



Case No: HT-2020-000083

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2020] EWHC 1862 (TCC)

Rolls Building
Fetter Lane, London, EC4Y 1NL

Date: 15/07/2020

Before:

MRS JUSTICE O'FARRELL DBE

Between:

KEW HOLDINGS LIMITED

Claimant

- and -

DONALD INSALL ASSOCIATES LIMITED

Defendant

Howard Smith (instructed by **Cardium Law Limited**) for the **Claimant**
Paul Cowan (instructed by **Kennedys Law LLP**) for the **Defendant**

Hearing date: 10th June 2020

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

“Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties’ representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 15th July 2020 at 10:30am”

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Mrs Justice O'Farrell:

1. The matters before this court are the Defendant's applications for:
 - i) an order striking out the claim for non-compliance with the order dated 5 February 2019;
 - ii) alternatively, a stay of proceedings pending the Claimant's payment in satisfaction of the judgment dated 5 February 2019; and
 - iii) an order for security for costs.

Background

2. The Claimant is a single purpose vehicle company, registered in the Cayman Islands. It is the registered proprietor of The King's Observatory, Old Deer Park, Twickenham road, Richmond under a long leasehold interest ("the Property"). The Claimant has no other assets. Mr Brothers is a director of the Claimant and resident in Hong Kong.
3. The Defendant is a company providing architectural services. The Defendant was retained by the Claimant in connection with the conversion and refurbishment of the Property to form a private residence.
4. In 2018 disputes arose between the parties concerning the Defendant's entitlement to unpaid fees. The Defendant referred the dispute to adjudication and obtained an adjudication award in its favour in the sum of £202,509 (including interest and the adjudicator's fees but excluding VAT).
5. The Claimant failed to pay the sums due and the Defendant commenced proceedings to enforce the adjudication award. On 5 February 2019 summary judgment was granted to the Defendant in the sum of £208,287.84 (inclusive of VAT), together with interest, the adjudicator's fees and costs summarily assessed in the sum of £24,400.
6. The Claimant's application for permission to appeal was refused by the Court of Appeal on 29 March 2019.
7. The Claimant failed to pay the judgment sum by 19 February 2019 as ordered or at all.
8. On 15 March 2019 the Court granted an interim charging order over the Property in respect of the outstanding judgment sum.
9. On 10 May 2019 the Court granted a final charging order over the Property in respect of the outstanding judgment sum, then £268,488.05, plus costs of the application, summarily assessed in the sum of £5,000.
10. On 13 September 2019 the Defendant commenced Part 8 proceedings pursuant to CPR 73.10C for a sale order in respect of the Property to enforce the judgment sum. Those proceedings are ongoing. The Claimant opposes an order for sale of the Property on the grounds set out in the witness statement of Mr Brothers dated 13 March 2020. The Claimant's position is that it has a claim against the Defendant for

damages for professional negligence and breach of contract, which claim amounts to an equitable set-off.

11. On 6 March 2020 the Claimant commenced these proceedings, claiming damages against the Defendant of £2 million approximately. The allegations include late and inadequate drawings, inadequate advice and overcharging for the Defendant's services.

The application

12. On 27 April 2020, the Defendant issued this application seeking the following orders:
 - i) pursuant to CPR 3.4(2)(b) and/or (c) and/or the Court's inherent jurisdiction, the Claimant's claim shall be struck out unless the claimant pays the Defendant the sums ordered by this Court on 5 February 2019 within seven days;
 - ii) alternatively, pursuant to CPR 3.1(2)(f) and/or the Court's inherent jurisdiction these proceedings shall be stayed unless and until the claimant pays the Defendant the sums ordered by this Court on 5 February 2019 within seven days;
 - iii) further or alternatively, pursuant to CPR 25.12 and/or CPR 3.1(5), the Claimant shall pay into Court within fourteen days the sum of £700,0000 or such other sum as the Court shall determine as security for the Defendant's costs in these proceedings, failing which the Claimant's claim shall be struck out.

Application to stay proceedings

13. CPR 3.1(2)(f) provides that the Court may stay the whole or part of any proceedings either generally or until a specified date or event.
14. In *Anglo-Swiss Holdings Ltd v Packman Lucas Ltd* [2009] EWHC 3212 (TCC) the court considered whether an established refusal to honour or satisfy a previous adjudication decision and court judgement would justify the stay of separate legal proceedings concerning the same subject matter, pending payment. Having reviewed the relevant authorities and considered the provisions of the Housing Grants, Construction and Regeneration Act 1996 as amended ("the HGCRA") together with the overriding objective, Akenhead J summarised the following principles at [21]:
 - “(i) The Court undoubtedly has the power and discretion to stay any proceedings if justice requires it.
 - (ii) In exercising that power and discretion, the Court must very much have in mind a party's right to access to justice and to issue and pursue proceedings.
 - (iii) The power is one that is to be used sparingly and in exceptional circumstances.

(iv) Those circumstances include bad faith and where the claimant has acted or is acting particularly oppressively or unreasonably.”

15. In this case the Claimant’s position has been set out in a letter dated 4 May 2020 and confirmed by Mr Smith, counsel for the Claimant. The Claimant does not oppose the application to stay these proceedings pending payment of the sums due pursuant to the Order dated 5 February 2019.
16. The other applications, to strike out the proceedings and/or for security for costs, are opposed.

Application to strike out

17. CPR 3.4(2) provides that:

“The court may strike out a statement of case if it appears to the court:

...

- (b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings; or
- (c) that there has been a failure to comply with a rule, practice direction or court order.”

18. Mr Cowan on behalf of the Defendant submits that the claim has been wrongly commenced without having discharged the payment required by the adjudicator’s decision and without having complied with the Court’s Order dated 5 February 2019. This constitutes an abuse of process and is contrary to law. Further, he submits that the claim has been commenced with the improper collateral purpose of facilitating its opposition to the Defendant’s claim for a sale order over the Property.
19. Mr Cowan submits that a paying party is not entitled to commence a fresh claim seeking the determination of the parties’ true entitlements unless and until it has first discharged its obligation to pay the amounts determined as payable in a prior adjudication. Reliance is placed on the decisions in *S&T (UK) Ltd v Grove Development Ltd* [2018] EWCA Civ 2448 (CA) and *M Davenport Builders Ltd v Greer* [2019] EWHC 318 (TCC) in support of his argument that the Claimant’s claim is contrary to law and an abuse of process.
20. In *S&T v Grove* the contractor was awarded a substantial amount of money in an adjudication award based on the adjudicator’s finding that the employer’s purported pay less notice was invalid. The contractor sought to enforce the award by summary judgment. The employer issued proceedings seeking declarations that the pay less notice was valid and that it was entitled to commence a further adjudication to determine the contractor’s true entitlement to payment. Coulson J (as he then was) granted the declarations and refused to grant summary judgment. The Court of Appeal upheld the judgment, agreeing with the judge’s conclusion that, if the pay less notice

had been invalid, the employer would have been entitled to commence a further adjudication to determine the true value of the relevant payment application. In concluding that such right could be exercised only after the employer had paid the notified sum, as required by section 111 of the HGCRA, Jackson LJ stated:

“[107] Both the HGCRA and the Amended Act create a hierarchy of obligations, as discussed earlier. The immediate statutory obligation is to pay the notified sum as set out in section 111. As required by section 108 of the Amended Act, the contract also contains an adjudication regime for the resolution of all disputes, including any disputes about the true value of work done under clause 4.7. As a matter of statutory construction and under the terms of this contract, the adjudication provisions are subordinate to the payment provisions in section 111. Section 111 (unlike the adjudication provisions of the Act) is of direct effect. It requires payment of a specific sum within a short period of time. The Act has created both the prompt payment regime and the adjudication regime. The Act cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime. Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation.

[108] One important policy of the HGCRA and the Amended Act is to promote cashflow in the construction industry. In other words, there should be prompt payment followed by any necessary financial adjustments. See *Melville Dundas Ltd (in receivership) and others v George Wimpey UK Ltd and another* [2007] UKHL 18; [2007] 1 WLR 1136 at [65]; the DTI paper 'Fair Construction Contracts' referred to in *Melville Dundas at* [65]; the subsequent DTI paper 'Improving Payment Practices in the Construction Industry' (2007), upon which Mr Speaight relies. If the statutory provisions are ambiguous (and I do not think that they are), a purposive approach to interpretation supports my conclusion in the previous paragraph.”

21. The issue was considered further in *Davenport* by Stuart-Smith J. In that case, the employers sought to rely on a later ‘true value’ adjudication award by way of set-off, defence or counterclaim against the contractor’s summary judgment application to enforce an earlier adjudication award which had not been paid. Stuart-Smith J refused to allow the employers to rely on the ‘true value’ adjudication as a defence or set-off and granted the contractor summary judgment:

“[21] Pausing for air at this stage, it seems to me consistent with the policy underlying the adjudication regime that a defendant who *has* discharged his immediate obligation should generally be entitled to rely upon a subsequent true value adjudication and that a defendant who *has not* done so should not be entitled to do so. In answer to the question whether a

person who has not discharged his immediate obligation *should* be entitled to rely upon a later true value decision by way of set-off or counterclaim in order to resist the enforcement of his immediate obligation I would give a policy-based answer that, in my view, he should not be entitled to do so since that would enable a defendant who has failed to implement the Payment or Payless Notice provisions to string the claimant along while he goes about getting the true value adjudication decision rather than discharging his immediate obligation and then returning if and when he has obtained his true value decision. In my judgment, the passages I have cited from *Harding* (at first instance and in the Court of Appeal) are at least consistent with and provide support for the policy-based approach I have outlined. Adopting a phrase from [141] of the judgment of Coulson J in *Grove* at first instance "the second adjudication cannot act as some sort of Trojan horse to avoid paying the sum stated as due".

...

[35] In my judgment, it should now be taken as established that an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication. Both policy and authority support this conclusion and that it should apply equally to interim and final applications for payment.

...

[37] The decisions of Coulson J and the Court of Appeal in *Grove* are clear and unequivocal in stating that the employer must make payment in accordance with the contract or in accordance with section 111 of the Amended Act before it can *commence* a 'true value' adjudication. That does not mean that the Court will always restrain the commencement or progress of a true value adjudication commenced before the employer has discharged his immediate obligation: see the decision of the Court of Appeal in *Harding*. It is not necessary for me to decide whether or in what circumstances the Court may restrain the subsequent true value adjudication and, in these circumstances, it would be positively unhelpful for me to suggest examples or criteria and I do not do so."

22. It is clear from the above authorities that the Claimant would not be entitled to start a further adjudication in respect of the Defendant's fees (on substantive issues not yet determined) without paying the outstanding adjudication award. Further, the Claimant would not be entitled to rely on any subsequent 'true value' adjudication as a defence to the enforcement of the outstanding adjudication award. However, those issues do

not arise in this case because the Court has already enforced the outstanding adjudication award by giving summary judgment in favour of the Defendant.

23. There is nothing in the HGCRA or in the above authorities that would render the current proceedings unlawful or an abuse of process as submitted by the Defendant. The HGCRA provides that an adjudication award is binding only until the dispute is finally determined by legal proceedings, arbitration or by agreement. Therefore, it expressly contemplates the commencement of legal proceedings to establish the parties' rights and obligations by way of a final binding determination. Unlike the adjudication provisions, which are subordinate to the payment provisions in the HGCRA, the right to bring legal proceedings to determine rights and obligations and seek remedies is more fundamental. The right of access to swift justice was guaranteed by Magna Carta and is enshrined in the Human Rights Act 1996, which gives effect to the Convention rights, including Article 6, the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. A party's right to access to justice is not unfettered but clear words would be required to make it subordinate to the payment provisions in the HGCRA.
24. Further, the Defendant submits that these proceedings are an abuse of process because they have been commenced by the Claimant with the improper collateral purpose of facilitating its opposition to the Defendant's claim for a sale order over the Property. Mr Cowan derives some support for this argument from the timing of the proceedings. The claim was issued seven days before the Claimant was required to file its evidence in response to the application for sale of the Property. Mr Brothers' witness statement seeks to rely on the claim for damages as an equitable set-off and a ground for opposing the order for sale. However, as Mr Smith drew to my attention, the Claimant's complaints about the Defendant's professional services are not new; they were raised prior to the adjudication and the enforcement proceedings. There is no evidence that the complaints are disingenuous. The pleaded allegations of professional negligence disclose a proper cause of action and it would not be appropriate for this Court to assess the likely merits of the same.
25. The Defendant's strongest argument in support of its application to strike out the claim is that the Claimant has shown a deliberate, persistent refusal to comply with the Order dated 5 February 2019. As Mr Cowan has submitted, the approach taken by the courts is robust enforcement of adjudicators' decisions in furtherance of the "pay now, argue later" principle laid down by the HGCRA. The Claimant has accepted that it is bound to pay the judgment sum on a number of occasions and has promised to pay the outstanding sum but has failed to do so. In those circumstances, it is unreasonable and oppressive behaviour for the Claimant to pursue its claim for damages against the Defendant without first honouring the adjudicator's decision and the judgment of this Court.
26. The Claimant accepts that it cannot rely on these proceedings to avoid paying the outstanding judgment sum; indeed, it accepts that the proceedings should be stayed pending payment of the outstanding judgment sum. However, Mr Smith submits that it would be inappropriate for the claim to be struck out. The power to order a stay under CPR 3.4 should be exercised sparingly and in exceptional circumstances and the Court must very much have in mind a party's right to access to justice and to issue and pursue proceedings: *Anglo-Swiss Holdings* per Akenhead J at [21]. Further, he

submits that there is no reason to adopt a more draconian approach in the present case than that set out in CPR 3.4(4), which provides:

“Where –

- (a) the court has struck out a claimant’s statement of case;
- (b) the claimant has been ordered to pay costs to the defendant; and
- (c) before the claimant pays those costs, the claimant starts another claim against the same defendant, arising out of facts which are the same or substantially the same as those relating to the claim in which the statement of case was struck out,

the court may, on the application of the defendant, stay that other claim until the costs of the first claim have been paid.”

- 27. Mr Smith submits that there is no reason why the Claimant should not be entitled to pursue its claim once payment of sums due under the Order of 5 February 2019 have been paid. The Defendant relies on the “pay now, argue later” regime of the HCGRA to justify the application for a stay. To strike out the claim would be contrary to that regime since it would deprive the Claimant of the ability to “argue later”.
- 28. I am satisfied that the Claimant is in deliberate and persistent breach of the Order dated 5 February 2019. The Claimant’s repeated promises to pay the outstanding sum indicate that it could satisfy the judgment but has chosen not to do so. The commencement of these proceedings without honouring the adjudication award and the judgment, in flagrant disregard of the “pay now, argue later” regime of the HGCRA, amounts to unreasonable and oppressive behaviour. However, I accept the submissions by Mr Smith that striking out the claim at this stage would be too draconian; the Defendant is entitled to the protection afforded by a stay of proceedings unless and until the judgment has been satisfied but the Claimant should be allowed to pursue its claims once it has paid the outstanding judgment sum.
- 29. For the above reasons, there should be a stay of proceedings pending payment of the outstanding judgment sum.

Security for costs

- 30. The Defendant seeks an order for security for costs pursuant to CPR 25.12 and/or CPR 3.1.
- 31. CPR 25.12 provides that a defendant to any claim may apply for security for his costs of the proceedings.
- 32. CPR 25.13(1) provides that:

“The court may make an order for security for costs under rule 25.12 if –

- (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
- (b)(i) one or more of the conditions in paragraph (2) applies ...”

33. The conditions set out in CPR 25.13(2) include:

- “(a) the claimant is –
 - (i) resident out of the jurisdiction; but
 - (ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention, a State bound by the 2005 Hague Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982;
- ...
- (c) the claimant is a company ... and there is reason to believe that it will be unable to pay the defendant’s costs if ordered to do so ...”

34. The Claimant is a company registered in the Cayman Islands. The Property is its sole asset, it receives no income from the Property and its filed tax returns show significant and continuing losses. It is common ground that conditions (a) and (c) of CPR 25.13(2) are satisfied.

35. The question for the Court is whether it would be just to make an order for security having regard to all circumstances in this case. The issues for consideration are:

- i) whether the Property provides adequate security against which judgment could be enforced;
- ii) whether the offer of a personal guarantee from Mr Brothers would be adequate security; and
- iii) whether an order for security would risk stifling the claim.

36. The Claimant’s position is that, although it would be unable to pay costs within 14 to 28 days if ordered to do so, the Property provides adequate long-term security, enabling the Defendant to enforce such order by a charging order and sale of the Property. Mr Smith submits that any order for security should be tailored to provide protection against the relevant risk. Where there is a real likelihood that the Claimant will not be able to pay the costs at all, any order for security should be determined by reference to the costs of the proceedings. Where the risk is limited to additional costs or delay in enforcement, security should usually be ordered by reference to the additional costs of enforcement: *Danilina v Chernukhin* [2019] 1 WLR 758 (CA) per Hamblen LJ at [51].

37. In a report dated 9 May 2019, Strutt & Parker valued the Property in the sum of £10 million, based on the assumption of a marketing period of 12 to 18 months. There is an existing charge over the Property by EFG Private Bank (Channel Islands) Limited (“EFG”) in respect of loans in the total sum of £5.125 million. By letter dated 4 June 2020, EFG stated that the bank would be unable to lend the Claimant any further funds and would not provide a bank guarantee to the Claimant for the purpose of furnishing alternative security for costs.
38. In my judgment the Property does not provide adequate security for the Defendant in this case. The valuation indicates that there would be sufficient equity in the Property for the Claimant eventually to meet its liabilities but, as explained in *Longstaff International Limited v Baker McKenzie* [2004] EWHC 1852 (Ch) per Park J at [17] – [19] and *Holyoake v Candy* [2016] EWHC 3065 (Ch) per Nugee J at [63], the relevant question is whether the company will be able to meet the costs order at the time when the order is made and requires to be met. It is accepted by the Claimant that the evidence indicates it could not meet a costs order within the usual time period for such costs to be paid, namely, 14 to 28 days.
39. Mr Brothers has offered to provide a personal guarantee to the Defendant in relation to costs which the Claimant may be ordered to pay, up to £450,000. A very brief statement of assets and liabilities has been provided, indicating that Mr Brothers has surplus assets over liabilities of £12.87 million. Mr Cowan submits that the guarantee offered is inadequate. Having regard to the evidence provided to the Court, Mr Cowan is manifestly correct. Firstly, Mr Brothers is resident in Hong Kong and his identified assets are out of this jurisdiction, in Hong Kong. Secondly, with the exception of £100,000 stated to be cash and assets that could be readily liquidated, the brief description of the assets and round figures against them do not indicate how the assets are held or how readily they could be realised to meet any costs judgment. Thirdly, the property in Hong Kong in which Mr Brothers resides has an equity value of approximately £16 million but it is owned by a third party company, Fung Sau Property Company Limited and occupied by Mr Brothers’ wife. Although Mr Brothers owns two-thirds of the shares in the company, there is no evidence that the property could or would be readily sold to meet any costs liability of the Claimant.
40. I reject Mr Smith’s submission that an order for security would risk stifling the claim. Although the Claimant has no assets other than the Property, against which EFG has refused to lend further sums, this litigation and the Part 8 proceedings are being funded by Mr Brothers. Mr Brothers is of very substantial means. Given his stated assets, if Mr Brothers wanted to provide security for costs in this case, no doubt he could do so by obtaining a loan and making a payment into court or providing a cash backed bank bond. Such an offer is conspicuous by its absence.
41. I am satisfied that it would be just in all the circumstances to make an order for security in this case. The Claimant has demonstrated that it is prepared to disregard orders of this Court requiring it to make payments the Defendant. The Defendant’s efforts to enforce the outstanding judgment sum have been protracted and are not yet concluded. That is ample evidence that the Claimant can’t pay or won’t pay sums ordered by this Court to be paid to the Defendant.
42. For the above reasons, in my judgment there is a real risk that the Claimant would be unable to pay the Defendant’s costs if ordered to do so. It would not be reasonable or

proportionate to require the Defendant to defend the claim against it without security for its costs. There is no real risk that ordering security in this case would stifle the claim.

43. Having determined that the Defendant is entitled to security for costs pursuant to CPR 25.12, it is unnecessary to consider the alternative application under CPR 3.1(5).
44. The Court has discretion to order such amount of security as it thinks just, having regard to all the circumstances of the case: CPR 25.13(1)(a).
45. The Defendant seeks security in the amount of £700,000. Mr Butler, solicitor for the Defendant, has produced an estimate of costs, indicating costs in the region of £700,000. I accept Mr Cowan's submission that the estimate is reasonable for a professional negligence claim in which allegations are made as to the quality and timing of design work carried out, the adequacy of advice given in respect of the procurement route for the project, and the fees payable for the work.
46. The Claimant invites the Court to make any order for security in stages, having regard to the very early stage of the claim, the possibility that the costs estimate could be reduced by a costs management order, the possibility that the claim could be disposed of before trial and the risk that the order might be oppressive.
47. The Court has discretion as to the amount of security to order and should fix such sum as it thinks just, having regard to all the circumstances of the case. The history of non-payment in this case is a strong argument in favour of the Court at this stage fixing a sum in respect of security that does not require the Defendant to incur future costs at risk of non-recovery (if ultimately successful). Taking account of the possibility that the estimate could be adjusted downwards by a costs management order, a reasonable sum to order by way of security now would be £600,000.
48. The Claimant must have a real opportunity to provide the security ordered. For that reason, I accept Mr Smith's submission that the order should not be in the form of an unless order at this stage.

Conclusion

49. For the reasons set out above, the court will make the following orders:
 - i) The Defendant's application to strike out the claim is dismissed.
 - ii) These proceedings shall be stayed, pending payment by the Claimant of the sums ordered by the Court on 5 February 2019, or as further ordered.
 - iii) The Claimant shall pay into Court within fourteen days the sum of £600,000 as security for the Defendant's costs in these proceedings.
 - iv) These proceedings shall be stayed, pending payment by the Claimant of the sum ordered to be paid into court as security for costs, or as further ordered.
 - v) The Court will determine any issues of costs not agreed by the parties on paper, following short written submissions to be filed by 4pm on 16 July 2020 or by way of a remote hearing.

