

**Neutral Citation No: [2012] NIQB 94**

*Ref:* WEA8652

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

*Delivered:* 19/11/12

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (COMMERCIAL)**

**BETWEEN**

**RODGERS CONTRACTS (Ballynahinch) LTD**

**Plaintiff**

**V**

**MEREX CONSTRUCTION LIMITED**

**Defendant**

**WEATHERUP J**

[1] This is an application for summary judgment in the sum of £139,754.68 being the amount awarded to the plaintiff to be paid by the defendant under an Adjudicator's decision dated 20 January 2012. Mr McEvoy appeared for the plaintiff and Mr Humphreys QC for the defendant.

[2] There are limited grounds to defend an application for judgment to enforce an Adjudicator's decision under the Construction Contracts (Northern Ireland) Order 1997. See for example Coleraine Skip Hire Ltd v Ecomwesh Ltd [2008] NIQB 141, Charles Brand Ltd v Donegall Quay Ltd [2010] NIQB 67 and Henry Brothers (Magherafelt) Ltd v Brunswick (8 Lanyon Place) Ltd [2011] NIQB102. There are no grounds advanced by the defendant to resist judgment in this case.

[3] The Court has power to grant a stay of enforcement of a judgment for an Adjudicator's award. Under Order 14 Rule 3(2) of the Rules of the Court of Judicature the Court may, on an application for summary judgment, grant a stay of enforcement until the trial of any counterclaim made or raised by the defendant in

the action. Formally there is no counterclaim made by the defendant in the defence. However there is a claim by the defendant for a stay of enforcement pending the outcome of a pending Arbitration between the parties in relation to the contract works. In effect the defendant raises a potential counterclaim for the anticipated award in the Arbitration.

[4] Alternatively, a stay of enforcement may be granted in the interests of justice under the inherent jurisdiction of the Court. One circumstance where the interests of justice may warrant such a stay is the impecuniosity of the plaintiff, that is, the probable inability of the plaintiff to repay the amount of the Adjudicator's award in the event that it is ultimately found that money is repayable to the defendant. See for example Henry Brothers (Magherafelt) Ltd v Brunswick (8 Lanyon Place) Ltd [2011] NIQB 102. In the present case the difference between the grant of a stay of enforcement under Order 14 and under the inherent jurisdiction of the Court is not a matter of substance.

[5] The Court, in granting a stay of enforcement, may impose conditions. Whether conditions should be imposed is the issue in the present case. The plaintiff recognises the problems arising from its financial difficulties and proposes a stay of enforcement that is conditional on payment of the amount of the judgment into Court or into an escrow account. In addition the plaintiff also points up financial difficulties on the part of the defendant. On the other hand the defendant contends for an unconditional stay of enforcement on the basis that it would be unfair to require the defendant to, in effect, provide security for the amount of the Adjudicator's award when the plaintiff is in financial difficulties.

[6] The Adjudication system was introduced to maintain cash flow during construction disputes and, in general, payment should be made on the Adjudicator's award pending overall resolution of the contract dispute in Arbitration or litigation or by agreement. In the meantime the enforcement of the Adjudicator's award is by legal proceedings and by application for summary judgment. The present case produces the not uncommon result that three sets of proceedings arise, namely the Adjudication on an issue that produces an interim result, the referral of contract disputes to Arbitration that will produce an overall result and the legal proceedings required to enforce the Adjudicator's interim award in the meantime. When there are no grounds to resist judgment on the Adjudicator's award pending the Arbitration, the role of the Court concerns the interim arrangements for the handling of the amount of the award until such time as the decision of the Arbitrator issues.

[7] The plaintiff is a civil engineering company and the defendant a construction company. On 1 July 2010 the parties entered an agreement for the conduct of certain works at Musgrave Scrap Wharf at Queen's Island in Belfast. A dispute arose over payments to the plaintiff and the plaintiff referred the dispute to adjudication. On 20 January 2012 the Adjudicator awarded the plaintiff the sum now claimed. By its defence the defendant alleges that the plaintiff supplied defective concrete for the work and as a result the defendant company faced a claim from its employer, the

Belfast Harbour Commissioners. The defendant paid the employer certain sums which it seeks to recover from the plaintiff. The Arbitration will determine whether the plaintiff is responsible. The defendant contends that with success in the Arbitration the balance of payments between the plaintiff and the defendant will result in no payment being due to the plaintiff.

[8] The defendant contends that the Court should not enforce the award of the Adjudicator by reason of the impecuniosity of the plaintiff. The plaintiff entered into a creditor's voluntary arrangement on 1 March 2011. The debts of the plaintiff amount to £1M and under the arrangement creditors are to receive 50p in the pound. Accordingly, the defendant contends that, if it is obliged to pay the amount of the Adjudicator's award, it is unlikely that the defendant would recover any sum due to the defendant if the defendant is successful in the Arbitration.

[9] In addition, the defendant contends that the Court should stay the enforcement of any judgment pending the outcome of the Arbitration. The defendant served a Notice of Arbitration on 5 April 2012, the Arbitrator was appointed on 5 September 2012 and under the expedited procedure under the ICE Arbitration Procedure Rules, the decision will be delivered by 28 December 2012.

[10] Further, the defendant contends that the plaintiff has not acted promptly in seeking to enforce the adjudication award made on 20 January 2012 as the Writ was not issued until May 2012 and this application for summary judgment was not issued until August 2012.

[11] The defendant states that it was not a party to the CVA nor given notice of it and that, after the Inland Revenue, the two largest creditors are Mr McGovern and Mr Rodgers who are Directors and owners of the plaintiff. Reference is also made to the fact that there are separate proceedings arising out of a construction contract between the plaintiff and Craigavon Borough Council and the Council is claiming damages for defective work. The Council is seeking to set aside the CVA. The defendant asserts that if the CVA is set aside it is likely to result in the plaintiff being subject almost immediately to winding up proceedings or some other form of insolvency action.

[12] A rejoinder affidavit by Mr McGovern states that the plaintiff denies that it is guilty of any negligence or breach of contract in relation to the contract works. It is stated that if the plaintiff were to be successful in the Arbitration and if the defendant does not have the money to pay the amount due to the plaintiff, the plaintiff will have expended time, money and effort in relation to the arbitration proceedings for no good reason. It is said that there is a significant risk that the defendant will be unable to pay any monies found due and owing following the Arbitration.

[13] The plaintiff refers to the defendant's financial statements for the year ending 31 May 2011. The financial statements indicate that there has been a significant

reduction in the assets of the defendant to the sum of £160,000 and that the net current liabilities exceed the assets by some £63,000. The notes to the accounts indicate that the defendant meets its day to day working arrangements with a £125,000 bank overdraft facility and normal credit facilities from suppliers. A further note states that the Directors have concluded that material uncertainties exist that cast significant doubt upon the company's ability to continue as a going concern and that the company may be unable to realise its assets and discharge its liabilities in the normal course of business.

[14] In relation to its own insolvency the plaintiff says that it has accepted that the plaintiff's financial position is poorer and materially different from its financial position at the time the parties entered into the sub-contract and that it also does not contend that its current financial position is wholly or in significant part due to the defendant's failure to pay the Adjudicator's award.

[15] In Wimbledon Construction Co 2000 v Vago [2005] EWHC 1986 (TCC) a number of relevant principles were summarised -

First, 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 a 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.

This states the English approach under RSC Order 47 Rule 1 by which, on an application made in respect of a money judgment, 'there are special circumstances which render it inexpedient to enforce the judgment', the Court may order a stay of execution (schedule 1 of the Civil Procedure Rules).

The special circumstances test does not apply under the Northern Ireland Rules. However, on an application for summary judgment there is the provision under Order 14 Rule 3(2) and the further power under the inherent jurisdiction of the Court in the interests of justice. The English Rules and the Northern Ireland Rules must both be read subject to the same overriding objective which is to enable the Court to deal with cases justly (being Order 1 Rule 1A in Northern Ireland).

Thus it may be stated that in Northern Ireland the probable inability of the plaintiff to repay the judgment sum awarded by the Adjudicator and enforced by way of summary judgment at the end of a substantive trial or arbitration hearing may constitute grounds to grant a stay of execution under Order 14 Rule 3(2) or the inherent jurisdiction of the Court.

Secondly, if the claimant is in insolvent liquidation or there is a dispute in the evidence that the claimant is insolvent then a stay of execution will usually be granted.

Thirdly, even if the evidence of the claimant's present financial position suggested that it is probable that the claimant 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 when the relevant contract was made 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.

[16] In the present case the parties are not contending that the financial position of the plaintiff is the same or similar to that which prevailed when the contract was made, nor that the plaintiff's financial position has been brought about by the failure to pay the amount of the Adjudicator's award.

[17] When a plaintiff seeking summary judgment on an Adjudicator's award is subject to a CVA I agree with Coulson J in Meade General Building v Dartmoor Properties [2009] EWHC 200 (TCC) that the CVA would be a relevant factor for the Court to take into account when deciding whether or not to grant a stay; the mere fact of the CVA would not of itself mean that the Court should automatically infer that the plaintiff would be unable to repay any sums paid out in accordance with the judgments so that a stay of execution should be ordered; the circumstances of both the CVA and the plaintiff's current trading position will be relevant to any consideration of a stay of execution.

[18] The defendant relied on London Borough of Camden v Makers UK Ltd [2009] EWHC 2944 (TCC). Makers sought summary judgment against Camden in respect of an Adjudicator's decision. Camden was concerned with what it perceived was the actual or impending insolvency of Makers and it commenced proceedings in respect of a dispute and the hearing was due the following month. The Court was satisfied that Makers was insolvent in that without the support of its parent company, which it no longer had, its business was loss making and had a substantial negative value and it would be unable to repay money that was paid to it. The claimant sought enforcement of the Adjudicator's decision but conceded that the sum awarded be paid into Court or an escrow account. The paying party, Camden, stated that it did not seek to challenge the decision of the Adjudicator as enforceable so there was no doubt there should be judgment for Makers. The issue was whether the Court should exercise its power to grant a stay. In relation to Camden's financial position it was stated that Camden was 'good for the money'.

[19] Aikenhead J concluded that there should be a stay of execution without conditions. It was stated to be clear that Makers remained insolvent and it would be unable to repay anything if it lost the trial. The trial was due in about three weeks' time. Counsel suggested that there would be significant commercial advantage in a condition being imposed requiring the lodgement of the money. It was suggested that it might force Camden's hand by way of settlement or compromise. The Court

was not satisfied that that was particularly realistic. There had been attempts at mediation and discussion and they had been unsuccessful and it was not felt by the Court that Camden was minded to settle the claim. It was stated that there was a disadvantage in the money being paid into Court or into an escrow account in that it locked up the sum of £1.3M for a time and that Camden as a responsible local authority would otherwise have been able to use that money and therefore it was no advantage to anyone that the money should be paid into Court.

[20] In the present case there is the added ingredient that not only the party claiming the payment is in financial difficulty but the paying party may be in financial difficulty as well. That position was considered in Baldwin's Industrial Services plc v Barr [2002] EWHC 2915 (TCC). Baldwin hired to Barr a 50 tonne crane and driver for use on a building site and the crane was damaged. An Adjudicator found that Barr was responsible for the cost of repairs to the crane. Receivers of Baldwin applied to enforce the Adjudicator's award. However Barr had made losses in two of the previous three years and faced liquidity difficulties. If Barr paid the amount awarded by the Adjudicator it was suggested by Counsel that Baldwin may fail to make any repayment that may fall due. On the other hand, Barr's case was that in order to exercise discretion it was necessary to consider the merits of Baldwin's claim and their view was that the Court or Arbitrator would take a different view from that of the Adjudicator. Barr had not at that stage taken any step in relation to a determination of the dispute but did undertake to commence arbitration or court proceedings to challenge the Adjudicator's decision forthwith.

[21] The Court considered the financial position of the parties and the merits of the dispute. In relation to Baldwin's financial position it was stated that there was a risk that it would work injustice to Barr if it could not recover the money if it turned out that the Adjudicator had made an error. On the other hand, as the Receivers had cast doubt on Barr's financial position, it would work injustice to Baldwin if the stay were granted without any requirement on Barr to secure the money.

[22] The Court stated that it would be difficult to reach conclusions on the merits on the basis of the limited evidence available. In the circumstances it was concluded that Baldwin's financial position and the consequent potential injustice to Barr, together with Barr's stated intention to begin proceedings forthwith, constituted special circumstances so that Barr was entitled to a stay on terms. Baldwin had offered to accept that payment be made into an escrow account and Barr was willing to pay the money into Court and offered to undertake to commence proceedings within a month. The Court considered that payment into Court was a better course of action as the Court proceedings were already on foot and it would be comparatively straightforward for either party to apply to the Court for directions as to the destination of funds if the parties were unable to agree.

[23] In the present case I am satisfied that the plaintiff is in financial difficulties and would probably be unable to repay the money if the plaintiff is unsuccessful in the Arbitration and that in such circumstances a stay of enforcement would usually

be granted. I am further satisfied that the two circumstances where a stay would not usually be granted do not arise, namely the plaintiff's financial position is not as it was at the time that the contract was entered into and further, the plaintiff's financial position is not due in any significant part to the failure to pay the amount of the Adjudicator's award. In the circumstances, a stay of enforcement should be granted. I am not in a position to assess the merits of the dispute between the parties save to recognise that each party may have a reasonable prospect of success. The outcome will be decided in a matter of weeks. The defendant also has financial difficulties and may be unable to pay an amount found due by the defendant in the Arbitration. Thus there would be prejudice to the defendant if the money is paid and proves to be irrecoverable and there would be prejudice to the plaintiff if the money is not paid and later found to be due.

[24] By virtue of the financial difficulties of the plaintiff a stay of the enforcement of the judgment is warranted in the circumstances. In order to protect the plaintiff's position I am satisfied that because of the defendant's financial uncertainty, the money should be made available to be paid to the plaintiff and that some form of security should be arranged. Accordingly, the money should be paid into Court.

[25] In the present case, in contrast to Camden v Makers, I am satisfied that the application in relation to the payment of the amount into Court is not a tactical step in the action, as it was found to be in that case. Rather the payment required in the present case is a protective step in order to secure the payment to whichever of the parties is ultimately found to be entitled to the money.

[26] Accordingly, there will be judgment for the plaintiff in the amount claimed, together with interest as claimed, there will be a stay of enforcement of the judgment under the inherent jurisdiction of the Court and it will be a condition of the stay that the amount due on foot of the judgment should be paid into Court within 21 days. The parties have leave to apply for removal of the stay and payment out as appropriate in light of the Arbitration award.