Legal Briefing

Pioneer Cladding Ltd v John Graham Construction Ltd

[2013] EWHC 2954 (TCC), Mr Justice Coulson

The Facts

During 2011 John Graham Construction Ltd ("Graham") was appointed main contractor for a new swimming pool and leisure facility in South Shields. The employer local authority nominated two preferred cladding sub-contractors, one of which was Pioneer Cladding Ltd ("Pioneer"). Graham invited both sub-contractors to complete a Pre-Qualification Questionnaire ("PQQ").

Pioneer returned a PQQ claiming an annual turnover of £400k and also provided Graham with a Project Portfolio which indicated that it was currently working on a number of schemes worth £2.9 million and was likely to be involved in another £4 million's worth of projects in the near future. At a meeting on 19 May 2011 one of Pioneer's directors indicated that Pioneer had substantial cash reserves.

Accordingly during June 2011 Graham engaged Pioneer to install the cladding and curtain walling. Clause 21 of the sub-contract concerned dispute resolution and provided as follows:

> "*(iii) … the Adjudicator's fees are to be borne by the Party which refers the dispute to adjudication…*
>
> *(v) In the event that the decision of the Adjudicator is the making of a monetary award ("Adjudicator's Award") in favour of the Sub-Contractor, the following provision shall apply:-*
>
> *(a) Graham shall place on deposit the amount of the Adjudicator's award with Northern Bank Ltd in the joint names of the solicitors acting for Graham and solicitors acting for the Sub-Contractor within seven days from the date of receipt by Graham of the Adjudicator's decision.*"

Pioneer subsequently referred two disputes to adjudication. The effect of the resulting adjudication awards was that a net sum of £193,005.53 was due to Pioneer. Graham did not pay and during 2013 Pioneer issued enforcement proceedings.

Pioneer argued that clauses 21(iii) and 21(v) of the sub-contract were contrary to the Housing Grants (Construction and Regeneration) Act 1996 ("the Act") and could not be relied upon to prevent payment.

In reply, Graham sought a stay of execution on the grounds that Pioneer was technically insolvent and would be unable repay monies at a later date.

The Issues

The key issues were as follows:

(i) Was clause 21(v) contrary to the Act?

(ii) Was clause 21(iii) contrary to the Act?

(iii) Was Graham entitled to a stay of execution?

The Decision

Mr Justice Coulson had little hesitation in holding that clause 21(v) was in breach of the policy underpinning the Act. The Judge considered that clause 21(iii) was equally likely to discourage a party from commencing adjudication and as such was unlawful, being contrary to the Act and the Scheme.

Regarding the third issue, the Judge found that where Pioneer was technically insolvent it was probable that it would not be able to repay Graham if it lost a subsequent arbitration. This satisfied the first requirement established by *Wimbledon Construction Company 2000 Ltd v Derek Vago* [2005] BLR 374 but the Judge noted, in line with *Wimbledon v Vago*, that a stay should not be granted if Pioneer's financial position was the same as it had been at the time the contract was entered into, or, if Pioneer's financial position was due or largely due to Graham's failure to pay the sums awarded by the Adjudicator.

The rationale behind the first proviso is that the paying party cannot avoid the repercussions of an Adjudicator's award if at the time the contract was made, it knew of and accepted the risk of doing business with a financially unstable company. In this instance the Judge found on the facts that Graham had entered into the sub-contract on a "false premise" where the information provided by Pioneer in the PQQ, the Project Portfolio and at the meeting on 19 May 2011 was misleading and incorrect. Therefore, Pioneer could not defeat Graham's application for a stay on the basis that Graham knew what they were getting into when they sub-contracted with Pioneer. On the contrary, having been misled, Graham had no proper idea as to Pioneer's financial position.

The Judge also concluded that the second proviso did not apply where on the facts, Pioneer's financial problems had nothing to do with Graham's failure to pay, but were inherent in the manner in which Pioneer ran its business. The Judge observed that Pioneer's practice of "robbing Peter to pay Paul" reflected cash flow difficulties stemming back to a time well before the date of the sub-contract with Graham.

Commentary

The Judge's conclusions regarding clauses 21(iii) and 21(v) of the sub-contract are unsurprising. The courts have previously demonstrated their intolerance of clauses that in practical terms impose a fetter on a party's right to adjudicate. See for example *Yuanda (UK) Ltd v WW Gear Construction Ltd* [2010] PLR 435 and *Sprunt Ltd v London Borough of Camden* [2012] BLR 83.

Likewise, where the facts strongly indicated that Pioneer had been financially unstable for some time so that Graham's non-payment would have made little difference, Pioneer could not rely upon the second proviso in *Wimbledon v Vago*.

However, the Judge's consideration of the first proviso in *Wimbledon v Vago* was novel. Thus the paying party may obtain a stay if it can be shown that notwithstanding reasonable enquires, it was misled as to the true state of the other party's financial position when entering into a contract.

Claire King
November 2013