

Construction Law Update

Adjudication Enforcement – Fraud and Stays of Execution

In the most recent instalment of proceedings between Grandlane Developments Limited (“Grandlane”) and Skymist Holdings Limited (“Skymist”), following its unsuccessful challenge as to the validity of the adjudicator’s appointment, Skymist sought to resist enforcement of the adjudicator’s decision on the basis of fraud and sought a stay of execution. However, how strong must the evidence be for such applications to succeed?

Background

Grandlane applied for summary judgment to enforce the adjudicator’s decision in which it was awarded £928,296.45. Grandlane’s claim included fees which it was liable to pay to the architects for the project, PTP. Skymist suspected that Grandlane had colluded with PTP and fraudulently inflated its claim in respect of PTP’s fees.

Was the decision tainted by fraud?

The principles relating to allegations of fraud in adjudication enforcement are set out in *SG South v King’s Head Cirencester LLP*. In summary:

- i. fraud or deceit can be raised as a defence in an adjudication;
- ii. if fraud is raised to resist enforcement or to support an application to stay execution of enforcement, it must be supported by clear and unambiguous evidence;
- iii. generally, where fraudulent behaviour was or could have been raised in the adjudication, it cannot be raised on enforcement; and
- iv. where fraudulent behaviour emerges after the adjudication, it may be raised to resist enforcement, but only if it directly impacts on the subject matter of the decision.

The court held that there was no clear and unambiguous evidence of fraud. In any event, Skymist had its suspicions during the adjudication and, having

failed to raise the issues then, it could not rely on them to resist enforcement.

Should the enforcement have been adjourned?

Following the adjudication, Skymist issued an application for pre-action disclosure in the Commercial Court. It argued that the enforcement of the adjudicator’s decision should be adjourned until after that application and consideration of any further disclosure. The court held that the documents which had already been disclosed did not suggest that any further disclosure would reveal clear and unambiguous evidence of fraud. Further, it would have been wrong in principle to allow an application made in separate proceedings to determine the decision on enforcement. Therefore, the application to adjourn was refused, and summary judgment was granted enforcing the adjudicator’s decision.

Stay of execution

In *Gosvenor London Limited v Aygun Aluminium Limited*, the Court of Appeal confirmed that a stay of execution may be granted where the evidence demonstrates there is a real risk that any judgment would go unsatisfied due to the claimant organising its financial affairs so as to dissipate or dispose of the adjudication sum. However, there is a high threshold to overcome and, as it is in respect of freezing injunctions, the evidence must show a real risk, judged objectively, that a future judgment would not be met because of unjustifiable dissipation of assets. The suggestion that Grandlane would use the monies awarded in the adjudication to account to PTP was insufficient to show that Grandlane would improperly dissipate the adjudication sum. The purpose of adjudication is, in many instances, to provide cash flow and, therefore, any payment to PTP was likely to be a proper payment made in the course of Grandlane’s business, as opposed to an attempt to dispose of its assets. Accordingly, there was not sufficient evidence to justify a stay of execution.

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Analysis

The courts have adopted a robust approach to adjudication enforcement and this case demonstrates the high threshold which must be met to avoid enforcement based on allegations of fraud or be granted a stay of execution. Even if Skymist had satisfied the evidential requirements, it would not have been able to rely on the allegations of fraud as it should have raised them during the adjudication, even though they were merely suspicions at that stage. This case serves as a stark reminder that parties should raise any such issues as soon as they become aware of them.

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