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Fraud unravels everything? Well, not quite.

March 2018

Grosvenor wanted the adjudicator's decision in its favour for £553,958.47 plus VAT enforced. Aygun contested enforcement on the grounds of fraudulent conduct by Grosvenor's employees and, failing this, wanted a stay (suspension) of enforcement primarily on the basis of Grosvenor's lack of solvency. *Grosvenor London Limited v. Aygun Aluminium UK Limited [2018] EWHC 227 (TCC), 28 March 2018*

The court enforced the decision, finding the allegations of fraud could and should have been made as part of Aygun's defence during the adjudication and the ones that emerged afterwards arose independent of the subject matter before the adjudicator. But the judge granted a stay on the basis that the individuals controlling Grosvenor would organise its financial affairs so that any monies paid over would be dissipated or disposed of resulting in any future judgment against Grosvenor going unpaid.

In reaching this judgment, the judge followed the earlier decision in *SG South v. Kingshead* and set out an additional principle to the existing five in *Wimbledon v. Vago* as follows:

"(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 with 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."

Brief Facts

Grosvenor was a sub-sub-contractor to Aygun for the installation only of cladding works. The project was delayed and despite an agreement being reached in March 2017 the parties ended up in adjudication on 29 September 2017. The decision was dated 16 November 2017 and was in Grosvenor's favour for unpaid labour costs.

At enforcement, Aygun raised allegations of fraud by Grosvenor employees linked with the 'disappearance' of a former Aygun employee along with the site labour records and a laptop. In addition, there were allegations that a separate Aygun employee had been subject to intimidation and threats in January 2018, i.e. after the adjudicator's decision.

In addition, Aygun applied for a stay of enforcement on the basis of Grosvenor's lack of financial liability including the likelihood that monies would be dissipated by Grosvenor before Aygun could challenge the substantive issues. In other words, any subsequent judgment against Grosvenor would go unsatisfied.

Decision on Summary Judgment of Adjudicator's decision – allegations of fraud

As there had been no challenges to the adjudicator's jurisdiction the decision would ordinarily be enforced.

However, Aygun relied upon allegations of fraud raised after the decision had been given but before the court hearing on 01 February 2018. This was because Aygun said it did not have the necessary time or evidence to hand to make the allegations earlier.

These allegations were properly made and particularised by Aygun. They were not specifically responded to by Grosvenor until after the court hearing by which time "it was far too late" and the court "refused to admit such evidence".

The allegations concerned Grosvenor's invoices in the period between 15 May and the end of October 2017. The basis for the allegations was the "enormous discrepancy" between the sums invoiced by Grosvenor and the works actually done or labour provided. There was also an allegation that Grosvenor deliberately slowed the progress of the works to further overcharge Aygun.

The witness evidence included allegations that a former employee of Aygun had disappeared from site taking all site labour records away on his laptop. Subsequent attempts by Aygun to retrieve this information and/or to contact the employee concerned had failed. The evidence also included allegations of intimidation of an Aygun employee in January 2018.

The court granted Grosvenor's application for summary judgment because the allegations of fraud could and should have been made during the course of the adjudication. The facts relied upon existed at the time and the court did not accept Aygun's explanation that it did not have sufficient time to deploy this defence. The court referred to principle (c) in the earlier case of *SG South v. Kingshead* as approved by two subsequent cases .

While the allegations of employee intimidation in January 2018 emerged after the decision (November 2017) they were ones independent of the subject matter before the adjudicator. The court referred to principle (d) in *SG South v. Kingshead*. As such, these particular allegations were not considered relevant to the issue of summary judgment.

Accordingly, the court decided that Grosvenor's application for summary judgment should be granted.

Decision on Aygun's application for a stay (suspension) of enforcement – new principle (g)

Having lost the summary judgment argument, Aygun wanted the court to stay (suspend) Grosvenor's right to enforce or recover the £553,958.47 plus VAT.

Aygun focussed on Grosvenor's apparent lack of financial solvency, in particular, clear discrepancies between two sets of statutory accounts for the years ending 30 April 2016 and 30 April 2017. The balance sheets for 2016 (which should have been the same) were very different. The court observed that this difference was "a puzzle" which Grosvenor's barrister was, despite being given time to take instructions, unable to explain to the satisfaction of the court.

The court referred to the earlier decision in *Wimbledon v. Vago* as being "generally accepted as the foundation for consideration of whether a stay of execution of an adjudicator's decision should be granted or not".

One also had to keep in mind that the relevant provisions of the court rules referred to the court having to be satisfied that “special circumstances” existed that justify a stay of execution.

The court decided special circumstances did exist, namely (i) the alleged fraudulent acts, (ii) the alleged behaviour since January 2018, and (iii) Grosvenor’s unsatisfactory statutory accounts. Whilst only (iii) could be said to concern Grosvenor’s financial solvency (or lack of it) the court noted that the principles in *Wimbledon v. Vago* were not said to be set in stone. In the circumstances, the court concluded that a further principle could be added as follows:

“(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 with 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.”

Not unsurprisingly, having added this further principle the court came to the conclusion that there was such evidence and this justified the grant of a stay of execution, i.e. Grosvenor could not get its money.

The court did make it clear that a ‘high test’ would be applied as to whether the evidence relied upon by the party seeking a stay reached the standard necessary for the principle to apply. So, by example, the court said “Mere assertions will not be sufficient. Isolated discrepancies on statutory accounts will not be sufficient either”.

Points of Interest

- 1) Fraud is a very serious allegation and it must be properly particularised, i.e. set out in detail. It can also only be alleged if specifically pleaded, i.e. set out in a formal statement of case.
- 2) The starting point in adjudication when dealing with allegations of fraud is and remains the principles set out by Mr Justice Akenhead in *SG South v. Kingshead*. Accordingly, if a party wishes to raise an allegation of fraud that impacts on the dispute before the adjudicator it should do so as part of the adjudication; it will probably be too late to raise it at the enforcement stage.
- 3) Allegations of fraud emerging after the adjudicator’s decision are divided between (i) those that directly impact on the subject matter of the decision and (ii) those that are independent of it. In the latter case, they are unlikely to prevent a decision from being enforced on an application for summary judgment.
- 4) Where concerns as to the lack of solvency exist the responding party may be able to obtain a stay of execution even if summary judgment is granted. The principles in *Wimbledon v. Vago* apply when considering if special circumstances exist to justify the granting of a stay of execution or not. However, these principles are not ‘set in stone’ and principle (g) applies following on from the existing principle (f), namely:

“(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 with 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.”

Accordingly, the proverbial 'door' is never shut on future arguments as to why a stay should be granted where concerns as to the solvency of the claiming party is concerned. That said, a party will need sound evidence if it is to succeed in convincing a court that an adjudicator's decision (which should otherwise be enforced) should be the subject of a stay of execution.

Michael Craik

March 2018