

## Construction Law Update

### Court refuses to enforce two adjudication awards where the claimant is subject to a CVA

The ability of a party in a company voluntary arrangement (“**CVA**”) to enforce an adjudicator’s decision is a question to be determined on a case-by-case basis. The recent decision in *FTH Limited v Varis Developments Limited* [2022] provides a useful reminder of the court’s approach to deciding such issues.

#### Background

In August 2018, the Claimant (“**FTH**”) entered into a design and build contract (the “**Contract**”) with the Defendant (“**Varis**”).

On 22 October 2019, Varis issued a pay less notice in respect of FTH’s relevant application for payment. This disclosed that the sum of £317k was otherwise due for payment but had been withheld because of FTH’s alleged failure to provide collateral warranties.

On 25 October 2019, Varis purported to terminate the Contract; and on 29 November 2019, it issued a further pay less notice showing a sum otherwise due of £90k, but subject to numerous alleged withholding items.

#### First Adjudication

On 20 January 2020, the first adjudicator upheld the validity of the pay less notice of 22 October 2019.

#### Second Adjudication

On 14 February 2020, the second adjudicator concluded that Varis’ purported termination was invalid and that they had repudiated the Contract.

#### CVA and Third Adjudication

On 13 May 2020, FTH entered a CVA. The Company’s liabilities reported in the statement of affairs did not include any provision for a cross-claim from Varis.

Following a third adjudication on 11 September 2020, in which the adjudicator awarded FTH £670k plus VAT, Varis intimated a cross-claim against FTH (initially valued at £1.3million and later rising to £1.7m) in respect of its losses arising from its alleged entitlement to terminate.

The case subsequently brought before the court concerned FTH’s attempt to enforce the second and third adjudication awards by way of summary judgment. Varis did not dispute that the Awards were valid, but sought to resist the grant of summary judgment, alternatively sought a stay of execution on the basis of FTH’s financial position and its own alleged cross-claims, which remained subject to final determination.

#### Held

The Court refused summary judgment in favour of FTH on the basis that there was a “real risk” that summary enforcement would deprive Varis of security for its cross-claims, alternatively that there was, on this same basis, a “compelling reason” not to give summary judgment. The Court also found that had it been necessary for it to do so, it would in any event have granted a stay of execution in favour of Varis.

#### Application for Summary Judgment

Where a company in insolvent *liquidation* has obtained an adjudication decision in its favour, that decision will not generally be enforced by way of summary judgment (*Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000]).

In contrast, different considerations may apply where a company *subject to a CVA* has obtained such a decision. In the context of a CVA, a court “*should*

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*be wary of reaching any conclusions which prevent the company from endeavouring to use adjudication to trade out of its difficulties” (Bresco v Lonsdale [108] (Coulson LJ)).*

Exercising its discretion under CPR part 24, the Court nevertheless declined to grant summary enforcement in this instance and drew on the following factors in support of its decision:-

1. The CVA, in contrast to that in *Bresco*, was not designed to allow FTH “to trade its way out of trouble”. Had the CVA successfully fulfilled all financial expectations, recovery at best would have been 56p in the £. FTH’s situation was thus more akin to the “straightforward situation where the claiming company is in insolvent liquidation and the liquidator is engaged in the process of recovering what he can in order to make a distribution to creditors” *Bresco* [78] (Coulson LJ).
2. By the end of 2019, FTH were not cashflow solvent and the projected recovery of 56p in the £ was entirely unachievable.
3. No evidence was adduced to suggest FTH was trading profitably.
4. An accountancy report, which forecasted FTH’s turnover in positive terms, when considered against the totality of the material available, was unhelpful as it was prepared when settlement of one of FTH’s claims was thought to be imminent.
5. Varis’s cross-claim had not been considered by the CVA Supervisors. Had this claim succeeded in whole or in significant part, the CVA would still have failed and FTH would still have gone into liquidation with very little, if any, recovery for creditors.

6. The CVA was for 12 months only and had not been validly extended.

### Application for a Stay

Refusing summary judgment meant there was no need for the Court to consider the *Wimbledon v Vago* principles for granting a stay. Despite this, it briefly considered the same, finding that it would in any event have exercised its discretion under CPR 83.7(4) in favour of Varis.

Reasons for this included FTH’s financial position, which had deteriorated to such an extent that it was probable it would be unable to pay the judgment sum; and the Court’s finding that this likely inability was not caused by Varis’s failure to honour the third adjudicator’s decision. FTH’s estimated statement of affairs in early 2020 showed a deficiency of c.£2.25m and this did not take into account, among other things, any amounts claimed by Varis.

Uncertainties in the information provided by FTH, which had been “somewhat economic with information relating to its financial position” also weighed in favour of granting a stay.

### Analysis

This case provides a useful reminder of the several matters a court may take into account should a company in CVA seek summary judgment to enforce an adjudication decision in its favour. While there is no outright bar to enforcement, such cases will turn on their own facts, and will inevitably involve close scrutiny of the nature and purpose of the CVA, the financial standing of the company, and the legitimate interests of the Respondent party.

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