Gosvenor London Ltd. v Aygun Aluminium UK Ltd. – Court of Appeal

The new Wimbledon v Vago "g" principle and the right to rely on allegations of fraud in support of stay applications in relation to summary enforcement of adjudicator's awards

The Court of Appeal, Coulson L.J. giving the judgment of the Court, dismissed Gosvenor's Appeal against the judgment of Mr Justice Fraser where his Lordship granted summary judgment of its application to enforce an adjudication award of some £655,000, but unconditionally stayed enforcement of that judgment: [2018] EWHC 227 (TCC); [2018] BLR 353: 177 Con LR 127: [2018] Bus LR 1439. The stay was granted on the basis of a new paragraph "g", added to the well-known known stay principles already set out in the judgment of Coulson J. (as the learned judge then was) in *Wimbledon Construction Company 2000 Ltd. v Derek Vago* [2005] EWHC 1086 (TCC): at [26].

The additional principle "g" is in the following terms:

"(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 purposes 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 evidence that Fraser J. considered to support the application of that principle in the present case was the detailed pleaded case of fraud in respect of Gosvenor's billing for its operatives (filed as a defence to the claim for summary judgment), the supporting witness statements from the directors and employees of Aygun – including allegations of perceived threats made to an employee, and Gosvenor's statutory accounts that had been completely restated (without explanation) in the days prior to the summary judgment hearing. Despite having the right to file and serve evidence in rebuttal of Aygun's fraud claims and witness evidence Gosvenor's lawyers expressly declined to do so.

Fraser J. was clear in his judgment that the fraud allegations could and should have been raised in the adjudication and consequently could not be relied upon to defeat a claim for summary enforcement of the adjudicator's award; however, he came to the conclusion that this was no bar to those fraud allegations being relied upon in relation to the Court's inherent power under CPR 83.7(4) to order a stay where "*… the court is satisfied that (a) there are special circumstances which render it inexpedient to enforce the judgment or order….then….the court may by order stay the execution of the judgment or order".*

The judge was also critical of Gosvenor's evidence (provided on the day of the summary judgment hearing though counsel) in relation to its restated statutory accounts. A flavour of the judge's view can be found at [33] of his judgment.

The Appellant's restated 2016 year-end accounts he found;

" …adds to the air of suspicion over the financial affairs and probity of this company. Indeed, air of suspicion is putting it mildly as well." [33]

And then at [34] the judge concluded that:

"*…the explanation given at the hearing of the 1 February 2018 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 have justified the court 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."*

In all the circumstances the judge took the view that an unconditional stay on enforcement was the only appropriate order to make. If either of the parties wished to litigate the matter before the TCC then that option was always still available.

The Appeal

Gosvenor applied for permission to appeal on four grounds. Two were dismissed on the papers. The CA refused Gosvenor the right to adduce new evidence on appeal (that should, quite obviously, have been filed in respect of the summary judgment hearing) as being contrary to the requirement that. The CA also refused to interfere with Fraser J's exercise of the – the appeal on that ground simply being dismissed as "hopeless".

However, two substantive grounds of appeal were accepted for appeal:

Ground 1:

"1. The learned Judge erred in law at paragraphs 39 and 60 in which he formulated a new principle applicable to applications for a stay of the enforcement of a judgment given to enforce an adjudicator's decision made pursuant to a construction contract. The learned Judge should have held that alleged fraudulent behaviour, acts or omissions which were or could have been raised as a defence in the adjudication cannot be raised in support of an application for a stay, in accordance with the principles set out in *SG South Ltd v Kingshead Circencester LLP* [2009] EWHC 2645 (TCC) at [20] which were approved by the Court of Appeal in *Speymill Ltd v Baskind* [2010] EWCA Civ 120 at [37]. As a result of the said error the learned judge wrongly took into account alleged fraudulent behaviour, acts or omissions which he had correctly found could have been raised as a defence in the adjudication."

Ground 2:

"The learned Judge was wrong to find that the evidence before him gave rise to an inference that the Appellant or those who control it would specifically organise the Appellant's financial affairs, other than in the ordinary course of business, to ensure that the adjudication sum paid to it would be dissipated or disposed of so that any future judgment against it would go unsatisfied. The evidence before the learned Judge does not warrant the inference drawn by the learned Judge and he should have found that there was no evidence before him that would justify such an inference."

The Proper Approach to Allegations of Fraud in Stay Applications

At the outset of the Appeal the challenge to Fraser J.'s right to add new "g" to those previously set in *Wimbledon*

v Vago was abandoned: and in any event would have flown in the face of the clear statement of Coulson J. in *Equitix ESI CHP (Wrexham) Ltd v Bester Generation UK Ltd* [2018] EWHC 177 (TCC); [2018] B.L.R. 281: 177 Con LR 104, where the learned judge, when addressing the status of the Wimbledon principles, opined that [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)."

However, the Appellant persisted with a recast Ground 1 and continued to argue that the real evil in the present case was not the new little "g" principle but the fact that when applying it Fraser J. had taken into account allegations of fraud, which he had already found could and should have been raised in the adjudication. Such an approach, it was submitted, was contrary to the decision of in and applied by the CA in *Speymill Contracts Ltd. v Eric Baskind* [2010] EWCA Civ. 120; [2010] B.L.R. 257; 129 Con. L.R. 66, a judgment in which the CA adopted the reasoning of Ackenhead J. in *SG South Ltd. v King's Head Cirencester LLP*, Corn Hall Arcade Ltd. [2009] EWHC 2645 (TCC); [2010] B.L.R. 47

The critical passage from Speymill provides as follows:

"20 Some basic propositions can properly be formulated in the context albeit only of adjudication decision enforcements:
(a) Fraud or deceit can be raised as a defence in adjudications provided that it is a real defence to whatever the claims are; obviously, it is open to parties in adjudication to argue that the other party's witnesses are not credible by reason of fraudulent or dishonest behaviour.
(b) If fraud is to be raised in an effort to avoid enforcement or to support an application to stay execution of the enforcement judgement, it must be supported by clear and unambiguous evidence and argument.
(c) A distinction has to be made between fraudulent behaviour, acts or omissions which were or could have been raised as a defence in the adjudication and such behaviour, acts or omissions which neither were nor could reasonably have been raised but which emerge afterwards. In the former case, if the behaviour, acts or omissions are in effect adjudicated upon, the decision without more is enforceable. In the latter case, it is possible that it can be raised but generally not in the former.

The appellant's case being that the decision in *Speymill* provides a "hard-edged" exclusion to raising allegations of fraud in support of a stay application where such claims could and should have been raised before the adjudicator.

The Respondent's position was that the stay jurisdiction was one of general application and always a matter of discretion – and certainly no "hard-edged" principle could be applied to restrict what was taken into account in support of the stay application.

The CA preferred the Respondent's arguments and came to the following conclusions, which are worth reproducing in full:

32. On an application to stay the execution of a judgment based on an adjudicator's decision, the court may be asked to weigh up the evidence and decide whether or not it demonstrates a real risk of dissipation. If the court concludes that there is a real risk that any future judgment in favour of the paying party would go unsatisfied, by reason of the dissipation of the judgment sum in the meantime, the court may grant the stay, regardless of what happened (or what could have happened) in the adjudication.

33. That is because the assessment of the risk of dissipation will not have been undertaken before; such a risk will not have been an issue in the adjudication, which will have been concerned solely with whether or to what extent the payer was liable to the payee. It may be that, in some cases, some of the evidence subsequently said to show a real risk of dissipation may also have been relevant to the issues in the adjudication, and may have been either expressly referred to in that adjudication, or comprise evidence that could have been raised in the adjudication. But the adjudication itself will not have been designed to test whether or not there was a real risk of dissipation of assets so as to justify a stay.
34. A court considering that question subsequently is therefore undertaking the exercise for the first time, and when doing so, must consider all the relevant evidence, regardless of whether or not it was or could have been raised in the adjudication. I do not read paragraph 20(c) of Akenhead J's judgment in SG South as concluding otherwise. The use of the evidence to support an application for a stay is for a different purpose and does not amount to a collateral attack on the adjudicator's decision.
35. Of course, if a particular part of the evidence had been rejected by the adjudicator, and that same evidence was said to be relevant to the risk of dissipation, the adjudicator's rejection may well be a material consideration in the exercise of the court's discretion, but it will not necessarily be decisive. The same must apply, a fortiori, to evidence which was not even raised in the adjudication, even if it could have been. These will be matters for the judge to consider in the exercise of his or her discretion."

That being the case, there could be no fault found in Fraser J's approach and that it was appropriate in the circumstance of the stay application to take into account fraud allegations that could have been raised before the adjudicator.

Evidence and the right to draw "adverse inferences"

The Court also rejected the Appellant's assertion that Fraser J. (in his robust judgment) had essentially reversed the burden of proof and required that Gosvenor demonstrate why a stay should not been imposed – rather than place that burden on Aygun as the applicant for the remedy. It was common ground that the standard of proof to justify applying new "g" was a high one – akin to that required for a freezing order – and that similar freezing order considerations would apply in respect of the question of whether there was a likelihood of "dissipation" [40] and [41].

Gosvenor's assertion was rejected for a number of reasons. First, it was clear from his judgment that Fraser J. had gone out of his was to take into account that he must not reverse the burden of proof [50]. Second, the approach taken by Fraser J. was entirely in line with the judgment of Gloster L.J. in *Holyoake & Another v Candy & Others* [2017] EWCA Civ 92, on the question of where the court was entitled to draw an adverse inference in the absence of rebuttal evidence. In that case her Ladyship stated the correct approach to be as follows:

"50. There are three points which inform this analysis. First, it is critical to remember that the burden is on the applicant to satisfy the threshold. The court will of course decide on the basis of all the evidence before it. However, in practice, if an applicant has not adduced sufficient evidence, the application will fail. The respondent's evidence will be immaterial – unless, unusually, it lent support to the application.
51. Second, it follows that, unless an applicant has raised a prima facie case to support a freezing order, the respondent is not obliged to provide any explanation or answer any questions posed – and nor can a purported failure to do so be held against the respondent. It is only if the applicant has raised material from which a real risk of dissipation can be inferred, that the respondent will be expected to provide an explanation. Then, in appropriate circumstances, the lack of a satisfactory explanation may give rise to an adverse inference."

In the face of a properly pleaded case in fraud, supported by detailed witness evidence, and the unsatisfactory and unexplained statutory accounts; the judge was quite right to draw and adverse inference from Gosvenor's blunt refusal to even countenance filing evidence in reply. As Coulson L.J. explains at [47]:

"47. In my view, this is what Fraser J did. He concluded that Aygun had raised material from which a real risk of dissipation could be inferred and that, in those circumstances, the lack of a satisfactory (or indeed any) explanation from Gosvenor gave rise to an adverse inference. That was therefore in accordance with the correct approach outlined by Gloster LJ."

Finally, the court turned its mind to the question of whether there was sufficient evidence from which Fraser J. could draw an inference of dissipation – and therefore have a proper basis to exercise his discretion and apply new principle "g".

Whilst it was not entirely clear to the Court which of the factors weighed most heavily in Fraser J.'s decision to grant a stay, it was apparent that the unsatisfactory statutory accounts (and the lack of proper explanation) was probably the most important element in his conclusion that there was a real risk of dissipation. For example, the fact that the sum now entered into accounts against creditors would now allow Gosvenor to pay away the adjudication award on apparently legitimate grounds.

Coulson LJ. took the view that:

"53 ….the judge was entitled to reach the conclusion that the evidence about the accounts (both as to their contents, and the late changes and the explanations proffered) cleared the required hurdle. It was the sort of evidence which falls fair and square within the Freezing Order jurisdiction, as summarised in the 6th edition of Commercial Injunctions by Steven Gee QC, at paragraph 12-033."

Conclusions

The Court of Appeal's judgment is important for three reasons.

First, and most obviously, the court has added a new principle to those previously set out in *Wimbledon v Vago*. It is not likely that this new principle will be frequently relied upon. However, following *Equitix* the real question is whether the stay jurisdiction can be allowed to expand whilst still acknowledging the requirement for rapid enforcement of adjudicator's awards.

Second, more generally, it clarifies the status of fraud allegations raised for the first time in summary enforcement proceedings – where they could or should have been raised in the adjudication. Such claims have no relevance to the question of the right to enforcement. However, such allegations can be considered in relation to the court's wide-ranging power to order a stay in such proceedings. They are raised for a difference purpose from opposing the right to summary judgment.

Third, whilst there is an expectation that there will be automatic enforcement of adjudicator's awards by way of summary judgment, it is now clear that a claimant's failure to file rebuttal evidence in such summary proceedings can provide proper grounds for a court to draw an adverse inference that can lead to the imposition of a stay on the execution of any judgement.

Dr Tim Sampson

David Sawtell

Dr Tim Sampson / 3rd Dec 2018

Disclaimer

The information and any commentary on the law contained on this web site is provided free of charge for information purposes only. Every reasonable effort is made to make the information and commentary accurate and up to date, but no responsibility for its accuracy and correctness, or for any consequences of relying on it, is assumed by any member of Chambers. The information and commentary does not, and is not intended to, amount to legal advice to any person on a specific case or matter. You are strongly advised to obtain specific, personal advice from a lawyer about your case or matter and not to rely on the information or comments on this site. No responsibility is accepted for the content or accuracy of linked sites.