

Adjudication

How are the latest – and most salient - adjudication enforcement decisions affecting practice?

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Honourable Mentions



- Natural Justice

- *Downs Road Development v Laxmanbhai Construction [2021] EWHC 2441*
- *CC Construction v Raffaele Mincione [2021] EWHC 2502*

- Costs

- *Aqua Leisure International v Benchmark Leisure [2020] EWHC 3511*

- Compétence exclusive

- *Motacus Constructions v Paulo Castelli SPA [2021] EWHC 356*

- LADs

- *Triple Point Technology v PTT Public Company [2021] UKSC 29*

Overview

- **Stays/Injunctions**

- *Broseley London v Prime Asset Management [2020] EWHC 944*
- *Millchris Developments v Fiona Selski Waters [2020] EWHC 1320*
- *WRW Construction v Datblygau Davies Developments [2020] EWHC 1965*
- *Quadro Services v FP McCann [2021] EWHC 1490*
- *Marbank Construction v G&D Brickwork [2021] EWHC 1985*

- **Collateral Warranties**

- *Toppan Holdings v Simply Construct (UK) [2021] EWHC 2110*



Broseley v PAML



Stuff you already know...

- *Wimbledon v Vago* [2000]
 - Keep firmly in mind decisions intended to be enforced.
 - Probable inability to repay at the end of substantive trial may constitute special circumstance so that it is appropriate to grant a stay.
 - If claimant in insolvent liquidation/no dispute insolvent, a stay usually granted
 - Even if it probably cannot repay when sum would fall due, usually not appropriate to grant stay if (i) same financial position as when contract made, or (ii) impecuniosity wholly or in significant part due to D not paying

Stuff you probably already know...

- *Gosvenor v Aygun Aluminium* – real risk of dissipation.
- *Total M&E Services v ABB Building* – burden on party seeking stay.
- *Farrelly v Byrne Brothers* – no obligation on D to disclose financials.
- *Kersfield v Bray & Slaughter* – court should lean in favour of enforcement.
- *AWG Construction v Rockingham Motor* – diligence of prosecuting cross claim

The Application for a Stay

- Inability to repay – but when?
- Pulling rugs and *S&T v Grove*
- Decision based on due diligence



The Application for a Stay

- Can PAML show when BLL unlikely to be able to repay?
- Evidence deployed
- COVID?
- *WRW v DDD*
- *Quadro v FP McCann*

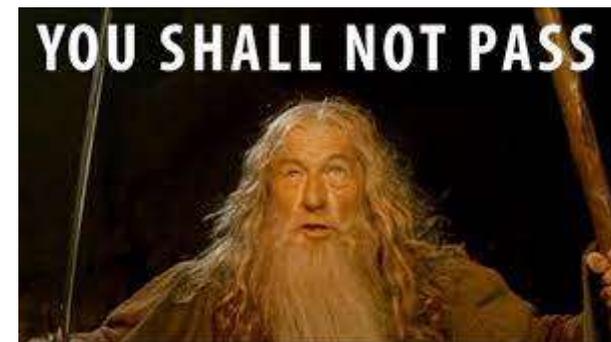


Millchris v Waters



Injuncting Adjudications

- S.37 Senior Courts Act 1981 *“in all cases where it appears to the court to be just and convenient to do so”*
- Para 9.4.1 TCC Guide – declaratory relief
- No jurisdiction
- Unreasonable and oppressive
- *Bresco*



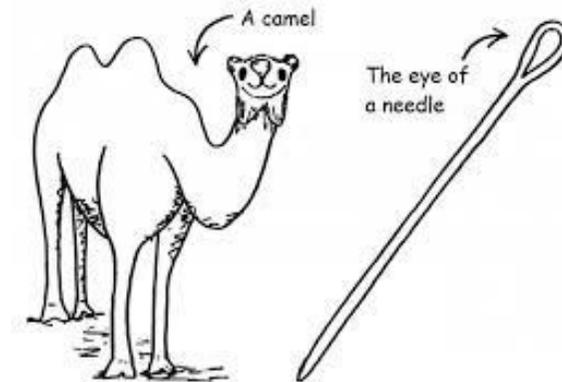
Injuncting Adjudications

- In light of COVID, will the Adjudication necessarily be conducted in breach of natural justice with the inevitable result that any adjudication will be unenforceable such that no useful purpose in allowing Adjudication to proceed



Natural Justice

- *“It may be possible to conceive of circumstances”*
- Might it be the basis for a more conventional natural justice defence to enforcement?
 - Witness illness?
 - Evidential hurdles?
- *Marbank v G&D Brickwork*



Collateral Warranties



HGCR s.104-105

- *“...a ‘construction contract’ means an agreement with a person for any of the following –
(a) the carrying out of construction operations
...”*
- *“...‘construction operations’ means...
(a) construction, alteration, repair, maintenance, extension, demolition or dismantling of buildings, or structures forming, or to form, part of the land...
...”*

State of Play

- *Parkwood Leisure v LOR [2013]:*
 - CW was a construction contract – 12 reasons
 - “warrants, acknowledges and undertakes”
 - “...has carried out *and shall carry out and complete the Works...*”
 - “A pointer against may be that all the works are completed and that the Contractor is simply warranting a past state of affairs...”
- **Coulson:**
 - Effect is that Act “*applies to all contracts related to the carrying out of construction operations*” subject to exceptions.
 - “*Safe to assume*” all CWs will be so regarded and makes commercial sense.

Toppan Holdings v Simply Construct

- The Wording:
 - Warranting that it “*has performed and will continue to perform...*” but no ‘acknowledging or undertaking’
- The Timing:
 - 4 years post PC, 3 years+ post Settlement Agreement, 8m after remedial works completed by another contractor

Impact

- An unsurprising application of the *Parkwood* decision?
- Emphasis on timing
 - *“Where a contractor agrees to carry out uncompleted works in the future that will be a very strong pointer that the collateral warranty is a construction contract and the parties will have a right to adjudicate.*
 - *Where the works have already been completed, and as in this case even latent defects have been remedied by other contractors, a construction contract is unlikely to arise and there will be no right to adjudicate.”*
- Sensible distinction?



Thank you!

Any questions?

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