

Reports from the courts

Our regular round up of the court decisions of most interest to construction comes from **Andrew Croft** and **Ben Spannuth** of **Beale & Company Solicitors LLP** who examine a case highlighting the risks of contracting with companies with parlous finances; and an appeal court ruling that shows the value of careful drafting of dispute resolution provisions.

WRB (N.I.) Limited v Henry Construction Projects Limited

[2023] EWHC 278 (TCC); Pepperall J

Henry Construction Projects Limited (Henry) was the main contractor on a development in London. Henry subcontracted the design, supply, installation, and commissioning of the mechanical, electrical, and public health systems for the development to 'WRB Limited' for £2,180,000 plus VAT (the Sub-Contract).

WRB (N.I.) Limited (WRB) is and was a dormant company. WRB disputed that it was party to the Sub-Contract. WRB's position was that WRB Energy Limited was the true party to the Sub-Contract, whereas Henry contended it had contracted with WRB. The issue was resolved by an earlier adjudication in favour of Henry.

On 30 March 2022, WRB commenced further adjudication proceedings seeking payment in the sum of £815,618.37 in relation to its Interim Application No. 15. On 18 May 2022, it was determined that the balance owed to WRB was £120,655.35 plus interest. Henry was directed to pay the ordered sum plus VAT, in addition to the adjudicator's fees and expenses (the Decision). Henry made no payments pursuant to the Decision.

On 19 May 2022, WRB sought payment of the amount due. In response, Henry requested an invoice, which WRB subsequently issued on WRB Group paper in the name 'WRB' with no further details about the business that was raising the invoice. Henry raised concerns that the invoice was not properly drawn and lacked the "necessary statutory information as to the company raising the invoice". On 24 May 2022, WRB raised a revised invoice including its full name and details of its registered office and company number. WRB emphasised that it did so without prejudice to its primary case that it was not the true sub-contractor.

On 8 July 2022, WRB issued an adjudication claim

seeking payment of £120,655.35 plus interest. On the same day, WRB applied for summary judgment. Henry applied for a stay of execution in order to have time to establish its alleged entitlement to a cross-claim totalling £754,495.72 for liquidated damages and other costs. Henry argued that WRB's "parlous financial standing" made it highly unlikely that monies paid pursuant to the Decision would be repaid in the event of a successful cross-claim. WRB objected that "even a short stay would undermine the statutory purpose of construction adjudication" and stressed that WRB had always been dormant and Henry must therefore "accept the risks inherent in doing business with such a company". WRB alternatively offered that WRB Energy Limited would guarantee the repayment of any part of the judgment sum if Henry were to obtain a later judgment in its favour.

Decision

Henry's application for a stay was dismissed. Pepperall J determined it was not necessary to require WRB Energy Limited to provide a guarantee despite recognising the likelihood that WRB would be unable to repay the judgment sum.

Whilst Pepperall J considered the applicable principles to refuse enforcement of a judgment or order as set out in *Wimbledon Construction Company 2000 Ltd v Vago [2005] EWHC 1086 (TCC)*, it was held that Henry had knowingly contracted with a dormant company such that the risk it was now seeking to avoid was the "inevitable consequence" of its actions. Furthermore, in accordance with the decision of *Granada Architectural Glazing Ltd v PGB P&C Ltd [2019] EWHC 3296 (TCC)*, "it would be unfair and contrary to the spirit of adjudication regime to allow [Henry] now to escape liability to meet an adjudication award on the basis of WRB's essentially unchanged financial position". Having resisted the argument that WRB Energy Limited was the true

subcontractor, it was concluded that Henry had “essentially made its own bed”.

Comment

This judgment is a reminder of the risks of contracting with dormant companies or companies of a “parlous financial standing” – parties are encouraged to undertake sufficient due diligence before entering into contractual arrangements. Although obiter, it is also a helpful reminder that a guarantee could allow a company in poor financial standing to enforce an adjudicator’s decision.

**(1) Kajima Construction Europe (UK) Limited
(2) Kajima Europe Limited v Children’s Ark Partnership Limited**

[2023] EWCA Civ 292; Coulson LJ

On 10 June 2004, Children’s Ark Partnership Limited (CAP) engaged Kajima Construction Europe (UK) Limited (Kajima) to design, construct, and commission the Royal Alexandra Hospital for Sick Children in Brighton (the Construction Contract).

Schedule 26 of the Contract set out a “Dispute Resolution Procedure” (the DRP), which provided for the referral of disputes to a Liaison Committee. Paragraph 3.1 of Schedule 26 confirmed that “[a]ny decision of the Liaison Committee shall be final and binding unless the parties otherwise agree”. Paragraph 7.1 of Schedule 26 provided that, to the extent not resolved in accordance with the DRP, disputes would be referred to the courts.

Clause 9.7 of the Construction Contract provided that no claim, action, or proceedings would be commenced against Kajima after the expiry of 12 years from the “Actual Completion Date of the Works”.

The Works were completed on 2 April 2007. Following the fire at Grenfell Tower, between December 2018 and early-2022, Kajima undertook cladding remedial works at its own cost but without admission of liability. On 29 March 2019, the parties entered into a two-year Standstill Agreement, which was later extended to terminate on 29 December 2021.

On 30 November 2021, Kajima informed CAP that the remedial works were largely complete and that it would not further extend the Standstill Agreement. Kajima maintained its position despite CAP disputing that the remedial works would be completed and noting it still faced a possible

claim from the Employer. CAP therefore issued proceedings against Kajima on 21 December 2021.

On 3 February 2022, CAP applied to stay the proceedings for two months to comply with the DRP. On the same day, Kajima applied to strike out or set aside the Claim Form on the basis that CAP had failed to comply with the DRP, which was a condition precedent to the commencement of proceedings.

At first instance, the TCC held that, although the DRP was a condition precedent to the commencement of court proceedings, it was unenforceable as the obligation to refer disputes to the Liaison Committee was not “defined with sufficient clarity and certainty”. In any event, had the DRP been enforceable, the TCC would have stayed the proceedings to allow the DRP to be followed instead of striking out the claim. Kajima appealed.

Decision

The Court of Appeal dismissed Kajima’s appeal.

The Court of Appeal agreed that the DRP was unenforceable due to several inconsistencies within the contractual wording which meant that the Liaison Committee was a “fundamentally flawed body which could neither resolve a dispute involving Kajima ‘amicably’, nor could fairly provide a decision binding on Kajima in any event”, including the absence of a representative from Kajima on the Liaison Committee, which suggested an unenforceable process. In addition, the Court of Appeal noted the uncertainty as to when the process would either commence or finish such that it was not clear when the condition precedent might be satisfied.

The Court of Appeal also clarified the TCC’s comments that a stay of proceedings is a “default remedy” – the Court of Appeal described this “as a shorthand to describe the usual (as opposed to the inevitable) order that the court will make when proceedings are started in breach of a mandatory contractual dispute resolution mechanism”.

Comment

This judgment is a reminder that parties must have regard to the dispute resolution procedures set out in their contracts – parties can otherwise expect that the courts will stay proceedings to allow such contractual dispute resolution mechanisms to be followed. Parties should ensure that such dispute resolution provisions are carefully drafted and clear as to the procedure to be followed. **CL**