



LORNE ALWAY

Construction Law and Dispute Resolution

EQUITABLE SET OFF FROM AN ADJUDICATION DECISION

F.G. Skerritt Ltd v Caledonian Building Systems Ltd [2013] EWHC 1898 (TCC)

Enforcing Adjudicator Decision; Set Off; Insolvency; Administrative Receivership.

BACKGROUND

This case concerns an application by the Claimant in this matter, FG Skerritt Ltd (FGS) to enforce an Adjudicator's Decision in circumstances where FGS is insolvent and Caledonian Building Systems Ltd (Caledonian) seeks to stay Summary Judgement under the RSC Order 47 Rule (1) and in reliance upon Rule 4.90 of the Insolvency Rules 1986.

FGS applied to Enforce an Adjudicator's award made in its favour. Caledonian sought to Stay the Enforcement of the award because FGS was insolvent. FGS was Caledonian's sub-contractor on a number of sub-contracts which were based on DOM/2. On 31 December 2009 FGS submitted an invoice for the outstanding balance of the sub-contract sum, less half the retention, for the design and construction of M&E works on HM Prison Eastwood Park. Caledonian refused to pay, saying that the works had not achieved practical completion.

On 11 February 2010 FGS went into Administrative Receivership. The Administrative Receivers sold FGS' book debts to Nathu Ram Puri Environmental Design Consultants ("EDC") under an agreement dated 16 February 2010. EDC is owned and controlled by Mr. Nathu Ram Puri who is also the ultimate owner and controller of FGS. It was common ground that the sale to EDC was ineffective in assigning FGS' book debt relating to the project at HMP Eastwood Park because the DOM/2 conditions include a prohibition on assignment. EDC was not therefore the owner of the relevant debt but FGS held the debt on trust for EDC.

After its Administrative Receivership, FGS submitted an invoice for the remaining half of the retention, 12 months after it contended practical completion had been achieved. During 2010 and 2011, another company controlled by Mr. Puri, Conder M & E Ltd., and/ or EDC undertook remedial works on the site. As Caledonian paid these companies and incurred costs due to FGS' administration, it did not pay the FGS invoice. Caledonian said that it might incur further costs due to defects in FGS' work on the HMP and other sites. FGS was wound up, and did not trade, although it was still on the list of companies.

The Adjudicator had awarded FGS £214,476.93. He said that Caledonian could not Set Off the cost of remedying the defects because it had failed to serve a withholding notice. The adjudicator also found that practical completion had been achieved in December 2009. Caledonian alleged that it would be able to rely upon its counterclaim in any final determination of the dispute.

SET OFF

Caledonian said it had paid over £40,000 to Conder M & E to date to remedy FGS' defective work. FGS submitted that this would be the maximum extent of any challenge which Caledonian could make, or could make by way of equitable set-off. On that basis FGS said that, if a stay were to be appropriate, it should only be limited to sums which could be set-off by way of equitable set-off.

RULE 4.90 OF THE INSOLVENCY RULES 1986

Whilst the Judge accepted that rule 4.90 of the Insolvency Rules 1986 acted to do substantial justice between the Parties by allowing for mutual set-off of sums which were much wider than the ability to make an equitable set-off and to prevent a Court giving summary Judgement where the Company is insolvent, and which would usually be granted, he did not consider that at this stage, where FGS was Insolvent but not in Liquidation, that it was right to apply this right of set-off which therefore had not yet arisen. Whilst FGS' current position was that it was insolvent and not trading, the judge did not think that because FGS might go into liquidation without the financial support from the Parent Company, it was appropriate at this stage to take account of what might occur and apply the consequences of Rule 4.90 of the Insolvency Rules 1986. To do so would be equivalent to applying Rule 4.90 in circumstances where, as a matter of statute, it did not yet apply.

Case details from Ann Glacki – Bliss Books

COMMENTARY - LORNE ALWAY

Given the Court's approach to the enforcement of Adjudicator's Decisions, in particular that they will not open up the Decision or its merits save for issues of jurisdiction, then by definition there are very few grounds upon which to resist complying with a Decision. It is with that in mind that an unsuccessful Responding Party will often consider any basis on which they can resist, either by challenging the summary judgement of a Decision or delaying it.

In this case Caledonian sought to delay it, on the basis that they had a case for set off and that FGS was insolvent. The point being, and in principle a genuine concern to any trading business, that the Decision that they should pay up in excess of £200,000.00 was only 'temporary' in that they had their only valid (counter) claim and that if they did pay up that as FGS was insolvent then by the time Caledonian had established their own entitlement FGS would not be in the financial position to pay or repay the money or the relevant part of it.

This case then provides a good example of the options available, or not, to an unsuccessful Responding Party.

It also provides guides on the appropriate application of Rule 4.90 of the Insolvency Rules, being only relevant in law in respect of a successful Party (already) in Liquidation and not binding on those that are insolvent but not yet in liquidation even though they may be heading that way.

The judgement also seems to suggest that what may be described as 'bare' set off, that is in the absence of liquidation and the support of Rule 4.90, will not be sufficient grounds on which to resist enforcement in any event.

For more information please visit www.lorne-alway.com or contact Lorne Alway on 01295 275975 or by email enquiries@lorne-alway.com