



LEGAL BRIEFING

Makers UK Ltd v London Borough of Camden

[2009] EWHC 2944 (TCC), Mr Justice Akenhead

The Facts

Makers UK Limited ("Makers") and the London Borough of Camden ("Camden") entered into a construction contract in June 2006 in relation to substantial refurbishments works at the Whittington Estate in Camden. In July 2007 the contract was terminated by Camden and this became the subject of two adjudications. The first adjudication was to determine whether or not the termination was lawful ("the liability adjudication"). The second adjudication was to determine the losses incurred as a result of that termination as well as uncertified and unpaid sums ("the quantum adjudication").

As Makers were successful in the liability adjudication Camden commenced legal proceedings in the TCC to determine liability and quantum in anticipation that Makers would commence a second adjudication. The trial was split into two parts with liability to be heard during November 2009 and quantum in Spring 2010. During the course of the litigation Camden entered judgment in default as the Defence was served and filed late. In the application to set aside the judgment before Mr Justice Akenhead, Camden raised the issue of the solvency of Makers by way of expert accountancy evidence.

Camden suggested that, while it accepted that judgment should be set aside, a condition should be imposed preventing Makers from adjudicating on quantum or any other issues addressed in the litigation because any future enforcement on an adjudicator's decision would be met with an application for a stay of execution due to Makers' financial status. Camden also requested that Makers should provide security for costs.

Camden argued that, if Makers were allowed to adjudicate on quantum before the issue of liability was decided by the Court, it would be placed in a superior and oppressive position. A prime concern of Camden's was that a further adjudication would be a costly distraction from the litigation. However, the Judge refused to restrict Makers' statutory right to adjudicate at any time and accepted that this would mean that adjudication could be used as a commercial lever. The request for security was also denied. Following this, Makers commenced the quantum adjudication and the adjudicator decided that Camden should pay Makers £1.3 million plus VAT and interest and/or financing charges and the adjudicator's fees.

Camden refused to comply with the decision of the quantum adjudication save for the payment of the adjudicator's fees. Camden considered that the solvency of Makers was such that, if the liability and quantum decisions were overturned by the Court, Makers would not be able to repay the £1.3 million and financing charges/interest. Makers commenced enforcement proceedings in the TCC for payment to be made into Court or an escrow account to be released upon agreement of the parties or order of the Court.

The Issues

Should the Court exercise its Case Management Powers under the Civil Procedure Rules (CPR Part 3) and:

- (i) order a stay of execution with the adjudicator's award paid to into Court or escrow; or
- (ii) in line with Camden's defence to the application, order a stay of execution (without conditions) on the grounds of Makers' insolvency.

The Decision

During Makers' application in the litigation to set aside the judgment in default, Camden's evidence of Makers' financial status had persuaded the Court that Makers was insolvent. Mr Justice Akenhead decided that the financial status must have remained the same (as there was no evidence suggesting otherwise in the current application) and that Makers would be unable to repay Camden if it went on to lose the impending trial.

The Judge noted that the particulars of claim were drafted with a certain sensitivity to the financial status of Makers as it asked for the payment to be into Court or escrow instead of a direct payment as was the usual practice. Another important factor was that the parties would have the judgment on liability within weeks. As a consequence, the Judge granted a stay of execution without conditions against enforcing the adjudicator's decision. However, the Judge was prepared to grant Makers specific permission to apply to lift the stay in the event it was successful in the trial on liability.

Comment

This case reinforces that, while the Court will not restrict the statutory right to adjudicate, it will restrain the enforcement of any decision if the claimant is shown to be insolvent, even if that evidence is several months old and was produced in a separate action. Makers had suggested that Camden should be ordered to pay the sums due because the commercial lever of adjudication and the resultant decisions could be used to encourage settlement. However, the Judge was not persuaded by this because of the previous conduct of Camden.

Mr Justice Akenhead considered that, because Camden had previously refused mediation it was not likely that the commercial advantage of compelling a local authority (who could be using the money elsewhere) to make a payment into Court or escrow would serve any purpose (other than a tactical advantage) given the proximity to the trial on liability.

As such, a claimant enforcing an adjudicator's decision must, if faced with unfavourable evidence of its financial status produce its own evidence to show that it is not insolvent because the Court will not necessarily entertain a more novel suggestion of payment into escrow or Court. Without such evidence, a stay of enforcement without conditions is likely to be ordered.

However, the Court did offer the opportunity to seek permission to lift the stay in circumstances where due to the timing of the split trial Makers would, in the absence of their enforcement application, had to have waited several months for the quantum judgment before they would have received payment.

Theresa Mohammed
January 2010
