The TCC Adds a New Limb “(g)” to the Wimbledon v Vago Principles and Concludes that Allegations Fraud Not Raised in the Adjudication are Relevant to the Imposition of a Stay Under this New Limb

Gosvenor v Aygun

On the 28 March 2018 Mr Justice Fraser handed down his judgment in Gosvenor London Ltd v Aygun UK Ltd [2018] EWHC 227 (TCC), a case in which the defendant was seeking to resist payment of an adjudicator’s award of around £650,000 (inc. VAT), on the grounds that a substantial part of the award was allegedly derived from fraudulent invoicing of Aygun. In the alternative Aygun sought a stay on the basis of the claimed fraud, alleged witness intimidation and most importantly the entirely unsatisfactory nature of the Claimant’s statutory accounts for 2016 / 2017 and the unbelievable explanations given on behalf of Gosvenor as to the contents. A combination of factors that lead the Court to conclude it was unlikely that Gosvenor would repay the adjudicator’s award were if required to do so, following a challenge to the adjudicator’s decision in subsequent TCC proceedings.

Fraser J.’s judgment in Gosvenor v Aygun is important for a number of reasons. Critically it has added a further principle to those set out at paragraph [26] of Wimbledon v Vago, by Coulson J. (as the learned judge then was), in order to deal with the factual situation presented by the present case. It is also important because it confirms (if confirmation were necessary) that where a claimant, such as Gosvenor, is faced with a credible defence of fraud pleaded in response to the summary proceedings – with substantial evidence in support - together with having been put on notice that credibility of its statutory accounts will be challenged at the hearing of the application for summary judgment and it fails to file any evidence in response then there is a substantial likelihood that a stay will granted: even where the claimant is entitled to summary judgment on the adjudicator’s award. Furthermore, Fraser J. was also highly critical of the “evidence” provided by the Claimant’s accountant on the day of the summary judgment, confirming the position flagged by Coulson J. in Equitix ESI CHP (Wrexham) Ltd v Bester Generation UK Ltd [2018] EWHC 177 (TCC) that the Court will take a dim view when presented with partial or otherwise misleading evidence in relation to a company’s financial position, when challenged under the Wimbledon v Vago principles on an application for a stay.

In all the circumstances, Fraser J. rejected Aygun’s fraud defence on the grounds that it could and should have been put before the adjudicator for determination at that stage. Consequently, applying the decisions of Akenhead J. in SG South Ltd. v King’s Head Cirencester LLP, Corn Hall Arcade Ltd. [2009] EWHC 2645 (TCC); and the Court of Appeal in Speymill Contracts Ltd. v Eric Baskind [2010] EWCA Civ 120 meant that Aygun’s fraud allegations – irrespective of any merit they might have – could not be relied upon by it to resist summary judgment on the unpaid adjudicator’s award. That part of the judgment is entirely in line with previous decisions of the TCC; save to note that the judge did raise a judicial eyebrow at the fact that Gosvenor chose to file no evidence in reply to Aygun’s allegations – including the allegations of witness intimidation.

However, as noted above, the judgment does break new ground in relation to the test for a stay of enforcement of adjudicator’s awards pursued through summary judgment applications before the TCC. Applications that were previously governed by the decision of Coulson J. (as the judge then was) in Wimbledon Construction Company
2000 Ltd. v Derek Vago [2005] EWHC 1086 (TCC); [2005] BLR 374. Fraser J. has concluded that a new limb “g” could and should be added to deal with the facts of the present case. The judgment also provides important clarification in relation to evidence of fraud (that could have been raised in the adjudication) in relation to the application of that new limb.

For a little over 13 years it had been taken for granted that the decision in *Wimbledon v Vago* set the somewhat narrow limits of the Court’s powers to stay enforcement of the payment of judgment on an adjudicator’s award. Essentially requiring the paying party to demonstrate that the recipient would not be in a financial position to repay the adjudicator’s award at a later date if required to do so – see 26(f)(i) and (ii) – subject to the important provisos that the recipient company had not been placed in its straightened financial position by the acts of the payor or the recipient’s financial position was not substantially different to that when it entered into the contract.

However, none of the original *Wimbledon v Vago* principles quite fitted the facts in the dispute in *Gosvenor v Aygun* and Fraser J. concluded (in the first draft of his judgment) that he has the power to add to those principles, following the decision of Coulson J. in *Equitix*, where the learned judge opined [62]:

“It was, of course, not my intention that this summary should be set in stone. It was simply a summary of the main points established by the cases up to that time. It does not, for example, deal with the position where allegations of fraud are made, particularly in circumstances where those might affect the financial standing of the referring party (who is almost always the party opposing the stay).” (emphasis added).

Furthermore, the judge also made clear that one of the key reasons for granting the stay in *Equitix* was because he was forced to concluded that [78]:

78 I am confirmed in that conclusion by what I find to be the deliberately limited financial information made available by the claimant so far. It is not appropriate for a party to recover £10 million by way of an adjudication and then, in answer to legitimate concerns raised by the other side as to their financial position, effectively stonewall the requests until the last minute and beyond.” (emphasis added)

As the decision in *Equitix* was handed down by the Court after the hearing of the *Gosvenor’s* application for summary judgment – but before the handing down of the first draft of Fraser J.’s judgment in *Gosvenor v Aygun* – counsel for the parties were invited to provide further submissions on the legal implication of *Equitix* to the present case – but no further evidence was to be filed or served by either party at this stage (despite the repeated requests by the Claimant for permission to do so).

Having considered those further submissions Fraser J. finally concluded (in the second draft of his Lordship’s judgment) that he did have the power to add to the *Wimbledon v Vago* principles and chose to do so in the following form:

“(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.”

The judge specifically rejected, as completely unworkable, the Claimant’s submissions that the appropriate alternative course (to adding new limb “(g)”) was for the Defendant to be required to pay the judgment sum to the Claimant and immediately apply for a Freezing Injunction [58] and [59].
However, the judge made clear that this new limb “(g)” - “…is only likely to arise in a very small number of cases, and in exceptional circumstance” and that in most cases the original Wimbledon v Vago principles will be sufficient. Furthermore, a high test will be applied to the evidence needed to make out this limb – equivalent to that required to obtain a freezing injunction – and “…mere assertions will not be sufficient. Isolated discrepancies on statutory accounts will not be sufficient either.” The future intentions of the Claimant will also not be a relevant consideration when applying new limb “g”. [61 (1) – (3)].

Having determined that he had the power to add new limb “(g)” to the Wimbledon v Vago principles, in the form indicated above, the judge then turned to the question of the evidence that could be relied upon by the Defendant in support of an application for a stay of execution, with the options set out at paragraph [26] of the judgment:

(a) The pleaded allegations of fraud that should have been raised in the adjudication;

(b) The allegations of witness intimidation; and

(c) The unsatisfactory nature of the Claimant’s statutory accounts and the even less satisfactory explanations of the discrepancies in those accounts provided at the summary judgment hearing.

It was argued for forcefully by the Claimant’s counsel that the Court could not take into account these allegations of fraud, when considering the stay application, as these allegations could and should have been raised in the adjudication (as the judge had already found) and those allegations could not then be recycled in support of the stay because such an approach was contrary to the decision in at paragraph 20(b) of Akenhead J. judgment in SG South Ltd.

Fraser J. rejected this approach and took the view that the court needed to take into account the different jurisdictions that underpinned an application for summary judgment (CPR 24) and those applying for a stay (old RSC Order 47 / CPR 83.7(4)), which is part of the High Court’s inherent jurisdiction. Summary judgment being available – as of right – in relation to the enforcement of adjudicator’s decision, whilst the imposition of a stay requires the court to identify “special circumstances” that would justify imposing a stay. Having considered the decision in SG South – and in particular para 20(b) - the judge decided that allegations of fraud were relevant to the question of the imposition of a stay under CPR 83.7(4) at [18].

The judge concluded that the defendant’s fraud allegations could still be raised in relation to the stay, even if they could not be relied upon by the defendant to resist summary judgment being granted on the claim to enforce the adjudicator’s award. And, contrary to the submissions for the Claimant, this was not “new law” – which would now excuse the Claimant’s failure to file evidence in relation to the alleged fraud for the purposes of its summary judgment application [55].

It should though be noted that the result in the case would have been no different had there been no allegation of fraud as the judge regarded the evidence in relation to the Claimant’s accounts as so unsatisfactory [27] – [33] and the explanations provided in court so deficient that he would have granted a stay for that reason alone. The force of the judge’s criticism of Gosvenor’s evidence on this accounting issue can be gleaned from paragraph [34] of the judgment:

“Gosvenor had specific notice that Aygun would rely upon Gosvenor’s own accounts at the hearing on the 1st February 2018. There was ample time for a proper explanation to have been given to the court. Further time could have been sought if that was necessary, but it was not, nor was any adjournment of the hearing of the 1
February 2018 sought. Secondly, the explanation given at the hearing of the 1 February was so obviously wrong, that had the matter not been so serious, it would have been verging on the comical. A High Court Judge is entitled to rely on what he or she is told at hearings. This was not an irrelevant sideshow (not that this would justify the being told obviously wrong matters in any event). This went to the central issue of Gosvenor’s financial standing, its very own statutory accounts, and was in the context of serious allegations of fraud.”

Just as in Equitix partial or unsatisfactory evidence as to the claimant’s financial position it is likely to lead to a stay on enforcement of any judgment.

In the circumstances of the dispute between Gosvenor v Aygun Fraser J. concluded that test under new limb “(g)” of Wimbledon v Vago was met and a stay would be placed on enforcement, that no conditions would be imposed on that stay (as requested by the Claimant) requiring the adjudication sum to be paid into court and the Defendant be required to file and serve a claim challenging the adjudicator’s award [57].

Conclusions

The two headline issues from the decision in Gosvenor v Aygun are therefore: (i) the addition of a new limb “(g)” to the principles set out at paragraph [26] of Wimbledon v Vago to deal with suspected dissipation of the adjudicator’s award by the claimant; (ii) the fact that properly pleaded allegations of fraud by the Claimant can be taken into account when applying that new principle to stay applications – even if the allegations of fraud could and should have been raised in the adjudication.

The final point to note, for practical purposes, is that it is clearly not open to a claimant - after this decision - to argue that it should be allowed to file evidence (after the summary judgment hearing), where it has failed to file evidence prior to that hearing, on the grounds that the defendant had not made a formal application for a stay. Such stay applications are part of the inherent jurisdiction of the court and it should therefore be assumed by a claimant that if it wishes to resist a stay being imposed it should file and serve any evidence it wishes to rely on prior to the hearing of the summary judgment [56]; particularly where the defendant’s evidence raises serious issues that any reasonable party would wish to address – even if just to formalise any denials.

Dr Tim Sampson / 28th Mar 2018

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