

Neutral Citation No. [2013] NIQB 99

Ref: **WEA8997**

Please also see [2013] NIQB 63

Judgment: approved by the Court for handing down

Delivered: **23/09/2013**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (COMMERCIAL)

BETWEEN

SUTTON SERVICES LTD

Plaintiff

and

VAUGHAN ENGINEERING SERVICES LTD

Defendant

WEATHERUP J

[1] This is the plaintiff's application for removal of a stay on a judgment dated 20 May 2013. The reasons for the judgment appear as neutral citation [2013] NIQB 63. Mr Millar appeared for the plaintiff and Ms Simpson for the defendant.

[2] The plaintiff as contractor applied for summary judgment to recover the amount of an Adjudicator's award dated 28 March 2013 in the sum of £350,532.09 together with interest. The issue on the application for summary judgment was whether there should be a stay placed on the judgment because of the financial position of the plaintiff. The defendant as employer proposed to proceed against the plaintiff for defective work. The defendant had concerns that if the plaintiff received payment on foot of the Adjudicator's award and was later found to be liable to the defendant in respect of defective work, the plaintiff would be unable to pay back any sum found due to the defendant.

[3] It is an established ground for the grant of a stay on the enforcement of an Adjudicator's award that the plaintiff's financial position places at risk the prospect of repayment of a sum that might later be found due by the plaintiff to the defendant. Two themes emerged in the present case that gave cause for concern.

The first theme concerned the financial strength of the plaintiff which was then in doubt. The second concern related to the availability of insurance for the plaintiff to cover the claim for defective work that was proposed to be made by the defendant. The plaintiff referred to insurance in respect of public liability and professional liability but it was concluded that the operation of a relevant insurance policy to cover the plaintiff's potential liability to the defendant had not been established under either policy. The indemnity that had been offered under the policy was stated to be in relation to 'the circumstances notified' and it was not clear what those circumstances were. Secondly, the entitlement under the policy was stated to be 'subject to the terms and conditions of the policy' and it was not clear what the impact of the terms and conditions would be. Thirdly, there was an issue as to whether the policy applied at the relevant time for the purposes of the defendant's claim.

[4] By reason of the evidence concerning the plaintiff's finances and the absence of relevant insurance I was satisfied that it had not been established that the plaintiff had an insurance policy in place that would cover the proposed claim by the defendant. Thus the defendant had satisfied the onus of establishing that the plaintiff would probably be unable to make payment to the defendant if so required. I gave judgment for the plaintiff in the amount of the Adjudicator's award, directed payment of the sum of £150,000 to the plaintiff, placed a stay on the balance provided the defendant paid the balance into Court within three days and issued proceedings against the plaintiff in respect of the claim for defective work within three days and served a Statement of Claim within 21 days of an appearance.

[5] The conditions set out in the judgment were complied with by the defendant. The plaintiff then forwarded the Statement of Claim to the relevant insurance companies to seek assurances in relation to the application of the policies. There followed correspondence between the respective solicitors in relation to the application of the policies. The plaintiff now seeks payment of the balance monies in Court on the ground that the plaintiff has insurance cover in place in respect of the defendant's claim and that the defendant is not at risk of failing to recover the amount that might become due under any claim that might be established by the defendant against the plaintiff in respect of defective work.

[6] By letter of 3 July 2011 from Argent Liability Adjusters, the claims handling agents to QBE Insurance Europe Limited, the public liability insurers (QBE) states that QBE are prepared to provide the plaintiff with an indemnity under the policy in respect of the claim advanced against them "... subject at all times to the terms and conditions of the policy." The letter goes on to confirm that QBE do not consider the claim was late notified to them and it is not their intention to refuse indemnity by virtue of any failure to comply with the claims notification condition in the policy. A letter in the same terms was sent on 3 July 2013 from Davies, loss adjusters to WR Barclay Insurance Europe Limited, the professional indemnity insurers (WBR).

[7] The response from Tughan's solicitors on behalf of the defendant dated 16 July 2013 resolves to three issues. The first is that the indemnity is stated to be subject to the terms and conditions of the policy, an issue to which I shall return. Secondly, the letters refer to the policy covering 'the circumstances notified' and a question mark is raised about the circumstances notified. I believe this point has been satisfied by the Statement of Claim issued by the defendant. The plaintiff is naturally cautious about the coincidence between the circumstances notified and the circumstances set out in the Statement of Claim but I am satisfied that the defendant has been required to set out the claim. The third issue concerns which insurer is providing indemnity. In the correspondence the defendant recognises that relevant cover may be provided by one or other or both of the insurers, subject to the terms and conditions of the policies. This third concern has been addressed.

[8] The issue resolves to the qualification that indemnity under the policies is subject to the terms and conditions of the policies. The letter from Tughan's of 16 July 2013 refers to Argent's letter stating that any indemnity would be subject to the terms and conditions of the policy and asks what are the relevant terms and conditions of the policy and why can the letters not confirm indemnity without qualification. Tughan's letter also states that Davies are fully aware of the terms and conditions of the policy and ought to be able to state clearly and unequivocally whether there are relevant terms which might have a bearing on the provision of indemnity. To this, Counsel for the defendant contends that no insurer would give an unequivocal indemnity.

[9] A letter of 19 August 2013 from Henderson Insurance Brokers, insurance brokers for the plaintiff, states that they have considered Agent's letter of 3 July 2013 and Davies letter of 3 July 2013 and in their professional opinion there can be no doubt that the plaintiff is insured in respect of the defendant's claim. It is stated that the only conceivable doubt about the claim is whether it will fall on WRB or QBE or both. The letter concludes - "However, for the avoidance of doubt we are not aware of any circumstances which would entitle either WRB or QBE to refuse cover."

[10] A reply from Tughan's of 13 September 2013 states that the insurers have had the Statement of Claim since 26 June 2013 and "ought to know whether they are willing to provide an unequivocal and unqualified confirmation of indemnity without hiding behind the terms and conditions of the policy."

[11] What remains unclear is whether either insurer knows of any matter that affects liability under the terms and conditions of the policy. The claims handling agents of QBE exclude an issue about notification of the claim. Similarly, the loss adjusters of WRB exclude any issue about notification of the claim. The insurance brokers go further and state that they are not aware of any circumstances that would entitle QBE or WRB to refuse cover. This could be stated by or on behalf of the insurers. It would not amount to a blanket indemnity as Mr Millar suggests. It would provide that in their present state of knowledge there would be no grounds for refusal under the policy. If past matters, now unknown, later emerge then the

insurer can refuse indemnity if the terms and conditions so allow. Similarly, if a future matter develops that permits refusal under the terms and conditions that will not be affected by an undertaking similar to that given by Hendersons.

[12] If the insurers give the same assurance as is given in the last sentence in Henderson's letter that would be sufficient assurance of the financial position of the plaintiff as to warrant release of the balance of the Adjudicator's award.