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CONSTRUCTION & ENGINEERING SOLICITORS

Construction Law Update

Adjudication, Fraud and Stays of Execution

The Court of Appeal has endorsed a first instance decision by the Technology and Construction Court ("**TCC**") granting a stay of execution on new grounds. In the context of adjudication enforcement, the leading guidance is set out in the case of *Wimbledon Construction Company 2000 Ltd v Derek Vago.* However, in the recent case of *Gosvenor London Limited ("**Gosvenor**") v Aygun Aluminium UK Limited ("**Aygun**")*, the Court of Appeal has confirmed the principles set down in *Wimbledon v Vago* are not an exhaustive list.

Background

The Court may order a stay of execution (a delay to enforcement of a court order) where it is satisfied that there are special circumstances which render enforcement unsuitable. In this case, Gosvenor sought to enforce an adjudicator's decision granting a substantial award in its favour. Aygun resisted this on the basis that a substantial proportion of the award was based on sums which Gosvenor had fraudulently invoiced to Aygun and that, if paid, the monies would be disposed of by Gosvenor so that it would not be able to repay Aygun, should Aygun successfully overturn the decision.

At first instance, the TCC granted summary judgment to enforce the decision as it found that the allegations of fraud could, and should, have been deployed as a defence in the adjudication. However, the TCC also granted Aygun a stay of execution by expanding the guidance set out in *Wimbledon v Vago* and said:

"*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.*"

Was the new principle correctly formulated?

Gosvenor argued that the new principle was contrary to the existing convention that the courts will generally not permit evidence of fraudulent activities which was, or could have been raised in the adjudication, to be raised as a defence to enforcement. Gosvenor said that the new principle should have stated that such evidence could not be used in support of an application for a stay.

However, whilst the Court of Appeal approved the distinction between an issue that was or could have been raised in adjudication and an issue raised for the first time on enforcement, it endorsed the new principle on the basis that "*…the assessment of the risk of dissipation will not have been undertaken before; such a risk will not have been in issue in the adjudication, which will have been concerned solely with whether or to what extent the payer was liable to the payee.*"

Was the new principle correctly applied?

The Court of Appeal upheld the TCC's approach that there is a high threshold to be satisfied for the Court to grant a stay based on the risk of dissipation; "*solid evidence*", not "*mere assertions and isolated discrepancies*" will be required. The TCC had applied this test correctly and exercised discretion to grant a stay primarily on the basis of Gosvenor's failure to properly explain serious discrepancies in its accounts and the risk of dissipation of assets. The Court of Appeal concluded that the TCC's decision was not unreasonable or unlawful and dismissed the appeal.

Analysis

Whilst the Court made it clear that the circumstances giving rise to this new principle were exceptional and thus its application would be rare, it nevertheless offers respondents alternative means to resist enforcement, and even seek new ones.

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