

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (COMMERCIAL)**

**BETWEEN**

**SUTTON SERVICES INTERNATIONAL LTD**

**Plaintiff**

**v**

**VAUGHAN ENGINEERING SERVICES LTD**

**Defendant**

**WEATHERUP J**

[1] This is an application under Order 14 of the Rules of the Court of Judicature for summary judgment for the amount of an Adjudicator's award dated the 28<sup>th</sup> of March 2013 in the sum of £350,532.09 together with interest, which sum was directed to be paid by the defendant to the plaintiff in respect of water treatment contract works at the Royal Victoria Hospital in Belfast. Ms Danes QC and Ms Simpson appeared for the defendant and Mr Miller for the plaintiff.

[2] The structure of the adjudication system introduced by the Construction Contracts (Northern Ireland) Order 1997 (as amended) was to introduce a speedy mechanism for settling disputes in construction contracts by an industry expert on an interim basis pending final determination by arbitration, litigation or agreement. The Adjudicator was to reach a decision in 28 days and the award was to be paid in the meantime pending final resolution. Enforcement of an award is by legal proceedings where the plaintiff may apply for summary judgment, which will generally be granted save for the defendant establishing one of the limited grounds that are now recognised for resisting such judgment. The approach to the

enforcement of adjudication awards was outlined Henry Brothers (Magherafelt) Ltd v Brunswick Ltd [2011] NIQB 102.

[3] In the present case the dispute is not about judgment being entered for the plaintiff but rather whether there should be a stay placed on the judgment because of the financial position of the plaintiff. The defendant proposes to proceed against the plaintiff for defective work and has concerns that the plaintiff, having received payment from the defendant on foot of the Adjudicator's award, that being an interim award pending resolution of the contract dispute by arbitration or litigation or agreement, will be unable to repay the defendant the amount that the defendant expects finally to be awarded against the plaintiff.

[4] One of the grounds on which an application for a stay may be granted is where the plaintiff's financial position places at risk the repayment of a sum that might later be found due by the plaintiff. The approach to the grant of a stay by reason of the plaintiff's financial difficulties was outlined in Rodgers Contracts v Merrick's Construction [2012] NIQB.

[5] The plaintiff's financial position may be such that there will be no dispute as to the plaintiff's financial difficulties but this issue may also arise, as in the present case, where the parties are in dispute about the plaintiff's financial position. A number of general points might be made about an application for a stay in these circumstances.

First of all it is important that the exercise of the discretion to grant a stay must not be used to frustrate the purpose of the adjudication scheme. The legislation was intended to provide for expeditious treatment of disputes on an interim basis to secure the circulation of finance pending final resolution of the contractual issues.

Secondly, the onus is on the defendant to establish that the plaintiff is probably going to be unable to make the payment to the defendant should the defendant be successful in the final outcome of the contractual dispute.

Thirdly, even if the defendant establishes that the plaintiff will probably be unable to repay the defendant, that would not usually justify the grant of a stay if:

- (i) the plaintiff's financial position is the same or similar to its financial position at the time when the relevant contract was made; or
- (ii) the plaintiff'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 Wimbledon Construction Company 2000 Ltd v Derick Vago [2005] EWHC 1086 (TCC)).

Fourthly, the Court may take into account the diligence of the defendant in pursuing the claim against the plaintiff as the defendant's conduct of that claim may

provide a basis for refusing to grant a stay or a basis for granting a stay for a limited time to enable the Court to review the progress of the defendant's claim against the plaintiff.

[6] Two themes have emerged in the exchanges between the parties on the issue of a stay being granted. The first concerns the financial position of the plaintiff. The second concerns the availability of insurance for the plaintiff to cover any claim made by the defendant.

[7] The plaintiff's grounding affidavit sworn by John Dugdale, solicitor in A L Goodbody on record for the plaintiff, anticipates the issue about the plaintiff's financial position and states that the purported concern is without foundation. Reference is made to the plaintiff's financial statement for the year ending 31 May 2012 and net assets of £441,000 and net current assets of £357,000 and net profits of £125,000, and to the financial statement for the year ended 31 May 2009 where the plaintiff had net assets of £699,000, net current assets £547,000 net profit £192,000. Mr Dugdale therefore states that the plaintiff's current financial position is similar to its financial position in the year ended 2009 when it was engaged by the defendant. Further it is stated that the plaintiff holds professional indemnity insurance with a value of £5,000,000 for each claim.

[8] The replying affidavit of Gavin Vaughan, Finance Director of the defendant, states that his company has serious concerns about the liquidity of the plaintiff and about its capacity to satisfy a successful claim by the defendant. Mr Vaughan refers to the financial statement for the year ended 31 October 2007, which was the date when the order was placed in respect of the contract, and says that the net assets have fallen by 30 per cent, the overdraft has increased from £32,000 to £380,000, turnover has reduced by £260,000 which is 7 per cent, and profitability has reduced from £401,000 to £188,000. Thus he states that the plaintiff's financial position cannot be said to be similar to that which it was when the parties engaged.

[9] A further cause of concern for the defendant relates to the demerger of the plaintiff from its group of companies. The plaintiff is said to have failed to provide information in relation to this demerger and failed to provide any current financial information following the demerger. The most recent financial accounts that are available are for the year ended May 2012 which precedes the date that the company structure of the plaintiff was altered.

[10] The defendant asked Price Waterhouse Coopers (PWC) to consider the information available and advise whether the demerger was likely to have had a detrimental impact on the plaintiff's finances and ability to repay. PWC have advised that a demerger could have such effects but they need further information in order to answer the question.

[11] In relation to the insurance position, Mr Vaughan states that if the defendant received the proposal form for the insurance policy and was satisfied that the public

indemnity insurer would respond to the defendant's claim then this would remove the defendant's fears about paying the plaintiff the sum due on the Arbitrator's award.

[12] A rejoinder affidavit was filed by Colin McCluskey, Managing Director of the plaintiff. He states in relation to the financial position that the accounts have been misunderstood and that the plaintiff had an internal group overdraft which had increased by £32,000, not from £32,000 to £380,000; further, it is said that since the buy out of the plaintiff this balance has been paid by external investors and the plaintiff is running a positive bank balance of £200,000-£500,000 and on the 3<sup>rd</sup> of May 2013 the positive balance was some £246,000.

[13] Mr McCluskey also deals with the insurance position. He states that the plaintiff holds public liability insurance with QBE Insurance (Europe) Ltd and Argent Liability Adjusters by letter of the 13<sup>th</sup> of May 2011 confirm that QBE "are prepared to grant Sutton with an indemnity under the policy in respect of any claims arising out of the Belfast Royal Infirmary circumstances notified, which are advanced against them. That indemnity is of course subject to the terms and conditions of the policy at all times."

[14] Mr McCluskey also refers to professional indemnity insurance and provides a copy of the policy. The policy provides for indemnity up to £5,000,000 for each claim in respect of and legal liability that arises out of the exercise and conduct of "business". "Business" is defined as being "As described in the proposal form". The plaintiff's insurers do not wish to disclose the proposal form. However, Mr McCloskey states that he can confirm that the work carried out at the Royal Victoria Hospital, namely the cleaning and commissioning of heating pipework, is the plaintiff's core business and is the type of work described in the proposal form.

[15] At the hearing there was further correspondence admitted by agreement of the parties. In relation to the plaintiff's financial position a letter from PWC of the 16<sup>th</sup> of May 2013 addressed the affidavit of Mr McCluskey. Two issues were examined, first of all, whether the overdraft balance increased by or from £32,000 and secondly whether the overdraft was repaid by external investment and whether the plaintiff currently relies on an overdraft facility.

[16] The PWC advice on the first matter of the £32,000 is that the audit and financial accounts indicate that the plaintiff's bank loans and overdraft balances increased from £32,000 in 2007 to £380,000 in 2012, that is to reject the suggestion made by Mr McCloskey. On whether the balance represents an inter-group balance, PWC advise that the financial statement does detail separately bank loans and overdrafts from amounts owed to the group undertaking and it would have been expected that inter-group borrowings would be detailed under amounts owed to the group undertaking rather than being classified as bank overdraft balances. On the second issue of external investment at the time of demerger, PWC are unable to advise whether the bank overdraft recorded in 2012 was repaid following the

demerger and although there is a positive cash balance it is not possible to conclude on the position with the bank without knowledge of the other payments and lodgements.

[17] In relation to the insurance position there was an exchange of letters on the 15<sup>th</sup> and 16<sup>th</sup> of May 2013 between the respective solicitors Tughans and A & L Goodbody. On 15<sup>th</sup> of May 2013 Tughans for the defendant refer to the public liability policy and state that it is not apparent why any claim would be considered to be a public liability claim. The defendant's proposed claim is stated to be that the plaintiff had a duty to monitor the water quality in the pipework systems which had corroded and had this been done properly the corrosion would have been detected in time to save the pipes. A request is made for a copy of the policy and certificate of insurance and the correspondence with Argent and QBE where they purported to give the indemnity. The letter then turns to the professional indemnity insurance and asks for the proposal form which has not been provided. Finally the letter asks for evidence that the plaintiff has insurance cover under the policies which is applicable at the relevant dates.

[18] A & L Goodbody for the plaintiff reply on the 16<sup>th</sup> of May 2013 and state that the defendant's misconceived concern is without foundation, the plaintiff's financial position is sound and the plaintiff is not prepared to engage further in what is described as an unjustified fishing expedition. The burden is stated to be on the defendant to produce evidence of the very real risk of future non-payment and it is not upon the plaintiff to prove otherwise. It is pointed out that the defendant has not yet issued any proceedings against the plaintiff in respect of the matters that they claim might ultimately give rise to a repayment.

[19] Finally, Tughans on behalf of the defendant made an open offer on the 16<sup>th</sup> of May 2013 that -

- (i) the defendant would pay £150,000 immediately;
- (ii) would commence proceedings immediately and serve a statement of claim by the 15<sup>th</sup> of September 2013;
- (iii) the plaintiff's insurers would confirm, following receipt of the statement of claim, whether they are prepared, subject to liability, to indemnify the plaintiff;
- (iv) if confirmation of indemnity were to be forthcoming or the plaintiff otherwise satisfied the defendant of the financial position, the defendant would forthwith pay the balance of some £200,000 awarded by the Adjudicator; and
- (v) the defendant was willing to pay the balance into their solicitors client account or into Court pending the other matters.

[20] In relation to the plaintiff's financial position and insurance position, I find as follows.

First of all the defendant has raised reasonable grounds for concern about the plaintiff's ability to repay if the defendant brings a successful claim against the plaintiff.

Secondly, the defendant's responses do not remove the reasonable grounds for concern about the plaintiff's finances. There are question marks over the accuracy of the plaintiff's recent responses as appears from the PWC letter of the 16<sup>th</sup> of May 2013.

Thirdly, the alteration of the plaintiff's company structure has arisen since the contractual relationship was entered into between the parties and represents a change of circumstances which contributes to the defendant's reasonable grounds for concern.

Fourthly, the plaintiff's financial position is not as it was at the time of the contract.

Fifthly, the application of a relevant insurance policy to cover the plaintiff's potential liability to the defendant has not been established. The indemnity that has been offered under the policy is stated to be in relation to the circumstances notified. It is not clear what the circumstances notified may be. The entitlement under the policy is subject to the terms and conditions of the policy and again it is not clear what the impact of the terms and conditions may be. Then there has been an issue as to whether the policy applies at the relevant time for the purposes of the defendant's claim.

Overall, it has been established that there are good grounds for concern about the plaintiff's financial position and ability to meet a claim by the defendant and it has not been established that the plaintiff has an insurance policy in place that would cover the proposed claim of the defendant.

[21] Thus the defendant has satisfied the onus of establishing that the plaintiff is probably going to be unable to make repayment to the defendant should that be required by the final outcome of the contractual dispute. On the other hand the defendant has not commenced proceedings against the plaintiff although has outlined in correspondence the broad character of the claim it is proposed to make.

[22] It is proposed to grant a stay on conditions as to payment and as to the progress of the defendant's claim. The defendant's claim must be fully pleaded as soon as possible. The Court will monitor the progress of the defendant's claim.

[23] The Order of the Court is as follows -

1. There will be judgment for the plaintiff for the amount of the Adjudicator's award and interest as determined by the Arbitrator.
2. There will be payment of the sum of £150,000 to the plaintiff within 3 days.
3. There will be a stay on the balance, provided -
  - (i) the defendant pays the balance into Court within 3 days.

- (ii) the defendant issues proceedings against the plaintiff within 3 days;
  - (iii) the defendant serves the Statement of Claim within 21 days of appearance, disregarding the long vacation if the date of appearance brings that into play.
4. On a breach of any of the three conditions at paragraph 3 above the balance will be payable to the plaintiff.
  5. There will be a review of the stay on the 6<sup>th</sup> of September 2013 to establish the manner and extent to which the proceedings to be commenced by the defendant are progressing.