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IN THE HIGH COURT OF JUSTICE



No. HT-2020-000355

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2020] EWHC 3066 (TCC)

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Wednesday, 21 October 2020

Before:

MRS JUSTICE O'FARRELL

B E T W E E N :

DELUXE PROPERTY HOLDINGS LIMITED
(a company registered under the laws of the British Virgin Islands) Claimant

- and -

(1) SCL CONSTRUCTION
(2) HER MAJESTY'S REVENUE AND CUSTOMS Defendants

MR S. ORAM (instructed by DAC Breachcroft LLP) appeared on behalf of the Claimant.

MR S. PERHAR (instructed by direct access) appeared on behalf of the First Defendant.

THE SECOND DEFENDANT did not attend and was not represented.

J U D G M E N T

MRS JUSTICE O'FARRELL:

- 1 This is the return date in respect of an injunction that was made by this court on 7 October 2020. An approved transcript of the judgment given on that occasion sets out the basis on which interim relief was granted. On that occasion, the claimant was represented by Mr Oram who represents the claimant this morning. The first defendant, who is represented this morning by Mr Perhar, on that occasion did not attend court but had sent in correspondence. The second defendant HMRC did not attend and, likewise, has not attended today by agreement with the claimant.
- 2 The matters in dispute arise out of the apparent overpayment of VAT in respect of the development of student accommodation in Tooting, London. The claimant Deluxe Property Holdings Limited was the employer in respect of two separate contracts each of which engaged the first defendant SCL to carry out works in respect of the development. It is common ground that both the contracts made provision for interim payments to be made during the course of the works and for any VAT that was properly chargeable to be added to those interim payments. The parties initially proceeded on an assumption that VAT was properly chargeable in respect of the works at 20 percent. Therefore, Deluxe made VAT payments to SCL in respect of each interim payment, and SCL accordingly declared that VAT as output tax to the second defendant HMRC.
- 3 Subsequently, the parties were advised that most of the works were, in fact, zero rated. As a result, on about 14 April 2020, SCL made a claim for reimbursement of the VAT that had been wrongly paid or credited to HMRC by way of a s.80 VAT claim. As part of that VAT claim, SCL signed an undertaking that it would pay any VAT monies reimbursed by HMRC to Deluxe by cash or cheque without any deduction for any purpose. On 1 June 2020, HMRC approved the VAT reimbursement claim and on 16 July 2020, that was repaid to SCL in the sum of £435,555.95.

4 On 14 August 2020, SCL withdrew the s.80 claim and substituted for it a claim for a VAT rebate in respect of the sums repaid. That substitution was accepted by HMRC as evidenced by an email dated 18 September 2020.

5 On 30 September 2020 the claimant started these Part 8 proceedings seeking a declaration that the s.80 claim and/or any sums paid in respect of that claim were subject to trust either by way of a constructive trust and/or a *Quistclose* trust in favour of the claimant.

6 On 7 October 2020, the claimant came before this court and obtained an injunction, requiring SCL to pay to the claimant's solicitors any monies in the possession or control of the first defendant which represents monies paid to the first defendant by the second defendant in respect of the claim made by the first defendant under s.80 of the Value Added Tax Act 1994 on or around 14 April 2020, and if any further monies should be paid to the first defendant by the second defendant in respect of the VAT claim, immediately pay those monies to the claimant's solicitors.

7 At paragraph 2 of the order, there was a requirement for SCL to inform the claimant's solicitors of:

- (1) the date on which the VAT claim was made, the reference number given to the VAT claim by the second defendant, and the current progress of that claim;
- (2) in respect of all monies paid to it by the second defendant in respect of the VAT claim, the amount, date, and particulars of each bank transfer of each such payment;
- (3) in respect of all tax credits given or applied by the second defendant in respect of the VAT claim, the amount, date, and particulars of each such credit; and

- (4) if any part of the monies identified under subparagraph (2) have since been paid away by the first defendant, the date, amount, and full particulars of that payment, and if any part of those monies has since been spent by the first defendant, the date, amount, and purpose of that expenditure.

In addition, at paragraph 4, SCL was required to swear and serve an affidavit setting out the information required in paragraph 2.

- 8 The position of the parties today is reasonably clear. Mr Oram has explained that Deluxe's position is that the s.80 claim and any proceeds in respect thereof are subject to a constructive trust and/or a *Quistclose* trust arising by reason of the s.80 claim and the statutory scheme that goes alongside it and/or by reference to the undertaking that was signed by Mr Lee of SCL in relation to the claim. Further, he submits that the trust continues to attach not only to the s.80 claim and any proceeds under that claim but also in relation to any substituted claim by way of a VAT rebate claim in respect of the overpaid VAT. Mr Oram submits that the fact that the mechanism has changed does not affect the basis on which both a claim against the HMRC and/or the receipt of the proceeds are still subject to a trust in favour of the claimant. If that is right, then, as Mr Oram submits, the first defendant was under an obligation to pay, by way of cash or cheque, those sums received and was not able to set off against those sums which constitute a proprietary claim any other sums that SCL claims are owed to it respect of the project.
- 9 The first defendant's position is also clear. It is accepted that the s.80 claim was made to recover from HMRC sums that had been paid by Deluxe to SCL and accounted for to HMRC in respect of VAT that the parties were advised was not in fact payable. However, SCL's case is that once it withdrew the s.80 claim and substituted for it a VAT rebate claim, it was then entitled to issue a credit note to Deluxe in respect of the VAT rebate without actually paying over by way of cash or cheque the sums received from HMRC.

- 10 Mr Perhar states that there is no unconscionability in this regard because the first defendant has issued a credit to Deluxe in respect of the VAT rebate sums and is not therefore seeking to hold the benefit of that rebate for its own purpose. Mr Perhar submits that there is a wider dispute arising out of termination of SCL's employment under the contracts by Deluxe, which SCL contends amounted to unlawful terminal termination and the sums that SCL claims are due and outstanding in relation to the construction works that have been carried out. Mr Perhar's position is that the injunction should be discharged, the Part 8 claim should be dismissed, and that this matter should proceed by way of Part 7 proceedings to determine the final account and/or termination account dispute as between the parties.
- 11 It is clear that there is a dispute between the parties as to whether any trust arose in respect of the s.80 claim, the monies repaid by HMRC, and/or the substituted VAT rebate claim. There is a dispute as to whether, in those circumstances, SCL must account to Deluxe for the VAT sums repaid by HMRC by way of cash or cheque payment, or whether it can simply give a credit against sums which SCL claims are due from Deluxe to SCL. Therefore, there is a clear issue to be tried. That issue is one that is suitable for determination by Part 8 proceedings. Given the stalemate between the parties, that determination should take place sooner rather than later. I will consider with the parties shortly as to any appropriate dates for the hearing.
- 12 That then brings me on to the main issue today which is whether the injunction order should continue. I deal with it following the established test set out in *American Cyanamid*. The first question is whether there is a clear issue to be tried. As stated above, there is an issue to be tried.
- 13 I then move on to the issue of damages. Mr Oram submits on behalf of Deluxe that damages would not be an adequate remedy in this case because although the defendant has received some £435,000 from HMRC, its accounts show that it is not in a good financial

position. I have a copy of the financial statement for SCL for the year ending 31 March 2019. That indicates that the company is solvent, it is still trading, but its current debtors and cash in bank total £238,855, and its creditors due within one year total £234,234. Therefore, the figure for its total assets, less current liabilities, is £4,621. A credit search has shown that there is an outstanding County Court judgment debt of £120,629. In that regard, Mr Perhar has explained on instructions that there is, in fact, a *Tomlin* order in relation to that judgment and that the judgment debt is being paid at the rate of £5,000 per month. I am satisfied that SCL is still trading and is not technically insolvent but it has no assets to satisfy any judgment. On the financial information that has been provided to the court, there is a real risk that damages would not be an adequate remedy for Deluxe if the court were not to continue the injunction and at the final determination, if it established that a Deluxe's position was the correct one.

14 As to whether or not damages would be an adequate remedy for SCL, the short point is that they would. There is evidence before the court that Deluxe is solvent and that it has assets in the jurisdiction that could be used to satisfy any judgment and/or costs order against it. Although queries have been raised about a Deluxe's position as a company registered in the BVI, no serious challenge has been made to its current financial solvency.

15 I turn to the balance of convenience test. I accept the submission of Mr Oram that SCL has been less than candid with Deluxe and, indeed, the court in providing information as to what has transpired. The fact is that although Mr Lee of SCL answered the questions set out in the injunction order at paragraph 2, he did so in the shortest manner possible without giving full and proper answers; indeed, in respect of some of the questions, not providing an answer at all. It is regrettable that it was not until yesterday that SCL volunteered the information that it had received the VAT repayment in the sum of £435,555.95 from HMRC. It was only this morning, as a result of questions posed by the court, that SCL disclosed that it received those monies on 16 July 2020.

- 16 In those circumstances, I am satisfied that it would be appropriate to continue the injunction so as to preserve the assets, and to continue the requirement to provide information about the whereabouts of those assets, whether SCL still retains them, or whether the money has been spent, so that the court is then in a position to make a full disposition of the dispute between the parties that can be resolved on the Part 8 proceedings.
- 17 I would emphasise that I am not making any judgment today as to the underlying merits of the dispute between the parties, or as to the merits of either party in relation to the dispute over the status of the s.80 VAT claim or VAT rebate claim, the existence of any trust in respect of the claim or proceeds, and/or the entitlement of SCL to credit Deluxe by way of direct payment or credit note. All of those matters will be resolved by the court but not today. The purpose of today is for the court to ensure that the ring is held pending a final resolution of this matter.
- 18 For all those reasons, I will continue the injunction order. I will include additional questions in relation to the VAT rebate that to Mr Oram has indicated he is drafting. It was only yesterday evening that it became apparent that SCL's position was that the sums had been repaid but by way of a VAT rebate as opposed to payment in respect of the s.18 claim.
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CERTIFICATE

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