of execution where summary judgment is given to enforce an adjudicator's decision were helpfully summarised by Judge Coulson (now Coulson LJ) in the *Wimbledon* case<sup>5</sup>:

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<sup>1</sup> (2002) 18 Const.L.J. 39.

<sup>2</sup> (2006) 22 Const.L.J. 378.

<sup>3</sup> *Galliford Try Building Ltd v Estura Ltd* [2015] B.L.R. 321; 159 Con.L.R. 10; [2015] EWHC 412 (TCC).

<sup>4</sup> *Sic.* The word "from" appears here in the rule, although the word "for" should have been used.

<sup>5</sup> *Wimbledon Construction Co 2000 Ltd v Derek Vago* [2005] EWHC 1086 (TCC).

“a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

b) In consequence, adjudicators’ decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

c) In an application to stay the execution of summary judgment arising out of an adjudicator’s decision, the court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind (see *AWG*).<sup>6</sup>

d) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see *Herschell*).<sup>7</sup>

e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see *Bouygues and Rainford House*).<sup>8</sup>

f) 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:

(i) the claimant’s financial position is the same or similar to its financial position at the time that the relevant contract was made (see *Herschell*); or

(ii) 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 (see *Absolute Rentals*).<sup>9</sup>

One point this analysis does not address is the likelihood that the adjudicator’s decision will ultimately prove either not to be correct or to be subject to some adjustment in the light of factors not available to the adjudicator. This, it is submitted, is a factor in exercising the discretion. The clear case *par excellence* is *Bouygues*, where the adjudicator’s decision was plainly and obviously wrong.<sup>10</sup>

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<sup>6</sup> *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd* [2004] EWHC 888 (TCC).

<sup>7</sup> *Herschel Engineering Ltd v Breen Properties Ltd (No.2)* [2000] B.L.R. 272; [2000] 2 T.C.L.R. 473; (2000) 70 Con..L.R. 1; (2000) 16 Const.L.J. 366, QBD (TCC).

<sup>8</sup> *Bouygues*, above; *Rainford House Ltd v Cadogan Ltd* [2001] B.L.R. 416; [2001] C.I.L.L. 1709; HT 01–014, QBD (TCC).

<sup>9</sup> *Absolute Rentals Ltd v Gencor Enterprises Ltd* [2000] C.I.L.L. 1637; (2001) 17 Const. L.J. 322; HT 99, QBD (TCC).

<sup>10</sup> *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2001] 1 All E.R. (Comm) 1041; [2000] B.L.R. 522; [2001] 3 T.C.L.R. 2; (2000) 73 Con. L.R. 135; [2000] C.I.L.L. 1673 CA.

### ***Galliford Try v Estura***

This case was concerned mainly with payment notices and successive adjudications, with stay of execution a secondary issue. The result in the case was that the contractor, Galliford Try, was entitled to the sum it had applied for by way of interim application 60, in the absence of a payment notice or pay less notice from the employer. An adjudicator had so decided and Edwards-Stuart J gave summary judgment to enforce the adjudicator's decision. The judge also held that it was not open to Estura to have a second adjudication to determine the correct valuation of Galliford Try's work, without first paying the sum awarded in the first adjudication.

The writer was strongly critical of the judge's analysis in *Galliford Try* on the main issues, in a previous issue of Construction Act Review (CAR)<sup>11</sup> and those criticisms are not repeated here. The writer indicated that the case would be revisited in due course on the separate issue of stay of execution, which is the subject of this article.

Part of the background to the stay of execution application was that Galliford Try's anticipated final account was £12.66m, only about £4,000 more than interim application 60. Galliford Try had therefore got almost everything it was hoping to recover and so had little incentive to submit a final account. The effect of this was that the employer would probably never have a contractual route to claw back any overpayment.

The judge commented that it was possible that Galliford Try had been given a windfall, although he was in no position to say. This is, strictly, true in that the judge would not have had information before him as to the correct valuation of Galliford Try's work under the parties' contract. Nevertheless, it is highly likely that the effect of the judge's decision was to give Galliford Try a windfall.

There was no suggestion that Galliford Try might not be good for the money in the event that some or all of it had to be repaid in due course. This is normally a key issue on a stay of execution application. However, *Galliford Try v Estura* is not concerned with the application of the principles set out in the *Wimbledon* case. That in itself does not mean that *Galliford Try v Estura* is necessarily wrong, as the *Wimbledon* guidelines are not necessarily exhaustive of the considerations that may properly fall within the rule set out in CPR 83.7(4).

The question then is what were the considerations which led to the grant of a stay. One matter identified by the judge was that there might be irreparable damage to Estura if the adjudicator's decision were enforced in full.

In essence, what this meant was that the judge accepted evidence from Estura that it could not afford to pay the sum for which judgment was given and it would therefore become insolvent. There are two unsatisfactory aspects of this approach. One is that it appeared that those behind Estura were able to supply funds when it suited them, for example to pay the costs of the proceedings. The other point is that it is not normally considered to be unfair to the paying party against whom judgment is given, such as to justify a stay of execution, if

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<sup>11</sup> Sheridan, *Payment Notices and Successive Adjudications Revisited* (2015) Const. L.J. Vol. 31 No. 4 220.

its financial position is that it cannot pay the amount of the judgment sum in full. But that was the approach taken by Edwards-Stuart J.

The judge stated that it would take six to nine months to obtain an adjudicator's decision as to the value of the works. The problem for Estura was supposedly that it could not pay the sum awarded and then reclaim it in six to nine months. However, it was unclear that this was so and even if it was so, it is not a sufficient justification for a stay.

In the writer's view, *Galliford Try v Estura* is an example of bad law leading to bad exercise of discretion. What the judge should have done on the primary issue before the court was to decide that there was no bar to Estura having the true value of the account decided in adjudication. Having made the initial finding, wrongly in the writer's view, that Estura could not have the dispute as to the true value of the account decided in adjudication until a later valuation dispute, having first paid the sum due based purely on notices, the judge was making bad law. He also created for himself a situation that he regarded as one entailing a risk of manifest injustice to Estura, to be patched up by a stay of execution.

Having made that initial error, or, if one assumes in the judge's favour it was not an error, what the judge should then have done is to grant summary judgment but not the stay of execution. Estura might have found the funds to pay up. Estura could then have had its valuation dispute decided in six to nine months and there was no apparent risk of Galliford Try being unable to repay. If Estura could not find the funds, that is not an adequate reason for a stay of execution, it is submitted. It is an unsatisfactory consequence of the incorrect decision on the primary question, but of course it is always unsatisfactory when a party is obliged to pay up as a result of a judgment wrongly made against it.

It may be argued that what distinguishes this case from cases in general is the temporary nature of the adjudicator's decision and the prospect of monies having to be repaid in due course. The first answer to this is that the problem arises from the decision on the primary issues, which was incorrect in the writer's view. The second issue with this argument is that, on his own admission, the judge did not have evidence before him as to the correct valuation of the account, not surprisingly as he was not deciding on valuation. The judge did not accordingly have information before him as to what might be the appropriate amount in respect of which to grant a stay.

The approach taken in *Galliford Try v Estura* on the issue of stay of execution was cited with apparent approval by Coulson J (as he then was) in the *Equitrix* case,<sup>12</sup> which the judge stated was "a similar case to *Galliford Try v Estura*, involving a large disputed claim and a final account off in the future, and no opportunity to redress the balance before then." Coulson J first granted summary judgment to enforce a decision of an adjudicator requiring payment to be made by Bester to Equitrix of over £9 million plus some interest. However, the judge required payment by Bester of £4.5 million, with a further payment into court of £1 million, with the effect that there was a stay in respect of approximately £4.5 million.

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<sup>12</sup> *Equitrix ESI CHP (Wrexham) Limited v Bester Generacion UK Limited* [2018] EWHC 177 (TCC). However, the unsatisfactory use of a stay to mitigate the consequences of the unsatisfactory primary decision was the subject of adverse comment by the same judge in *Grove Developments Ltd v S&T(UK) Ltd* [2018] EWHC 123 (TCC) at [119] and [139].

The reasons for this approach were, however, much more compelling in the *Equitrix* case than in *Galliford Try v Estura* and different in nature. The *Equitrix* case did not involve the vexed question of an interim sum due based purely on notices and the courts' dubious view that a second adjudication on the correct valuation is not permitted until after payment of that sum. In addition, Equitrix was a "special purpose vehicle", a company created solely for the purposes of the project in question, which was a biomass fired energy generating plant. In the end, Equitrix had terminated the contract with Bester and elected not to proceed with the project. Equitrix was accordingly now a special purpose vehicle without a purpose. Coulson J stated:

"That means that, not only does [Equitrix] have no possible incentive to remain in existence for a minute longer than it needs to, once it had repaid its debt to its parent, but that it is also overwhelmingly likely that [Equitrix] will be wound up sooner rather than later."<sup>13</sup>

The cases illustrate the point that the rule being applied is that in CPR 83.7(4), not the summary provided by Coulson J in the *Wimbledon* case. That summary, although cited in both *Galliford Try v Estura* and in *Equitrix*, is a useful summary of points considered and decided in earlier cases, but it is not exhaustive and was not actually of much relevance in either *Galliford Try v Estura* or *Equitrix*. *Galliford Try v Estura* also illustrates a further difficulty created by the line of cases that decides, quite unnecessarily and as a result of inadequate legal analysis in the writer's view, that there cannot be a second adjudication on true valuation until the sum ordered to be paid in a first adjudication decided purely on notices has first been paid.

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<sup>13</sup> *Equitrix*, above, at [71].