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Dispatch

Adjudication: parties subject to a CVA

FTH Ltd v Varis Developments Ltd

[2022] EWHC 1385 (TCC)

Will the courts summarily enforce adjudication decisions where the claimant is subject to a Company Voluntary Arrangement ("CVA")?

FTH, who were subject to a CVA, sought summary enforcement of two adjudication awards. Varis accepted that they were valid awards but resisted enforcement and/or sought a stay, on the basis of FTH's financial position and its own crossclaims. Coulson LJ in *Bresco v Lonsdale (Dispatch* Issue 241), had said that:

"... the general position relating to a CVA may, depending on the facts, be very different to the situation where the claimant company is in insolvent liquidation ... A CVA is, or can be, conceptually different. It is designed to try and allow the company to trade its way out of trouble. In those circumstances, the quick and cost-neutral mechanism of adjudication may be an extremely useful tool to permit the CVA to work. In those circumstances, courts should be wary of reaching any conclusions which prevent the company from endeavouring to use adjudication to trade out of its difficulties. On one view, that is what adjudication is there for: to provide a quick and cheap method of improving cashflow."

Here, the Judge noted that *Bresco* did not provide "*very definitive guidance*" as to how the Court should approach a case where a claimant subject to a CVA seeks summary enforcement of an adjudicator's decision. There was jurisdiction to grant summary judgment, but whether the Court would do so in any given case depended on the facts of that case. The proper approach was to consider, on the facts of this case, whether there was a real risk that the summary enforcement may deprive Varis of security for its crossclaim.

Varis submitted that there was a real risk that summary enforcement would deprive Varis of security for its crossclaim. The CVA here was not, on its face, designed to allow FTH "*to trade its way out of trouble*." Even if the CVA fulfilled all financial expectations, there would only be a recovery of 56p in the £. However, FTH's two claims would not, in fact, produce the recovery foreshadowed in the CVA. The second, (not the claim here), would not lead to any recovery, which would make the projected recovery "*entirely unachievable*." It was, therefore, much closer to "*the straightforward situation where the claiming company is in insolvent liquidation and the liquidator is engaged in the process of recovering what they can in order to make a distribution to creditors,*" as per *Bresco*.

FTH said they were now carrying out work and receiving revenue, but this was not of assistance, as there was no evidence that they were trading profitably. The CVA supervisors had not considered the Varis crossclaim (put at £1.7m). If this succeeded, in whole or in significant part, the CVA would fail and FTH would go into liquidation with very little, if any, recovery for creditors. Finally, the CVA was for 12 months only, and had not been validly extended.

The Judge, therefore, concluded that Varis had shown that here there was a real risk that summary enforcement would deprive them of security for their crossclaim.

Varis had also applied for a stay under the Wimbledon v Vago principles (*Dispatch* Issue 61). Here, the Judge noted that the Courts expect parties in the position of FTH who wish to avoid a stay to provide detailed and reliable financial information. Here, (see *Equitix v Bester,* [2018] EWHC 177 (TCC)) FTH had been "*somewhat economical with information*" relating to its financial position. This was a case where, generally, the uncertainties in the information supplied made the Judge more inclined to grant a stay. Further, this was not a case where FTH's financial position was the same as its financial position when the Contract was made in 2018. FTH's finances had clearly deteriorated in late 2019, leading to the CVA in May 2020. Finally, FTH's financial position was not due, wholly or in significant part, to Varis' failure to pay the adjudication award. Had it been necessary, the Judge would have granted a stay.

Adjudication: pay less notices

Advance JV & Ors v Enisca Ltd

[2022] EWHC 1152 (TCC)

In a decision dated 8 February 2022, an adjudicator decided that Advance did not issue a valid pay less notice against an interim application for payment and that, consequently, Advance was to pay Enisca the sum of £2.7million. In general terms, the amended NEC3 subcontract form provided that:

- Enisca could make an application for payment on or before the assessment date;
- Advance was required to assess the amount due for payment and certify a payment by issuing a Contractor payment certificate within three weeks of the assessment date;
- Payment became due 21 days after the assessment date; and
- A party intending to pay less than the notified sum must notify the other party not later than seven days before the final date for payment.

In its Application 23, e application immediately prior to the application on which the adjudication was based), the difference between the parties was £1,415,902.42. It was common ground that the assessment date of this application was 24 September 2021.

On 22 October 2021, Enisca submitted Application 24 by email. The gross value showed an increase of over £1.4 million,

or almost 40%. The last date for providing a pay less notice was 26 November 2021. No payment certificate was provided by Advance to Enisca and no document was provided which expressly sought to respond to Application 24.

On 19 November 2021 (the next assessment date under the Contract), Enisca submitted Application 25, an increase of just £85,661, but the net payment applied for was £2.7million. On 25 November 2021 (one day before the expiry of the time window for provision of a pay less notice in respect of Application 24 and within the 21 day period for certification following the assessment date in respect of Application 25), Advance sent a package of documents which included a "Certification of payment assessment" expressly said to be for the assessment date of 19 November 2021 ("the Payment Certificate"), i.e. the assessment date referable to Application 25, payment cycle 29.

The assessment resulted in a negative payment value and the figures was adjusted to show a zero payment. The pay less notice made reference to "application No 25", the back-up assessment referred to "application 25" and the sum considered to be due was calculated by reference to the assessment of, and comparison with, the information provided in Application 25.

Notwithstanding this, Advance said that the pay less notice could be relied upon as a valid notice in response to Application 24 because the contractual requirements for timing and content were met, it was sent before 26 November 2022, and properly construed, the terms of the pay less notice would have indicated to the reasonable recipient that Advance did not intend to make any further payment, either in respect of Application 24 or Application 25.

Here, in the absence of service by Advance of a payment certificate, there was no dispute that the notified sum was the sum contained in Application 24. Enisca noted that it was the "backbone" of the HGCRA that payment cycles exist which create due dates and final payment dates. Provision was made for notices to be given during each of these cycles and pay less notices must be referable to the notice identifying the notified sum. Whilst there was no absolute requirement for a pay less notice to make express reference to the notice to which it is responding, it must nevertheless be clear that it is, in fact, responding to that particular notice.

The Judge commented that the construction of notices must be approached objectively. How would a reasonable recipient have understood them taking into account the relevant context. The Judge also referred to Coulson on *Construction Adjudication:*

"The courts will take a common sense, practical view of the contents of a payless notice and will not adopt an unnecessarily restrictive interpretation of such a notice ... It is thought that, provided that the notice makes tolerably clear what is being held and why, the court will not strive to intervene or endeavour to find reasons that would render such a notice invalid or ineffective."

A payment notice must be referable to individual payment cycles. Here, Application 25 was an application for a different amount from that previously applied for in Application 24, albeit not by a significant margin, but these applications were, and were intended to be, substantively different and assessed at different dates. It was difficult to see how one notice referable to only one assessment date could possibly be said to be responsive to two applications for payment. The pay less notice referred to Application 25; it was not a pay less notice in respect of, or referable to, Application 24. The timing point, namely the provision of the pay less notice one day before the end of the deadline for Application 24, was no more than neutral in circumstances where the pay less notice was also within the (overlapping) period for service of a pay less notice under Application 25.

If the pay less notice was intended to remedy the failure to serve a payment certificate in relation to Application 24, then it did not make that clear. In the absence of any suggestion that it was designed to plug that gap, the reasonable recipient would have taken it at face value. The decision was enforced.

Adjudication: freezing injunction

Nicholas James Care Homes Ltd v Liberty Homes (Kent) Ltd [2022] EWHC 1152 (TCC)

By a pre-action letter of claim, Liberty claimed sums in the total of £1.15million. By reply, NJCH asserted a right to recover overpayments in the sum of £2.6 million. On 21 October 2021, NJCH started a "true value" adjudication in respect of the value of work carried out. On 18 February 2022, the adjudicator ordered Liberty to repay some £2.5million. Liberty did not pay and NJCH issued summary enforcement proceedings on 29 March 2022. The court issued a standard directions order on 1 April 2022. The hearing was listed for 15 June 2022.

On 21 April 2022, NJCH obtained a freezing injunction, without notice, that Liberty must not remove or in any way dispose of the value of any of its assets up to the value of £2.9million. At the full, on-notice hearing, Mrs Justice O'Farrell was satisfied that NJCH had a good arguable case in relation to the substantive adjudication enforcement claim:

"It is well-established that the court's approach to adjudication enforcement is a robust one. The applicant has the benefit of a 'true value' adjudication decision in its favour for a substantial sum of money. Generally, the court will enforce such adjudication decisions, even where it can be shown that there are errors of fact or procedure. The only defences that will usually succeed are a breach of the rules of natural justice or the absence of jurisdiction on the part of the adjudicator."

It was common ground that Liberty had transferred assets, with a total value of almost £6 million, to related third-party entities in November 2020, despite knowing at that time that NJCH claimed an entitlement to re-payment of very substantial sums. NJCH did not find this out until 2022. There was therefore a very real risk that Liberty would be unable to satisfy any judgment against it. NJCH did not have to establish that Liberty intended to deal with its assets with the purpose of ensuring that any judgment would not be met. The test was an objective assessment of the risk that a judgment may not be satisfied because of an unjustified dealing with assets. Accordingly, the freezing injunction was kept in place until after the adjudication enforcement hearing on 15 June 2022.

Dispatch is produced monthly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

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