

Construction Law Update

Adjudication, Enforcement, Payment and Winding-Up Petitions

This update considers the case of *Victory House General Partner Limited, Re a Company [2018] EWHC 1143 (Ch)*, in which an application to restrain a winding-up petition was made following an un-paid, and enforced, adjudicator's decision.

Background

Victory House General Partner Limited ("VHG") engaged RGB P&C Limited ("RGB") in relation to the development and conversion of an office building at Victory House, Leicester Square. Disputes between them led to several adjudications, following which RGB petitioned to wind-up VHG.

Adjudication No.1 concerned RGB's interim application for payment 30 ("IA 30"). The adjudicator decided that IA 30 had been properly made. VHG's arguments that there had been a memorandum or understanding which provided for other payments to be made, and that the appropriate pay less notice was served, were rejected. RGB was therefore entitled to be paid the full amount of IA 30 in the sum of £682,802.88 plus VAT. The decision was enforced in the Technology and Construction Court and VHG was ordered to pay the judgment sum plus interest by 2 February 2018. VHG did not comply.

RGB then issued interim application 31 ("IA 31") and thereafter commenced Adjudication No.2, in which it sought a declaration that the true value of the works was in excess of £11 million. The adjudicator applied the relevant contractual provisions and decided that, whilst VHG had previously paid RGB more than £8.5million, the true value of the works was £7,087,027.58. In the circumstances, the adjudicator decided that the sum due under IA 31 was nil.

A third adjudication was commenced by VHG in which it claimed damages for defects arising from work carried out by RGB. VHG was unsuccessful.

RGB issued winding up proceedings against VHG on the basis that it had failed to pay the enforced judgment debt arising out of Adjudication No.1. VHG applied to strike out and to restrain being given notice of, the winding up petition.

Should the petition be dismissed?

In support of its application, VHG relied on *Grove Developments Ltd v S&T (UK) Ltd* (see our article in February 2018) to argue that if it paid the judgment sum, an immediate cause of action for re-payment would arise on the decision in Adjudication No.2. The court noted:

"I think [VHG] is entitled to say... that it is bad enough for [VHG] that it has paid some £8.5 million when Adjudication No.2 has determined that the correct interim payment would be of the order of £7 million; it will be worse still if [VHG] had to, to avoid winding up, pay the further sum by way of the judgment debt."

The court stated that the general test for executing a winding up a petition is that, "absent special circumstances...a petition should be dismissed if there is a cross-claim put forward bona fide on substantial grounds in an amount which exceeds the petition debt." As the Employer's cross claim was bona fide and on substantial grounds, the court dismissed the winding up petition.

Analysis

When discussing the award of Adjudication No 1, at paragraph 20 of his judgment, Mr Justice Morgan states: "The employer ought to have complied with the court order but has failed to do so".

Notwithstanding this clear failure to comply, VHG's application to restrain RGB's petition to wind-up was successful. In the circumstances, it would appear that a party ordered to pay a sum to another party as a

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consequence of a technical claim can rely upon the true valuation to defend its decision not to pay.

However, the adjudications in this case concerned different interim applications and no jurisdictional challenge was raised in relation to Adjudication No.2. It remains to be seen how the courts (especially the Technology and Construction Court and higher courts) will approach two adjudications concerning the same interim application and if they will permit or enforce the decision in a second adjudication before the debtor has made payment in respect of the first.

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