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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY & CONSTRUCTION
COURT (QBD)
[2019] EWHC 3464 (TCC)



No. HT-2019-000104

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 5 December 2019

Before:

MRS JUSTICE O'FARRELL

B E T W E E N :

MULTIPLEX CONSTRUCTION EUROPE LTD

Claimant

- and -

R & F ONE (UK) LTD

Defendant

MR S. WILKEN QC (instructed by CMS CMNO LLP) appeared on behalf of the Claimant.

MR P. BROOK SMITH QC (instructed by Taylor Wessing LLP) appeared on behalf of Defendant.

J U D G M E N T

MRS JUSTICE O'FARRELL:

- 1 This is the claimant's application for a declaration against the defendant that it remains entitled to suspend its works.
- 2 The background to this matter is that on 3 August 2017 the claimant, Multiplex Construction Europe Ltd, entered into a contract with R & F One (UK) Ltd, the defendant, (formerly known as Wanda One (UK) Ltd) for the construction of a large building development at Nine Elms in Vauxhall. The contract is in the Design and Build 2011 JCT form subject to bespoke amendments by the parties. The contract sum is over £670 million. I am told that to date the defendant has paid the claimant sums in excess of £200 million.
- 3 The contract contained provision for payment security to be provided as follows at clause 4.1A.1:

“The employer will provide to the contractor a payment bond with a value of £15,000,000 from a surety approved by the contractor (such approval not to be unreasonably withheld or delayed) as attached at Appendix 10 (the payment security) which term shall include any adjustment or any replacement by what is anticipated by clause 4.1A.2 on or before 10 January 2018.”
- 4 Clause 4.1A.3 provided:

“The contractor shall not make a claim under the payment security, except where the employer fails to pay:
(a) by the relevant final date for payment any sum properly due under this contract taking into account any payment notice and/or pay less notice issued by the employer
...
and in each case the contractor's claim shall be limited to the relevant outstanding sum.”
- 5 Clause 4.1A.4 provided:

“If the employer fails to provide the payment security in accordance with clauses [sic] 4.1A.1 by a date falling 7 days following the date on which the payment security should have been issued in accordance with clause 4.1A.1, the contractor shall be entitled to immediately suspend under clause 4.11 the performance of his obligations under the contract until such time as the payment security is received.”
- 6 It is common ground that the defendant did not provide the payment security on or before 10 January 2018. As a result, the claimant commenced proceedings and issued an application for summary judgment.
- 7 Before the summary judgment hearing took place, the parties reached a settlement. A Tomlin Order was made, pursuant to which the proceedings were stayed save for the purposes of carrying into effect the terms of the settlement agreement and for that

purpose the parties had permission to apply without the need to issue new proceedings.

- 8 Attached to the Tomlin Order was the settlement agreement dated 5 July 2019. The settlement agreement contained the following provisions:

Clause 2.1.1:

“R & F will provide the payment security from the Bank of China UK Ltd by close of business 30 October 2019, the settlement bond.”

Clause 2.1.2:

“The settlement bond will be a single bond of £15 million.”

Clause 2.1.5:

“If R & F does not provide the payment security by 30 August 2019 then Multiplex will be entitled to suspend all or part of the works in accordance with clause 4.1A.4 of the contract.”

Clause 8.1:

“Each party hereby indemnifies and shall keep indemnified the other party, its related parties of any of them against all costs and damages including any future liquid expenses of the parties incurred in all future actions, claims, suits and/or other proceedings in respect of enforcing their rights under this agreement.”

- 9 R & F did not provide the relevant payment security from the Bank of China by the date set out in the settlement agreement and, therefore, the claimant sought to enforce the terms of the settlement agreement through the Tomlin Order.

- 10 That matter came before His Honour Judge Kramer QC, sitting as a Judge of the High Court, on 25 September 2019. On that occasion the defendant had had insufficient time to respond to the application and the court, therefore, adjourned the enforcement proceedings on terms including the following:

“By way of declaratory relief the claimant is entitled to suspend all or any part of the works in accordance with clause 4.1A.4 of the contract as defined in recital A to the settlement agreement attached to the Tomlin Order.”

- 11 The claimant’s application was adjourned to 25 October 2019 upon the following terms:

“(a) Within five days of the provision by the claimant to the defendant of an executed discharge and release in relation to previously proffered payment security the defendant shall pay into court the sum of £9 million. Such sum is to be held by the court pending final determination of the defendant’s application.

(b) Pending the resumed hearing, the defendant shall use its best endeavours to comply with clause 2.1 of the settlement agreement.”

12 The defendant was ordered to file and serve further evidence as to the steps taken to establish that it would be possible to provide the settlement bond. Provision was made for the claimant to serve evidence in reply and for the defendant to file and serve further evidence explaining what steps had been taken in respect of its best endeavours to comply with clause 2.1 of the settlement agreement.

13 The matter then came back before the court on 29 October 2019 when an order was made by Waksman J sealed on 30 October 2019 whereby he ordered the claimant's application be adjourned to the first available date during the week commencing 6 December 2019 on the following terms:

“(a) By 8 November 2019 the defendant shall pay into court the further sum of £6 million. Such sum is to be held by the court pending final determination of the claimant's application or as may be otherwise agreed between the parties.

(b) Pending the resumed hearing, the defendant shall use its best endeavours to comply with clause 2.1 of the settlement agreement by no later than 29 November 2019.”

Provision was made for further evidence to be filed by the defendant and the defendant was ordered to pay the claimant's costs.

14 It is common ground that the defendant has paid into court the sums ordered by the court of £9 million and £6 million, a total of £15 million, and that sum remains in court. It is also common ground that the defendant has not produced any payment security bond that is acceptable to the claimant.

15 By letter dated 8 November 2019, the claimant informed the defendant that it intended to suspend further works on site if the payment security was not provided. In response, Taylor Wessing, the solicitors acting on behalf of the defendant, sent a letter dated 14 November 2019 disputing that the claimant was entitled to suspend works and stating:

“In the event that Multiplex suspended the work, R & F may elect to accept Multiplex's repudiation or to seek to recover from Multiplex all damages incurred as a result of Multiplex's wrongful suspension. In this and all other respects, R & F's rights are fully reserved.”

16 In those circumstances, this application was issued by the claimant seeking a further declaration from this court that the claimant remains entitled to suspend all or any part of the works in accordance with clause 4.1A.4 of the contract as defined in recital (a) to the settlement agreement attached to the Tomlin Order.

17 The position before the court today is as follows:

(i) It is common ground that the defendant is in breach of the contract in failing to provide the payment security by January 2018.

- (ii) It is common ground that the defendant is in breach of the settlement agreement by failing to provide adequate payment security by August 2019.
 - (iii) There is a hearing fixed before the TCC on 13 December 2019 at which the Court will determine the claimant's application to enforce the terms of the settlement agreement pursuant to the Tomlin Order and will determine the way forward in terms of long term payment security, whether by way of (a) specific performance of the terms of the settlement agreement; or (b) by way of a *Liberty Mercian* type order under which the sums in court can be used as payment security during the currency of the contract; or (c) by way of direct payment of the sum of £15 million or any part thereof out of court to the claimant.
 - (iv) I understand that this afternoon by four pm the defendant will provide a further witness statement setting out the steps that it has taken to comply with the order to use its best endeavours to provide adequate payment security in accordance with its obligations under the contract and the settlement agreement.
- 18 The application today is for the court to exercise its discretion to grant declaratory relief setting out the claimant's continuing entitlement to suspend works pending the provision of adequate payment security by the defendant.
- 19 Mr Wilken QC, leading counsel for the claimant, makes the application on the basis that the defendant remains in breach of the settlement agreement. The settlement agreement makes express provision for the claimant to suspend works in the absence of adequate payment security. Even today there is still no offer on the table, as it were, of adequate payment security. Therefore, the claimant remains unsecured in respect of the defendant's obligations to make interim payments during the currency of the works. There is a history of late payment in relation to applications for interim payments. Currently there is no outstanding sum due by the defendant to the claimant but that is following a recent outstanding payment in respect of an interim payment of just over £11 million which was paid by the defendant only following the issue of a statutory demand. In those circumstances, Mr Wilken submits that the claimant is entitled to exercise its discretion to suspend the works and seeks a declaration as to that entitlement.
- 20 Mr Phillip Brook Smith QC, leading counsel for the defendant, submits that it would not be appropriate for the court to exercise its discretion to grant declaratory relief in these circumstances. The defendant accepts that it is in breach of the contract and now in breach of the settlement agreement terms. An update will be provided today by 4 pm as to the best endeavours used by the defendant to put in place appropriate payment security. All interim payments are up to date including DB27 which was paid late but has now been paid in full. Up until now over £200 million has been paid to the claimant in respect of this development. The defendant is pursuing the procurement of an appropriate payment security from Standard Chartered Bank. It is close to finalising the terms on which such security will be proffered but was not in a position today to explain to the court what those terms were or when the finalised offer will be made.

21 The defendant's submissions really turn on two interlinked arguments. The first is that there is adequate procedural security for the claimant now by way of the sums in court. The second is that, given that there is such procedural security for the claimant, it would be arbitrary and capricious for the claimant to exercise any right to suspend the works. Therefore, the court should not grant the declaration sought.

22 As to the first point, Mr Brook Smith relies upon the authority of *Re Peak Hotels & Resorts Ltd (In Liquidation); Crumpler & Another v Candey Ltd* [2018] EWCA Civ 2256 in which Sir Colin Rimer set out at para.82 the following:

“*Halvanon Insurance Co Ltd* [1988] 1 WLR 1122 is cogent first instance authority that money paid into court as a condition of being given leave to defend remains the defendant's property subject to the security interest the payment in gives the claimant.”

23 Effectively, once money has been paid into court it provides a procedural security for the claimant although it remains the property of the defendant. The claimant becomes a secured creditor with the equivalent of an equitable charge in favour of the funds.

24 As to that point, what is quite clear is that in those circumstances, the claimant has no right to immediate payment out of any of the funds. The claimant would be entitled to make an application to the court for a payment out of the funds. No doubt, in appropriate circumstances, that could be done by way of a consent order. If the defendant for any reason became insolvent, and I note that the defendant in this matter is a shell company, then the claimant's right to claim on those funds would be as a secured creditor and not as having an immediate right to the whole of the funds. Therefore, it does not provide the same payment security as would a bank guarantee or bond, pursuant to which the claimant would have access by way of an appropriate demand to immediate payment of cash funds.

25 Turning to the second limb of the defendant's submissions, it is not accepted by the defendant that the claimant has an existing right to suspend the works because it has the full security of the £15 million in court. Reliance is placed on two authorities. In *BT plc v Telefonica O2 UK Ltd* [2014] UKSC 42 Lord Sumption stated at para.37:

“As a general rule, the scope of a contractual discretion will depend on the nature of the discretion and the construction of the language conferring it. But it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously. *Abu Dhabi National Tanker Company Ltd v Product Star Shipping Ltd (No 2)* [1993] 1 Lloyd's Rep 397, 404 (Leggatt LJ); *Gan Insurance Company Ltd v Tai Ping Insurance Company Ltd (No 2)* [2001] 2 All ER (Comm) 299, para 67 (Mance LJ); *Paragon Finance Plc v Nash* [2002] 1 WLR 685, paras 39-41 (Dyson LJ). This will normally mean that it must be exercised consistently with its contractual purpose: *Ludgate Insurance Company Ltd v Citibank NA* [1998] Lloyd's Rep IR 221, para 35 (Brooke LJ); *Equitable Life Assurance Society v*

Hyman [2002] 1 AC 408, 459 (Lord Steyn), 461 (Lord Cooke of Thorndon).”

- 26 Similar statements are set out in *Property Alliance Group v Royal Bank of Scotland plc* [2018] EWCA civ 355 in the Court of Appeal at para.162 to 165:

“The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties.”

- 27 Although I accept that in this case the claimant has a discretion as to whether to exercise its rights under the settlement agreement to suspend works, it is not the case that the exercise of such discretion would be arbitrary or capricious in circumstances where there is an admitted breach of the settlement agreement. In such circumstances the claimant would be exercising its discretion consistently with the contractual purpose of the right to suspend. It really comes back to the first point which is whether the payment into court of £15 million pending the final determination of these proceedings in just over a week’s time provides adequate security for the claimant so as to make any exercise of the right to suspend capricious or arbitrary.
- 28 In my judgment it is clear that it does not. The whole purpose of having the payment of money in court is to provide long term security for the claimant pending the court’s final determination of the enforcement of the settlement agreement. However, that does not equate to security as envisaged by the payment security, either under the contract or under the settlement agreement. The whole purpose of payment security is to provide ready access to cash funds in the event of any default by the defendant in respect of its payment obligations. It is intended to preserve the contractor’s cash flow during the currency of the project. Given the history of late payment by the defendant, the claimant is fully entitled to insist on such adequate payment security for the remainder of the works. Payment into court is no substitute for full and proper payment security as provided for in the settlement agreement.
- 29 In those circumstances, where it is common ground that the defendant has not to date provided adequate payment security and, therefore, is in breach of the settlement agreement, the claimant is entitled to exercise its right to suspend works as set out in the settlement agreement. For those reasons, the court will grant the relief sought by the claimant in this matter.
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CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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This transcript has been approved by the Judge.