

Dispatch highlights some of the most important legal developments during the last month, relating to the building, engineering and energy sectors.

Dispatch

Interest and VAT

Pharos Offshore Group Ltd v Keynvor Morlift Ltd
[2025] EWHC 2496 (TCC)

The judgment dealt with a number of consequential matters that the parties had been unable to agree following a main judgment, where Constable J determined that the balance owed to Pharos after setting off the counterclaim, net of interest, was £495k inclusive of VAT. One of those matters was whether interest was payable on the VAT.

KML accepted that interest ran pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 ("LPA") in principle but argued that the VAT element was not a qualifying debt. A qualifying debt is defined in section 3(1) of the LPA as:

"A debt created by virtue of an obligation under a contract to which this Act applies to pay the whole or any part of the contract price is a 'qualifying debt' for the purposes of this Act, unless (when created) the whole of the debt is prevented from carrying statutory interest by this section."

KML said that the VAT element itself did not form part of the contract price, both as "a statement of the obvious", but also by virtue of clause 6.1 of KML's standard terms and conditions which provided:

"The Contract Price is fixed and firm, exclusive of VAT and inclusive of packaging and any delivery and insurance costs as stated in the Purchase Order."

The obligation to pay the VAT element was created by virtue of the provision of a taxable supply by Pharos to KML – namely the services that Pharos supplied to KML under the contract – which would have arisen even if there had been no contract. If interest upon the VAT element did apply, Pharos would receive an unwarranted windfall (and a purchaser in the position of KML would suffer an equally unwarranted penalty) in the form of a 20% uplift on LPA interest whenever the underlying debt giving rise to the claim for LPA interest constituted consideration for a taxable supply. A supplier would not be liable to account for that windfall to HMRC as output tax, nor would such a purchaser be entitled to recover that sum as input tax, because the sum would not itself constitute VAT.

Pharos argued that any attempt to remove the VAT element from the scope of the LPA was void under section 8(1) of the LPA, which provides:

"Any contract terms are void to the extent that they purport to exclude the right to statutory interest in relation to the debt, unless there is a substantial contractual remedy for late payment of the debt."

The judge noted that, usually, a contract price agreed between parties – unless it is stated specifically to exclude VAT – would include any VAT which is required to be paid. The obligation to

pay this contract price (inclusive of VAT) would "plainly" be a qualifying debt for the purposes of section 3(1) of the LPA. Whilst it was right that if the effect of the LPA was to require enhanced interest to run on the VAT element of a contract price, the recipient may receive a sum in excess of its likely losses – and potentially significantly so if accounting for VAT on a cash basis, at least in the default position where any contract price is deemed to include VAT – that was precisely the effect of the LPA. If the intention had been for VAT to be excluded from the definition of a qualifying debt, the statute would have said so:

"The purpose of the Act was to discourage late payment of commercial debts, and the fact that the recovery by the recipient under the Act is in a sum in excess of purely compensatory interest is inherent in the LPA."

Further, the definition of "Contract Price" within the particular contract in this case as excluding VAT did not mean that VAT was excluded from constituting a "qualifying debt" for the purposes of the LPA:

"The contract between KML and Pharos required KML to pay not just the sum which was contractually defined as the 'Contract Price', but applicable VAT. That obligation was not created merely by the statutory tax laws, but expressly on the face of the Purchase Orders themselves. The express contractual obligation upon Pharos to charge the applicable VAT was plainly met with the reciprocal obligation to make payment of that sum, as a matter of contract."

Therefore, for the purposes of the LPA, VAT formed part of the "contract price". The obligation to pay the Contract Price gave rise to the (contractual) obligation to pay the applicable VAT upon the Contract Price. The judge finally noted that this result also led to: "a coherent regime where LPA interest applies in the same way whether the contract is based upon a VAT-exclusive price (to which VAT is added by the payor) or a VAT-inclusive price".



Adjudication enforcement

Providence Building Services Ltd v Hexagon Housing Association Ltd

M20CL073

Providence applied for summary enforcement of an adjudication decision dated 30 April 2025. Hexagon did not oppose that application but sought a stay of the judgment pending the Supreme Court's determination of an appeal in a separate dispute about the validity of the termination of the contract (see *Dispatch*, [Issue 291](#)).

The application for a stay was based on the *Wimbledon v Vago* principles (see *Dispatch*, [Issue 61](#)). Hexagon said that its financial position was such that, if Providence succeeded in the Supreme Court, then it would not be able to repay the adjudication sum. Providence's case for resisting the stay was based on the need to avoid a manifest injustice. If the stay were ordered, it would be faced with a winding-up petition from one of its creditors with irreparable prejudice to its participation in the Supreme Court appeal. It would be wrong to give Hexagon "a victory by default".

Parfitt J noted that the parties had been litigating extensively against each other in various ways since the contract was terminated in May 2023. Relying on the case of *Gosvenor London Ltd v Aygun Aluminium Ltd* [2018] (see *Dispatch*, [Issue 215](#)), Parfitt J noted that CPR 83.7(4) gave the court a discretion to grant a stay of a judgment "if the court is satisfied that – (a) there are special circumstances which render it inexpedient to enforce the judgment ... either absolutely or for such period and subject to such conditions as the court thinks fit".

There was a difference in the context of adjudication enforcement because of the temporary nature of the adjudication decision. The *Wimbledon v Vago* principles address the problem of an impecunious claimant not being able to repay the adjudication sum, if the issue was finally determined in favour of the paying defendant. Following *Wimbledon v Vago*, any consideration of a stay must keep in mind that adjudication awards should be paid, and that claimants should not be kept out of their money. A claimant's probable inability to repay the judgment sum might make a stay appropriate under "special circumstances" (for example, if Providence lost in the Supreme Court, then it would need to, but not be able to, repay the money).

Providence focused on "manifest injustice", in the sense that it would be manifestly unjust to grant the stay and that it should therefore be refused. In Parfitt J's view, Providence's position was that "manifest injustice" was a defence to the stay being sought here, not a ground for granting it.

On the facts, the judge found that the point made by Providence was not strictly that it would cease to exist if the judgment was not enforced but that there was a strong prospect of one of its creditors serving a winding-up petition which would prejudice its ability to participate in the Supreme Court hearing. However, this was not the kind of insolvency addressed in *Wimbledon v Vago*, where the court was dealing with the interim nature of adjudication decisions:

"The unfairness addressed by the stay ... is to the party having to make an interim payment because of 'pay now, argue later' in circumstances where their potential right to being paid back is perilous because of their counterparty's threatened insolvency...this would cut across the structure of the scheme in the 1996 Act: the risk in the speedy adjudication of disputes to benefit cashflow is balanced by making those adjudication orders only temporarily binding. Insolvency, formal or otherwise, upsets this structure because it removes the safety net provided by the future final resolution of the dispute – in substance, the money will not be paid back even if the payor finally establishes that the payment was not due."

Providence's argument cut across this: "At its essence, it relies on the claimant's insolvency to refuse a stay rather than to grant it". Looking at the position here, Providence brought the adjudication in question – a final termination account

premised on its right to terminate as established by the Court of Appeal's decision, the one now being appealed.

Parfitt J noted that, whilst Providence was entitled to act on its success in the Court of Appeal, it was Providence's choice to bring the second adjudication knowing that Hexagon's appeal to the Supreme Court was pending. It was not unlikely, given the parties' recent dispute history, that the second adjudication – being a termination account – would become the expensive process that it did. It was difficult to blame Hexagon's conduct of the second adjudication as responsible for its financial condition when given Providence's obvious need to marshal its limited resources. Providence decided to pursue the second adjudication knowing that there was a risk any success it might achieve would be unravelled should the Supreme Court disagree with the Court of Appeal. As a result, the judge found that they could not attribute relevant fault to Hexagon for the "objectively predictable consequences so far as irrecoverable costs were concerned".

The Supreme Court hearing was due to take place in a couple of months, after which there would be a binding determination of an issue that appeared essential to the adjudication award which was the subject of this enforcement stay application. It followed that the timescale for the potential stay was not open-ended and so this was the opposite of a case where a party wants a stay pending final determination but has taken no steps to initiate such a determination (which itself would be a good ground for refusing a stay). The possible merits of the appeal need not be based on the arguments of the party seeking the stay because the Supreme Court has given permission.

Further, Hexagon's proposed order did not seek to keep Providence out of its adjudication money any longer than necessary, stating that it would pay Providence the next day, if its appeal was dismissed. The stay being sought was "tailored and limited".

Ultimately, it was not the failure to pay the judgment sum that was the material cause of the financial problems, but the financial risks inherent in litigating rather than building. The judge accordingly granted the stay. The risk of Hexagon succeeding in the Supreme Court and then being unable to recover the judgment sum outweighed the risks associated with keeping Providence out of the judgment sum until Hexagon lost that hearing.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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