



Dispatch

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

Adjudication: stay of enforcement proceedings Sutton Services International Ltd v Vaughan Engineering Services Ltd

[2013] NIQB 63

This is a case from Northern Ireland, where Vaughan argued that there should be a stay placed on an adjudicator's decision because of the financial position of the plaintiff. (In Northern Ireland, they still use the traditional court terms.) Vaughan said that they proposed to proceed against Sutton for defective work but had concerns that Sutton, having received payment under the adjudicator's award, would be unable to repay the amount that Vaughan expected to be finally awarded. Weatherup J noted that it was important that the exercise of the discretion to grant a stay must not be used to frustrate the purpose of adjudication. The onus was on the defendant to establish that the plaintiff was probably going to be unable to make the payment to the defendant should the defendant ultimately be successful. He also referred to the *Wimbledon v Vago* case (Issue 61) noting that even if a defendant establishes that the plaintiff will probably be unable to repay the defendant, that would not usually justify the grant of a stay if:

- (i) the plaintiff's financial position is the same or similar to its financial position at the time when the relevant contract was made; or
- (ii) the plaintiff's financial position is due either wholly or in significant part to the defendant's failure to pay those sums which were awarded by the adjudicator.

The Judge said that the Court may take into account the diligence of a defendant in pursuing the claim against the plaintiff, as the defendant's conduct of that claim may provide a basis for refusing to grant a stay, or a basis for granting a stay for a limited time to enable the Court to review the progress of the defendant's claim against the plaintiff.

The Judge was of the view that Vaughan had raised reasonable grounds for concern about Sutton's ability to repay if Vaughan brought a successful claim. Further, Sutton's financial position was not as it was at the time of the contract. There had been discussion about the provision of an insurance policy to cover Sutton's potential liability, but the existence of a suitable policy had not been established. The indemnity that was offered under the policy was stated to be in relation to the circumstances notified. It was not clear what the circumstances notified might be. The entitlement under the policy was subject to the terms and conditions of the policy and again it was not clear what the impact of the terms and conditions might be.

Then there was an issue as to whether the policy applied at the relevant time for the purposes of the defendant's claim. Therefore the Judge ordered a stay, however it was subject to the monitoring by the Court of the progress of Vaughan's claim.

Indeed, the Court ordered that there would be a stay provided that (i) Sutton paid the balance owing into Court within 3 days; and (ii) Vaughan issued proceedings within 3 days and served the Statement of Claim within 21 days. There was also to be a review of the stay in September 2013 to establish how the proceedings were progressing.

Bonds and guarantees: making a call Sea-Cargo Skips AS v State Bank of India

EWHC [2013] 177 (Comm)

A demand was made under a refund guarantee. The Bank said the demand was not made in the required form and therefore the Bank was not liable to honour it. The guarantee required a statement from the Buyer:

"that the vessel or the construction thereof is delayed with more than 270 days as set out in the contract article IV 1 (E) which entitles the buyer to cancel the contract and to receive repayment of the advance payments, that you the buyer have pursuant to such right of cancellation duly cancelled the contract..."

The Bank said that the demand failed to make reference to a delay within article IV 1(e) of the shipbuilding contract and also failed to state that the Buyer was entitled to receive repayment of the advance payments. Mr Justice Teare looked at the wording used in the demand. He noted that the demand did not "slavishly follow" the wording of the refund guarantee.

The Buyer said that the demand was compliant and so bound the Bank to pay and unless the parties had contracted for a stricter degree of compliance it was sufficient if the demand set out in substance what was required. Mr Justice Teare made reference to Staughton LJ who said in the case of *I.E Contractors v Lloyds* [1990] 2 Lloyd's Reports 496:

"The question is 'What was the promise which the bank made to the beneficiary under the credit, and did the beneficiary avail himself of that promise?' The degree of compliance required by a performance bond may be strict, or not so strict. It is a question of construction of the bond."

So was the demand sufficient to trigger the Bank's liability to pay?



The Judge noted that the Bank was not party to the shipbuilding contract. It could not be expected to investigate the position between the Buyer and the Shipbuilder. Its liability to pay did not depend on the actual position between the Shipbuilder and the Buyer but on whether a demand for payment had been made containing the requisite statement by the Buyer. Here the Judge was of the view that the demand did not contain a statement that there had been 270 days' delay as set out in article IV 1(e). Whilst the Judge accepted that it was common ground that the demand did not have to repeat precisely the words of the refund guarantee, it was necessary for it to refer to article IV 1(e) so that the Bank could see on its face that it was a compliant demand. He said that:

"An ambiguous demand cannot be compliant; ... It therefore appears to me that the demand did not comply with the terms of the refund guarantee."

Therefore the demand was not one which, on the true construction of the demand, triggered the Bank's liability to pay.

Adjudication: stay of enforcement proceedings FG Skerritt Ltd v Caledonian Building Systems Ltd [2013] EWHC 1898 (TCC)

Caledonian engaged FGS as a subcontractor in a number of contracts between 2009 and 2010, including the design and build of the mechanical and electrical works on a project at HM Prison Eastwood Park. The contract was based on the DOM2 standard form with a contract price of over £1.8 million. FGS submitted an invoice for the outstanding balance of the subcontract sum, less half the retention. This was on the basis that practical completion had been achieved. Caledonian did not accept that practical completion had been achieved and did not pay that invoice. FGS went into administrative receivership.

The administrative receivers sold FGS's book debts to Nathu Ram Puri Environmental Design Consultants ("EDC"). The sale to EDC was ineffective in assigning FGS's book debt because the DOM2 conditions included a prohibition on assignment. EDC was not therefore the owner of the relevant debt. The legal position was that the assignment took effect by way of a trust, so that FGS held the debt on trust for EDC.

FGS ceased work on the project in 2010 following the administrative receivership, but then submitted an invoice for the remaining half of the retention, 12 months after it contended practical completion had been achieved. The administrative receivers ceased to act as such on 14 March 2011. FGS was not wound up but did not trade. It had not yet been struck off the register of companies. FGS issued a notice of adjudication and was awarded £184k (plus VAT).

As a result Caledonian's counterclaim relating to costs incurred in completing the subcontract works and rectifying defects as a consequence of FGS's administrative receivership could not be set-off against the invoiced sums. FGS issued proceedings seeking to enforce the adjudicator's award, FGS's parent company, Melham Group Limited ("MGL") having offered a guarantee.

Mr Justice Ramsey also referred to the *Wimbledon v Vago* case and noted that if a claimant is insolvent then a stay of execution will usually be granted. However, if the party who has to pay has no real grounds for challenging the adjudicator's decision, then even if the party is insolvent a stay would not be appropriate because it would deprive creditors of the opportunity of making some recovery from the insolvent company. Here, whilst there was no challenge to the correctness of the adjudicator's decision in relation to the sums due on the two invoices, there was a challenge by way of defence of equitable set-off both for the sums already expended in remedying defects in FGS's work at HM Prison Eastwood Park and also arguable claims for future remedial work to those works. These raised real grounds of equitable set-off amounting to a sum exceeding the sum awarded by the adjudicator.

In considering the terms of the guarantee that was offered, the Judge had to consider the obligation of a party to disclose confidential financial information to another party so that that other party can consider whether to apply for a stay. He said that there was no general obligation for a party to provide confidential financial information to another party in order to allow that other party to investigate the solvency, so as to seek to establish that the judgment should be stayed. However:

"when as here, a party is seeking to avoid a stay where it has been shown to be insolvent and where it is proffering a bank guarantee to avoid the stay, the position is quite different. Where it is proffering a guarantee it is only appropriate that it provides the necessary current financial information of the company proffering the guarantee so that the Court and the other party can properly assess the worth of that guarantee."

The fact that the money is held in trust by FGS for EDC and therefore has to be paid to EDC did not affect the general principle that an adjudicator's decision is temporarily binding and should be enforced. In general there was no requirement for a party to show or establish that the money was to be used in one way or another, in order to obtain enforcement of an adjudicator's decision. Therefore the Judge ordered that there should be summary judgment based on the sums in the adjudicator's decision but that that judgment should be stayed pending the production of a satisfactory guarantee.

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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