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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES
TECHNOLOGY & CONSTRUCTION
COURT



No. HT-2018-000050

[2018] EWHC 1127 (TCC)

Rolls Building

Friday, 13 April 2018

Before:

MR JUSTICE STUART-SMITH

BETWEEN :

ENERGO A.S.

Claimant

- and -

BESTER GENERACION UK LIMITED

Defendant

MS K. GOUGH (instructed by Keystone Law) appeared on behalf of the Claimant.

MR T. OWEN (instructed by Decimus Fearon LLP) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE STUART-SMITH:

- 1 This is an application to enforce an adjudication decision by Mr Simon Tolson, given in adjudication proceedings started by the defendant against the claimant by notice on 22 November 2017.
- 2 The parties entered into the contract that is the subject of this dispute on 10 May 2016. The contract was made between the defendant, as employer, and the claimant, as contractor, for the engineering, procurement, construction and commissioning of a bio-mass fired energy generating plant and associated works at Kingmoor Park, Bryn Lane in Wrexham.
- 3 By his decision, the adjudicator found that the claimant had lawfully terminated its contract with the defendant on 15 June 2017 and that a subsequent call or calls by the defendant upon the claimant's performance security to 100 per cent of its value in August and September 2017 was unlawful. Accordingly, the adjudicator ordered the defendant to repay to the claimant, by 13 February 2018, the sums drawn down under the performance security in the sum of £2,709,277.99. He also ordered the defendant to pay his fees and expenses in the sum of £38,500 net of VAT. The defendant failed to comply with the orders of the adjudicator; and when the claimant sought payment, the defendant did not respond.
- 4 Accordingly, the claimant issued these enforcement proceedings for summary judgment and interest on 16 February 2018. Directions were given on 22 February 2018. This is the judgment of the court on the claimant's application.
- 5 The defendant does not challenge the validity of the adjudicator's decision. It accepts that summary judgment should be entered against it. However, it submits that there should be stay of execution on two grounds; one, the probable inability of the claimant to repay the judgment sum at the end of the substantive trial between the parties and, two, the defendant's own financial position if there were no stay of execution.
- 6 On 22 February 2018, Fraser J gave directions for the conduct of these enforcement proceedings, which included an order that the defendant should serve any further evidence by 12 March 2018, then for responsive evidence from the claimant to be served by 22 March 2018. Pursuant to that order, the defendant served evidence from a Mr Watson and a Snr Prieto on or about 8 March 2018. It had, by then, requested financial information from the claimant, which requests have not been answered to its satisfaction.
- 7 The claimant responded to the defendant's evidence on 22 March 2018 with a further witness statement from its solicitor and a substantive witness statement from the claimant's Chief Financial Officer going to the claimant's financial position. He disclosed the claimant's latest audited accounts which were for the year 2016. They showed, amongst other things that: (1) the capital held in the company was equivalent to about £2.5 million; (2) that the total assets of the company were equivalent to £8.2 million made up of fixed assets of £2.1 million and current assets of £6.1 million, of which about £910,000 were cash; (3) equity in the company was audited at £3.55 million, or its equivalent, of which £1.04 million was from profit, retained earnings and reserved profits; (4) turnover for 2016 was audited at £15.2 million, on which a profit of £726,000 was recorded. The Chief Financial Officer's evidence provided no documentary support in relation to the period since 2016, save for an increase in capital from £2.47 million to £4.23 million in January 2018. He stated that the claimant was still trading and able to meet its obligations. He also gave evidence that in the event that the claimant was unsuccessful in subsequent legal proceedings it would be able to sustain liabilities up to the amount of the bank guarantees.

His summary concluded: “PDS is a going concern with projects being carried out, the order book is healthy, as is our current financial position, notwithstanding having to pay Komerčni Banka in full to satisfy the facility for the cross-guarantee, details of which are set out below.” He produced documentary evidence to show that the claimant had repaid to its bank the sums drawn down by the defendant that are now in dispute.

- 8 By an application notice dated 11 April 2018, the defendant requested permission to adduce further evidence, namely a short report from a forensic accountant. I mean no disrespect to the accountant in saying that his report adds little to what is self-evident in any event. His summary conclusions are to the effect that it is not possible to deduce the current financial state of the claimant from accounts for the year 2016. In addition, he makes the obvious point that the strengthening of the balance sheet in January 2018 could have been related to the need for the claimant to repay its bank the sums drawn down by the defendant that are in dispute in the present proceedings. Bearing in mind the lateness of the application and the express terms of Fraser J’s order, to which I have referred, I do not consider that the additional evidence that the claimant applies to adduce is capable of making a significant difference to the outcome of the case and no good or sufficient reason has been shown to admit it at this stage. I therefore ruled at the start of the hearing that it should not be admitted. I have taken due note of the self-evident points to which I have referred.

The adjudication scheme and stays of execution

- 9 It is well known and established beyond argument that the scheme for adjudications and their enforcement is intended to provide a rapid solution by way of enforcement of valid decisions by adjudicators. The starting point, and usually the end point, is that the court will enforce the decision of an adjudicator, whether it is right or wrong, unless he did not have jurisdiction to reach his decision or there has been a material breach of the rules of natural justice. Adjudication is all about interim cashflow and it is routine to enforce decisions that require substantial allocations of cash to one party or another in the knowledge that it may prove to be merely an interim measure. The fact that the basis of an adjudicator’s decision is to be challenged in other proceedings is of itself, seldom, if ever, a ground for non-enforcement.
- 10 The jurisdiction to order a stay of execution is encapsulated in CPR 83.7. That rule provides that the jurisdiction to order a stay is dependent upon the court being satisfied that there are “special circumstances which render it inexpedient to enforce the judgment or order” or that “the applicant is unable from any reason to pay the money”. Where one of both of those criteria are satisfied, the court “may” order a stay of execution on such terms as it thinks fit, though it is not obliged to do so. I see no conflict between the two regimes of adjudication and exercising a stay, but consider that the nature and purpose of the adjudication regime should be borne in mind when considering whether there are “special circumstances that render it inexpedient to enforce the judgment or order”.
- 11 I bear in mind throughout that it is for the party that raises the issue of a stay being imposed to satisfy the court that the necessary prerequisite criteria are satisfied and that the court should take the course the party is proposing. In particular, where a party wishes to rely upon its inability to pay as a ground for a stay, CPR 83.7 requires it to support its application with a witness statement, which *must* disclose the debtors means. Following the lead given by Fraser J in *Gosvenor London Ltd. v Aygun Aluminium UK Ltd.* [2018] EWHC 227 (TCC), I knote the difference between the working assumption that a valid adjudication decision will be in force and the restricted circumstances in which the court may order a stay

of execution. What seems clear is that the mere fact the adjudicator's decision might later be held to be wrong will not, of itself, generally amount to a special circumstance rendering it inexpedient to enforce the judgment or order.

12 I respectfully agree with and adopt the summary principles given by Coulson J, as he then was, in para.26 of *Wimbledon Construction v Vago* [2005] EWHC 1086 (TCC):

a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.

b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.

c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under [Order 47](#) with considerations a) and b) firmly in mind (see *Awg*).

d) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of [Order 47 rule 1\(1\)\(a\)](#) rendering it appropriate to grant a stay (see *Herschell*).

e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see *Bouygues and Rainford House*).

f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

- (i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see *Herschell*); or
- (ii) The claimant'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 (see *Absolute Rentals*).

13 I also accept and adopt the additional principle which Fraser J identified at para.39 of *Gosvenor*, which was that:

“(g) if the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs for the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid then this would also justify the grant of a stay.”

14 In addition, I agree with Coulson J's recent observation that his summary in *Vago* was not set in stone (see *Equitix ESI CHP (Wrexham) Ltd. v Bester Generacion UK Ltd.* [2018])

EWHC 177 (TCC) at para.62). It is, however, a suitable and satisfactory summary for present purposes. I therefore turn to the two grounds advanced by the defendant in support of the imposition of a stay.

The Claimant's Financial Position

15 The first point raised is the claimant's financial position. The defendant's submission is carefully phrased. It submits that the claimant's financial position and the evidence and information adduced by the claimant are "unsatisfactory". It relies heavily upon the claimant's failure to disclose further documentary evidence. I accept that there may be cases where the evidence calls for an explanation of a claimant's means where they have been questioned by a defendant. *Equitix* was such a case (see para.66, which sets out the reasons why Coulson J concluded that the financial information provided by the claimant was unsatisfactory).

16 However, I respectfully agree with Ramsey J at para.27 of *FG Skerritt Ltd. v Caledonian Buildings & Systems Ltd.* [2013] EWHC 1898 (TCC), where he said:

"Putting the matter rather more generally, it is for a debtor who wishes to rely upon the financial standing of the claimant as a reason for a stay at least to put before the court sufficient information as to call for an answer from the claimant to allay the concerns that arise from the debtor's information. In the general run of cases, it is not sufficient for a defendant simply to make assertions or to call for the claimant to provide information to substantiate its good financial standing."

17 I have summarised the evidence given by the claimant's CFO in response to the defendant's suggestion that its financial position might justify a stay. In my judgment, though I do not doubt that the claimant has further information at its disposal, I consider that the evidence provided is sufficient to meet the needs of the case. The defendant has not put forward any reasoned or evidenced basis for challenging what the CFO says. The circumstances of a case such as referred to at para.66 of *Equitix* are quite different. None of the considerations raised by Coulson J there apply in the present case, apart from the possible need for support from a parent company. Even so, the context in the present case is quite different. There is no evidence to suggest that the financial standing of the claimant has deteriorated since it has entered into the contract with the defendant. There is positive and documented evidence that it was able to pay its bank the sums drawn down by the defendant and there is positive evidence of a strengthening of its balance sheet in January 2018. In summary, there is no reason to doubt or reject the CFO's evidence which includes the express assertion that:

"In the event of failure in the subsequent legal proceedings and [the claimant] being ordered to settle the liabilities up to amount of the bank guarantees ... [the claimant] would be able to cover this from its own resources."

I therefore reject the submission that PBS's financial standing justifies the imposition of a stay."

The Defendant's Financial Position

18 I turn, then, to the defendant's financial position. Once again, the defendant's submissions are carefully phrased. The defendant points to the fact that, if it were to win in the main proceedings that are on foot, it would be entitled to a large interim payment pursuant to its

interpretation of the contract and its termination. It submits that it would lose the benefit of having security payments which, on this hypothesis, it would ultimately be shown to have rightly drawn down. This hypothesis, though theoretically accurate, is the normal consequence of enforcing an adjudicator's valid decision, even though it may later prove to be wrong. The defendant raises the spectre that if it is ultimately successful it may not recover the fruits of a substantial judgment, including the £2.7 million element, which it would have had if the present judgment is stayed. The force of this submission is limited by the defendant's submission (at para.36 of its written skeleton) that:

“There is no evidence a stay would place PBS under significant or (inaudible) financial pressure or that its conduct of the litigation would be prejudiced.”

If no stay is imposed, the claimant's position will be further improved by the return of the £2.7 million.

- 19 On established principles, the first question to be answered is whether the court is satisfied that the defendant is unable for any reason to pay the money, namely the £2.7 million. There is no satisfactory evidence of means to satisfy the mandatory requirement of CPR 83.7(3). Put more broadly, there is no evidence that can satisfy me of such an inability. It is material to note that while criticising the claimant for its alleged failure to provide more financial information the only evidence about the defendant's financial position comes from the Bester Group's legal counsel. He, too, exhibits accounts for 2016, which are subject to the same limitations as I have previously identified in respect of the claimant's accounts for that period. He asserts that the position is “broadly the same today as it was on 31 December 2016”. He refers to Bester's liability to Equitix and asserts that adding the £2.7 million to the sum payable under the Equitix judgment would leave a total well in excess of £10 million owing. He concludes that:

“Against a backdrop of assets of approximately £2.666 million, Bester would become insolvent. This would make it virtually impossible for Bester to continue to pursue its counterclaim in the High Court (HT-2017-000330) and deprive Bester of the opportunity to correct Mr Tolson's erroneous decision.”

I note the use of the equivocal word “virtually”.

- 20 On instructions today, Mr Owen has said that if an order for immediate payment is made, either directly or into court, the judgment sum will not be paid. While accepting that those are his instructions, that is no substitute for a witness statement disclosing Bester's means as required by the CPR.
- 21 For the reasons that I have given, I am not satisfied that either of the gateway criteria laid down by CPR 83 and the authorities concerning the imposition of stays are satisfied. I would, therefore, decline to impose to a stay. However, I have also considered what my approach would be if I had been satisfied that either gateway criteria had been satisfied. In either event, I would have declined to impose a stay. I give my reasons shortly.
- 22 Firstly, and taking a general view, I ask what good reason there is for the money to be left with the defendant when it accepts the claimant's entitlement to summary judgment. The substance of the defendant's submission is that both parties are financially suspect. That being so, my first instinct is that the terms of the adjudicator's order are binding and should be complied with and that nothing to do with the source of the money (i.e. that it comes

from the drawing down of a performance security) or the party's conduct justifies leaving the money with the defendant and therefore at the claimant's risk rather than with the claimant and therefore at the defendant's risk. I am not persuaded that the source of the money provides justification for treating this particular sum of money as different from a sum adjudicated to be payable under an interim account. Nor do any of the particular circumstances relied upon in other cases, each of which is fact specific, provide a compelling analogy that requires a stay to be imposed.

- 23 I have also considered whether if the gateway criteria had been satisfied I might have ordered a stay on terms of the money being brought into court within a very short period, which might have the superficial attraction of reducing the risk for each party. However, since I have been assured by Mr Owen that the defendant would not comply with the condition that required the money to be brought into court, it would be an exercise in futility to make an order that simply inserted an additional step before bowing to the inevitable.
- 24 For these reasons, there will be summary judgment for the claimant in the terms claimed in subparagraphs 1, 2 and 4 of the prayer in the particulars of claim. I will hear submissions on the precise amounts payable by way of interest and on costs.

CERTIFICATE

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

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This transcript has been approved by the Judge