

## Construction Law Update

### Lessons from the Court of Appeal: How *not* to go about enforcing a judgment on behalf of a company in liquidation

In *John Doyle Construction Limited v Erith Contractors Limited* [2021], the Court of Appeal (“**CoA**”) discussed the principles which apply when enforcing an adjudicator’s decision in favour of an insolvent company.

#### Background

In 2010, Erith Contractors Limited (“**Erith**”) engaged John Doyle Construction Limited (“**JDC**”) to undertake hard landscaping works at the Olympic Park in East London (the “**Works**”) under an amended NEC3 sub-contract (the “**Sub-Contract**”). Before completion of the Works, JDC went into liquidation. In 2018, JDC commenced an adjudication against Erith for sums it claimed to be due under its final account. The adjudicator awarded JDC c.£1.2 (the “**Decision**”). Despite its insolvency JDC sought to enforce the Decision by applying for summary judgment.

At first instance, the TCC considered in detail the requirements which must be satisfied before summary judgment can be granted in favour of a company in liquidation, including the need for the insolvent company to provide adequate security for both the sum of any potential crossclaims by the defendant and the costs of those proceedings (for further detail, see our previous bulletin on the TCC’s judgment [here](#)). Having considered these requirements, the TCC held that JDC had failed to provide adequate security and declined to enforce the Decision.

#### Grounds for Appeal

Permission to appeal the TCC’s judgment was granted on 10 December 2021 on three grounds: (1) the TCC had failed to consider alternative security which JDC had offered; (2) the TCC had erred in its interpretation of a Deed of Indemnity (the “**Deed**”) offered as security for Erith’s costs; and (3) the TCC had erred in law by holding that Insolvency Rule 6.42 did not provide adequate security for Erith’s costs.

In the background, a wider issue for the CoA to consider was whether a company in liquidation with an adjudicator’s decision in its favour on its final account, facing a continuing set-off and counterclaim, should be entitled to summary judgment at all.

#### Issues to be considered by the CoA

##### 1. What is the burden on a claimant seeking to enforce and adjudicator’s decision?

A company in liquidation seeking to enforce an adjudicator’s decision should take all necessary steps to ensure that its position is “*crystal clear*”, to be as efficient as possible and make evident the issues the judge is being asked to decide. Any undertakings or security offered need to be “*clear, evidenced and unequivocal*”. It is not for the judge to turn “*vague suggestions*” into offers or agreements.

##### 2. Security for Erith’s crossclaim – is payment into an Escrow Account or the Court Sufficient?

JDC submitted that at first instance it had made an alternate offer of security, that the judgment sum be paid into an Escrow account or the Court by Erith, and that the TCC had failed to consider the same.

The starting point for the CoA was whether this alleged offer had actually been made. Having considered the evidence, the CoA concluded that a clear and unequivocal offer that the judgment sum be paid into an Escrow account or the Court had not been made. To the contrary, the only security that had been offered was a letter of credit or an ATE insurance policy, both of which had been considered by the TCC.

Notwithstanding its finding that an alternate offer had not been made, the CoA considered whether a payment into *Court* of a judgment sum was, in principle, a proper way in which security could be provided. Given the same would deprive both parties of the cash, the CoA commented that, if so, it would be “*the worst of all possible worlds*” and contrary to the

underlying philosophy of construction adjudication (i.e. to maintain cash-flow). The CoA declined to conclude definitively whether a payment into Court represented a proper method of security but commented that, if it was, it should be “*very much a last resort*”. On the basis that there was no clear alternate offer for security, JDC’s first ground of appeal was dismissed.

### 3. Security for Erith’s costs of pursuing a crossclaim

JDC’s second ground of appeal was based upon a suggestion that the TCC had erred in its interpretation of a Deed offered as security for Erith’s costs of pursuing a crossclaim. JDC argued that, on its true interpretation, the security provided by the Deed was sufficient. Upon review, the CoA found “*insurmountable difficult[ies]*” with the Deed. In particular, “*what was missing from the evidence was any statement by any insurer that they were prepared to offer Erith this Deed in this case, as security for any orders for Erith’s costs.*” The Deed was merely a template and named a firm of insurers who JDC expressly stated were *not* providing the indemnity. Clearly, this was not adequate evidence of an indemnity.

Dismissing JDC’s second ground of appeal, the CoA noted “*In my view, that is how not to go about enforcing a judgment on behalf of a company in liquidation when there is an extant cross-claim. The building blocks of any security being offered – for what? by whom? on what terms? – need to be in place before it can be assessed by the offeree and by the court.*”

### 4. Does Insolvency Rule 6.42 provide security?

JDC’s third ground of appeal was that the TCC had erred in law by holding that r.6.42 of the Insolvency (England and Wales) Rules 2016 (“**IR**”) did not provide adequate security for Erith’s costs. As this argument was not raised at first instance, the CoA was confident that the same was not open to JDC on appeal. Nevertheless, it commented that whilst r.6.42(4) prioritises expenses incurred by the liquidator in legal proceedings brought *by the liquidator* over the costs and expenses of the liquidation, it did not follow that, if Erith commenced its own proceedings against JDC and obtained a costs order in its favour, that the liquidator would have to prioritise Erith’s costs. JDC’s third ground of appeal was thereby dismissed.

### 5. Should a company in liquidation be entitled to summary judgment where crossclaims were to be determined?

The CoA held even if the judge had erred regarding the adequacy of the security offered, JDC would still not have been entitled to summary judgment whilst there was a crossclaim of Erith’s to be finally determined.

Put simply, it is only appropriate to grant summary enforcement when the ‘net balance’ owed has been finally determined (not simply provisionally by an adjudicator).

### 6. Would a stay of execution have been granted?

Despite JDC’s failure to make its claim, the CoA briefly considered whether Erith would have been entitled to a stay of execution had it succeeded. Having considered the relevant authorities, the CoA concluded that whilst in the right case, provided adequate security had been given, instead of a stay of execution a judgment sum could be paid out to the claimant company, in the current case (and particularly considering the uncompromising stance adopted by JDC) it would have granted a stay of execution for the whole sum in any event.

### **Analysis**

The conduct of JDC in this case was described by the CoA as “*how not to go about enforcing a judgment on behalf of a company in liquidation when there is an extant cross-claim.*” Learning from JDC’s mistakes, therefore, any party in similar circumstances must ensure that it provides clear and unequivocal security for both the sum of any potential crossclaims as well as the costs of those proceedings.

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