IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
TECHNOLOGY & CONSTRUCTION
COURT (QBD)
[2020] EWHC 1328 (TCC)

No. HT-2018-000309

Rolls Building
Fetter Lane
London EC4A 1NL

Monday, 30 March 2020

Before:

MRS JUSTICE JEFFORD

B E T W E E N :

DIMENSION DATA ADVANCED INFRASTRUCTURE LTD — Claimant
Respondent

- and -

(1) BERKELEY HOMES PLC
(2) ST EDWARD HOMES LTD
(3) BERKELEY HOMES (URBAN RENAISSANCE) LTD — Defendants/
Applicants

MR R. COPLIN (instructed by Hill Dickinson LLP) appeared on behalf of the Claimant/Respondent.

MS C. SLOW and MR M. TWIVY (instructed by Trowers & Hamlins LLP) appeared on behalf of the Defendants/Applicants.

J U D G M E N T

(via Skype Conference)

MRS JUSTICE JEFFORD:

1 This is an application for security for costs brought by the three defendants, Berkeley Homes Plc, St Edward Homes Ltd., and Berkeley Homes (Urban Renaissance) Ltd. For the purposes of this application, no distinction is drawn between those three defendants and, where I have referred to "the defendant" or "the defendants" or "Berkeley", it is a reference to all three.

2 The application is made against the claimant, Dimension Data, pursuant to Part 25.12. The court may make an order under that provision if the conditions set out in Part 25.13 are satisfied. The first is that the court is satisfied that, having regard to all the circumstances of the case, it is just to make such an order, and, secondly, that one of the conditions set out in 25.13(1)(ii) is satisfied. One of those conditions is that the claimant is a company and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so.

3 On this application, there is no real dispute, indeed no dispute at all, that that second condition is satisfied. The claimant company is in administration. There is evidence before the court that there is no intention to seek to save it as a running and operating concern, and its financial position is such that it would, if ordered to do so, be unable to pay the defendants' costs.

4 The issue before me turns on two things. The first is whether I should, in the exercise of my discretion, order security at all. The second is whether, if I order security, I should make what Ms Slow, rightly in my judgment, describes as an unusual order. I shall turn to those two issues in due course but, to set that in context, it is first necessary to set out some of the background to this matter.

5 The claimant and the defendants entered into a contract dated 17 March 2016. The claimant was to provide to the defendants M&E infrastructure and fitout works in connection with a housing development in London W14. There was call-off contract dated 11 February 2016 and a project specific instruction, which I have referred to as "the contract", dated 17 March 2016. It is not material to the present proceedings but there was a subsequent variation to that contract by way of a deed of settlement dated 23 February 2017.

6 In July 2018, the claimant went into administration. Its contractual engagement was not terminated until January 2019. In the meantime, two things of significance happened. Firstly, the present proceedings were commenced on 8 October 2018. So far as I am aware, the claimant did not inform the defendants that they had commenced these proceedings and they certainly did not serve them at the time. Secondly, the claimant commenced an adjudication which led to the decision of the adjudicator in December 2018.

7 It may be relevant that the claimant's position is that both of those steps were taken to protect its position under cl.9.7.5 of the contract. I do not set it out at this point but that is a clause which provides for the final account, in certain circumstances, to become conclusive. The claimant took the view that, on that clause's proper construction, it was required to commence proceedings in order to prevent that conclusivity provision - the guillotine provision as it has been referred to - biting. But the claimant now says it was unclear whether, as a matter of construction, it was required to commence court proceedings or whether an adjudication would do. It is not necessary for me to decide that point or express any view on it, but it is the explanation given for why both steps were taken towards the end of 2018.

8 The adjudicator's decision included a decision that the claimant was entitled to a substantial extension of time. That had a very significant effect on the defendants' claim for liquidated damages which was in the region of £7 million. The defendants then took the point, having disputed the jurisdiction of the adjudicator on this issue throughout the adjudication procedure, that the adjudicator did not have jurisdiction in respect of an extension of time claim.

9 There were two issues raised. The first was that there had been no dispute capable of reference to adjudication in respect of extensions of time, and the second was that, in any event, the claimant could not be entitled to an extension of time because it had failed to comply with condition precedents as to notice in respect of an extension of time. The defendants indicated in correspondence that they would seek to issue Part 8 proceedings in respect of those two matters and provided draft Part 8 proceedings which sought two declarations essentially addressing the two points that I have mentioned.

10 Given the administration of the claimant, the defendants required permission to commence those Part 8 proceedings, and that was the subject matter of some correspondence. In the meantime, the four month period for the service of the Claim Form and Particulars of Claim was proceeding and, on 1 February 2019, shortly before that time period expired, the claimant served the Particulars of Claim.

11 In the period preceding that and in the period following, there was some correspondence between the claimant and the defendants about the position as between them and in relation to the Part 8 proceedings. Mr Coplin does not seek to argue that in that correspondence the claimant's solicitors specifically or expressly asked the defendants' solicitors whether they were taking any point on conclusivity. The points that they might have taken were either, as already indicated, that the commencement of an adjudication was not sufficient to prevent the guillotine provisions applying and coming down or that, if the adjudicator did not have jurisdiction over part of the claim brought in adjudication, then the guillotine provisions were engaged and not prevented from coming down.

12 That question was simply not expressly asked by the claimant. The focus of the correspondence was rather on the defendants' position as to the severability of the extension of time part of the decision from the balance of the decision. That is of some relevance because it seems to me that the defendants were not in a position to know whether they were being asked a question because it had something to do with the guillotine provisions.

13 From the correspondence that I have seen - including the defendants' solicitors' letter of 16 January, the claimant's solicitors' letter of 23 January, the defendants' solicitors' letter of 6 February 2019 and the claimant's solicitors' letter of 22 February 2019 - that was simply not apparent.

14 I also note that, in the defendants' solicitors' letter of 6 February 2019, they made some reference to the present proceedings being a defensive step. That seems to me to have been taken somewhat out of context in the course of this application. The defendants' solicitors said in that letter that they understood that the claimant was in administration and that, as their clients' counterclaim exceeded the value of the claim, and could not be said solely to raise the defence of set-off, it was necessary for them to seek permission of the court or the administrators to bring a counterclaim. They then proceeded:

> "We trust that such a request will not be controversial in circumstances where the declarations sought by the company in the claim raise connected issues with the subject

> matter of our clients' counterclaim and are sought presumably in the claim as a defensive mechanism to deprive our clients of their right to claim delay damages."

In other words, it seems to me that the reference in that letter to a defensive mechanism was simply focused on the fact that an application or a claim for an extension of time will always operate as a defence to a claim for liquidated damages. It goes no further than that.

15 Pausing there, at that point and before the Defence and Counterclaim was served, the defendants, unsurprisingly in the circumstances, made a request for security for costs. Following the service of the Defence and Counterclaim on 2 April 2019, there were repeated stays of these proceedings until, on 19 November 2019, by consent, the stay was extended to 13 December 2019 and it was ordered that the application for security, if it was to be made, was to be made by 20 December 2019. That is the application that is now before me.

16 The reason I have gone through the history of this matter, not in as much detail perhaps as counsel's submissions but in some degree of detail, is that it has been part of the argument on discretion before me, firstly, that the commencement of these proceedings was itself a defensive action because the proceedings were commenced in the circumstances of ensuring that the guillotine did not come down. That may have been one of the reasons for commencing the proceedings in the first instance but it seems to me that it cannot be said that that was the reason for pursuing the proceedings once the Claim Form and Particulars of Claim had been served. Although there might have been some concern on the part of the claimant as to the effectiveness of the adjudication proceedings to stop the guillotine coming down, that was not, as I have said, an issue that was expressly raised with the defendants, giving the defendants any opportunity to respond.

17 There were a number of steps that could have been taken if that were the position. The claimant could have sought the defendants' clear agreement as to the effectiveness of the adjudication for those purposes. They could have sought an expedited hearing in court on a Part 8 basis as to the construction of the contract and the effectiveness of the adjudication to prevent the guillotine coming down. They could have sought an extension of time in which to serve proceedings in order to avoid the matter progressing unnecessarily. They did none of those things. Instead, they carried on with this action and, in my view, took a decision to do so.

18 It was hardly unexpected that the defendants should then seek security. The defendants have, following the decision in *Dumrul v Standard Chartered Bank* [2010] EWHC 2625, in accordance with the practice foreshadowed in the *Crabtree* decision, now offered to provide an undertaking that, if the claim is struck out or indeed stayed as a consequence of the claimant being ordered to provide security, but being unable to do so, they will not pursue their counterclaim.

19 Mr Coplin's submission, however, goes further and, by analogy with the *Dumrul* decision, he argues that there is a position that has been reached where it would be unfair to allow the position to arise where the defendants are able to bring proceedings against the parent company and the bondsman, where they would not be liable to any financial penalty, and that I ought not, therefore, in the exercise of my discretion to order security.

20 I have not so far made reference to that particular matter, but it brings me to the second point which is key to the arguments that have been addressed to me today.

21 In addition to the contractual arrangements that I have referred to, a bond was given in respect of the claimant's performance of the contract by Euler Hermes in the total sum of about £1.3

million. It was a default bond, rather than an on demand bond, in which Euler Hermes, in effect, guaranteed the performance of the claimant's contractual obligations. There was similarly a parent company guarantee provided by the company now known as Dimension Data Holdings Limited. That too was a guarantee that guaranteed the performance of the claimant's contractual obligations. Both of those documents contained express provisions that provided that the defendants did not have to pursue the claimant first before bringing any claim under the bond or the guarantee.

22 Ms Slow submits, and I take this from her skeleton argument which she has elaborated upon this morning, that those provisions are of importance because the existence and the nature of the obligations owed by the bondsman and the parent company to the defendants are simply irrelevant to the security for costs application.

23 Because those provisions expressly enable Berkeley to pursue third parties, without pursuing or obtaining a judgment against the claimant, all things being equal, the defendants will have been entitled to bring proceedings against those two parties without any concern for the position of the claimant company. As Ms Slow puts it, the bond and parent company guarantee are intended to provide Berkeley with a route to recovery that does not involve having to sue or be involved in litigation with an impecunious company. The bondsman and the parent company would be in the position of being able to raise the claimant's claims as a defence of set-off, but would not have, and never would have had, a financial claim against the Berkeley companies.

24 Ms Slow submits, therefore, that, had this claim not been commenced, Berkeley would have been free to pursue its claims under the bond and the guarantee without having to litigate against an insolvent company and without facing any counterclaim,; that the claimant would always have had to commence proceedings against Berkeley to recover monies for its benefit and, given its administration, provide security; and, so far as the position between Berkeley and the claimant is concerned, that would be no different from the usual position where an impecunious claimant is ordered to pay security as a condition of advancing its claim and subsequently fails to pay that security. That is that the claim would be struck out. All of those submissions seem to me to be well made.

25 Mr Coplin argues that the unfairness to the claimant lies in the fact that, if Berkeley do bring proceedings against the bondsman and the parent company guarantor, his client will be in a position where, if it has not provided security and the claim has been struck out, the very issues that arise between the claimant and the defendants would be determined in the claim against the guarantor or the bondsman. The claimant would then potentially be kept out of money which it might be determined in those proceedings were, in fact, due to it. The claimant would have to seek to commence further proceedings, against the background of its claim having been struck out, and/or would have to be joined into the proceedings against the bondsman and the guarantor or have its proceedings consolidated with those against the bondsman/guarantor.

26 Those submissions have some attraction in terms of potential unfairness to the claimant, but they fall away, in my view, for precisely the reasons that Ms Slow has given, namely that they reflect the position that the claimant would have been in, in any event, and not a position that would be brought about by the ordering of security for costs to be provided by the claimant.

27 The alternative, however, suggested by Mr Coplin is that, rather than order security for costs and order that, if it is not put up, the claim will be struck out, what I should do is make an order which stays the proceedings and somehow allows the proceedings to be revived. The proceedings could be revived if the position that I have described is reached, namely that

there is a claim against the bondsman or the guarantor and the claimant wishes to join in with that action or have its current action joined to those proceedings, so that, if those proceedings resulted in the decision that the claimant had a financial entitlement, it would will be able to pursue that entitlement. With that in mind, he proposes an order in which these proceedings would be stayed if security were not put up, either for a defined period or indefinitely. The initial proposal was that they should be stayed for a period of 12 months. If, during that period, the Berkeley companies commenced proceedings against the bondsman or the guarantor, the claimant would be at liberty to apply to lift the stay and continue with these proceedings. If that did not happen, both the claim and counterclaim would be struck out after a period of 12 months.

28 As I said in the course of argument, it seemed to me that what that, in fact, did, on analysis, was inhibit the defendants in pursuing their claims against the bondsman or the guarantor because there would be an incentive for them to wait for 12 months until the claim had been struck out. In the alternative scenario, where the claim is stayed indefinitely against the possibility of the Berkeley companies commencing proceedings against the bondsman or the guarantor, that would have the effect that the claim hung over the Berkeley companies indefinitely unless and until they decided what to do about the bondsman and the guarantor, which may be not merely months but years into the future.

29 In answer to that point, Mr Coplin referred me to some correspondence in which the defendants indicated that they would commence such proceedings. It appears that a pre-action protocol letter was sent sometime around the end of September or early October 2019 to the parent company indicating that that was the defendants' intention.

30 Ms Slow rightly, it seems to me, says that that letter, read as a whole, was as much concerned with putting the parent company on notice of the carrying out of remedial works and the ability to inspect as it was with starting the ball rolling in terms of proceedings. Secondly, its primary point was to bring the parent company to the table in the mediation that was then proceeding as between the claimant and the defendants. In short, it reads too much into it, despite the fact that there does appear to have been a pre-action protocol letter, to say that that shows clearly that Berkeley are intending to proceed against the parent company. The same is true of a letter to which Ms Slow properly referred me in which a claim is made under the bond because of the expiry of a limitation period under the bond of one year from the date of practical completion.

31 It is a matter for my discretion whether to grant security. The arguments that are advanced by the claimant as to why I should not do so in this case do not seem to me to be of sufficient weight to persuade me that I should not grant security. Not to do so would place the defendants in a position where they face a claim by an impecunious company without any security for their costs. There is a possibility that things will change, but it is only a possibility.

32 Any prejudice to the claimant in ordering security is that its claim may be struck out and it would, or may, be unable to participate if the Berkeley companies do pursue the bondsman and the guarantor. That prejudice seems to me to be minimal and bordering on illusory, because the claimant is simply in the position that it would have been in if those proceedings against the bondsman and/or guarantor had been commenced first.

33 It also does not, in my judgment, follow that, even if the claimant company were joined into those proceedings or the claimant's proceedings were consolidated, no security would be ordered or that it would be in a significantly lesser amount. That would presuppose that it was sufficient not to order security for the Berkeley companies potentially to have a claim for

costs (including the costs of the claimant's claim) against the bondsman or the guarantor. That, at this stage, would be pure speculation.

34 I have obviously considered , however, whether the more nuanced order that the claimant proposes, in which the proceedings would be stayed if security were not provided in accordance with an order of the court rather than struck out, would, in these particular circumstances, be appropriate. I am not persuaded by that argument for the very same reasons that I have already given, namely that the claimants are in no significantly different position from that they would have been in if the Berkeley companies had simply proceeded in the first instance against the bondsman and the guarantor. Further, as I have said, it would create a situation in which the Berkeley companies would potentially have this claim hanging over them indefinitely or, if the stay were granted for a shorter period, giving them incentive not to pursue the bondsman and the guarantor, thus putting them in a position of making decisions which they simply should not have to be engaged with.

35 In short, therefore, I accept the defendants' submission that there should be security and that it should be ordered to be provided on the basis that, if it is not provided, the claim will be struck out. So far as the amount of the security is concerned, the defendants have made a proposal as to amounts to be paid in stages, which are set out in the draft order annexed to Mr Coplin's skeleton argument.

36 In the course of the hearing, it was agreed between the parties and I record that those sums were satisfactory for present purposes and would be the amounts to be ordered by way of security, were I persuaded to grant security, which I am.

37 However, those sums, both paid and to be paid, may be revisited at the case and costs management conference, if it happens, in due course. There are various arguments between the parties as to appropriate rates and amounts. They will not be the subject matter in their entirety of any costs management conference because some of them are incurred costs, but I make it clear for the purposes of this judgment that what has been agreed between the parties is that the figures that are to be ordered by way of security may still be revisited, even if they themselves relate to incurred rather than estimated costs.

38 Accordingly, and subject to the arguments on the costs of this application, the order to be drawn up is essentially that proposed by the defendants, but with the amounts in tranches as set out in Mr Coplin's draft.

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