OUTER HOUSE, COURT OF SESSION

[2019] CSOH 64

CA115/19

OPINION OF LORD DOHERTY

In the cause

MARS BLACK SHEEP HOTELS LIMITED

Pursuer

against

DOUGLAS & STEWART UK LIMITED

Defender

Pursuer: Dunlop QC; Davidson Chalmers Stewart LLP
Defender: MacColl QC; Burness Paull LLP

13 August 2019

[1] The pursuer carries on business as a hotelier. The defender is a construction company. In terms of a written contract dated 15 November 2018 the parties agreed that the defender would carry out construction work at three hotel properties. The contract incorporated the provisions of the SBBC Scottish Minor Works Building Contract (2011). In terms of that standard form (article 7, and clause 8.2 of the conditions) either party was entitled to refer any dispute or difference to adjudication, in which case Part 1 of the Schedule to The Scheme for Construction Contracts (Scotland) Regulations 1998 (as amended) by The Scheme for Construction Contracts (Scotland) Amendment Regulations 2011 applied (except in so far as modified by clause 8.2 of the contract conditions).

[2] Between the autumn of 2018 and May 2019 the defender carried out very substantial construction works at the hotels. The pursuer made payments to the defender totalling £6,533,367.69 in respect of work done. By May 2019 the parties were in dispute as to whether further payments were due by the pursuer in respect of the work. The defender gave the pursuer notice of intention to suspend performance. By letter dated 27 May 2019 the pursuer indicated that it was terminating the contract. The defender served a notice of adjudication dated 4 July 2019. On 10 July 2019 it served a notice of referral. On around 18 July 2019 the pursuer claimed for the first time that it had been induced to enter into the contract by misrepresentations by the defender. This commercial action was signetted a few days later. The summons seeks (i) reduction of the contract: (ii) payment by the defender to the pursuer of £3,800,000 with interest: (iii) interdict against the defender a) taking any further steps in furtherance of the adjudication already commenced; b) taking any steps to enforce any award resulting from the adjudication; c) otherwise referring any dispute as to or arising from the contract to adjudication: (iv) suspension of the existing adjudication process. It also seeks interim interdict and interim suspension. The pursuer avers that the defender misrepresented that the pursuer would be entering into a contract with a substantial commercial entity based *inter alia* in the UK which had a proven track record and a significant asset base. It avers that that misrepresentation was fraudulent, failing which negligent, failing which innocent, and that the misrepresentation induced it to enter the contract. It further avers that *restitutio in integrum* may be achieved by the defender retaining the *quantum meruit* value of the work done, which it estimates at £2,715,000. It seeks repetition of £3,800,000. Alternatively, in the event that the pursuer establishes that there was fraudulent or negligent misrepresentation but reduction and restitution are not possible, it seeks damages of £3,800,000.

[3] On 23 July 2019 at an *ex parte* hearing Lady Wolffe granted interim interdict and interim suspension. The defender enrolled for recall of those interim orders. The recall motion first called before me for a hearing on 31 July 2019. At that time counsel for the defender indicated that late on the previous day the defender had intimated affidavits from two representatives of the defender (Andrew McNair and Ciaran Redmond) and productions, and that the pursuer had not yet been able to consider them. The motion was continued to the next available date in the court diary when both counsel were available, 6 August 2019. In advance of the continued hearing the pursuer lodged an affidavit from Sanjay Narang. Both parties lodged further productions. I heard submissions and took time to consider my decision over the lunch break. I recalled the interim interdict and interim suspension. I gave brief oral reasons. Counsel for the pursuer sought leave to reclaim. He submitted that had the action not been a commercial action leave would not have been required, and that the pursuer ought not to be "penalised" on that score. Counsel for the defender adopted a neutral stance in relation to leave. I granted leave. I did so not because I was persuaded that the pursuer ought not to be "penalised" - in opting for the commercial procedure it had subjected itself to the different rules which apply to commercial actions. I granted leave because the decision was an important one for the parties which raised an issue of wider interest.

[4] Those are the circumstances in which I have prepared this Opinion.

Counsel for the defender's submissions

[5] Mr MacColl submitted that the pursuer did not have a *prima facie* case for interim interdict and interim suspension. Neither its pleadings nor the affidavit from Mr Narang disclosed such a case. The inferences of misrepresentation by the defender which the

pursuer sought to draw from the facts were simply not justified. The pursuer had not disclosed material matters to Lady Wolffe. In particular it had not been made clear that the pursuer had been well aware by mid-September 2018 of the identity of the defender as the proposed contracting party. It had not been represented that the defender, rather than other companies in the Douglas and Stewart group, had carried out the projects described in the brochure which the pursuer had been given or the projects which the parties had discussed. The defender had indicated it was in a position to provide and deploy the necessary resources to carry out the works - as it in fact had done. The pursuer had not made any inquiry of the defender or anyone else as to the defender's financial assets. The defender's financial position had not been raised by either party during the discussions. By March 2019 the pursuer had become aware of the accounts which the defender had filed in 2018 (which disclosed it had nominal assets in 2017 – before the defender commenced trading), but it had continued to instruct substantial work under the contract. It was only after the adjudication had been commenced that the pursuer had suggested that there had been any misrepresentation. Mr MacColl suggested that helpful guidance on the *prima facie* case requirement could be obtained from *Gillespie* v *Toondale Ltd* 2006 SC 304, per the Opinion of the Court at paragraphs 12 and 13, albeit the context of the discussion there was diligence on the dependence of an action rather than interim interdict or interim suspension.

[6] If there was a *prima facie* case then the balance of convenience favoured recall. Parliament had provided that parties to construction contracts should have the right to have disputes resolved on a provisional basis by adjudication. The interim orders cut across that, to the defender's very considerable prejudice. If adjudication was not available to the defender there would be no prospect of a speedy decision in its favour and early payment. It would have to resort to litigation or arbitration which would give rise to delay and

expense. The court should have regard to the fact that it was only at a very late stage – after the adjudication was commenced – that the pursuer had raised the question of misrepresentation and reduction. If the interim orders were recalled and the adjudication proceeded the pursuer would be able to seek to persuade the adjudicator that the disputed sums were not due in terms of the contract. The defender had been trading since 2018 and it had had substantial earnings from this and other contracts. Mr MacColl accepted that he had not lodged any material vouching the defender's current financial position. He also accepted that if the adjudicator decided in the defender's favour, and the award was enforced, the pursuer would be dependent on the defender having sufficient assets from which the pursuer could recover that sum in the event that it succeeded in obtaining reduction at the end of the day. He submitted that that was a not uncommon circumstance where an adjudication award was made. Moreover, there were steps which the pursuer could take to seek to protect its position.

Counsel for the pursuer's submissions

[7] Mr Dunlop submitted that the pursuer had not just a *prima facie* case, but a strong *prima facie* case. In order to demonstrate a *prima facie* case the pursuer simply required to show that it had a case to argue: *Reed Stenhouse (UK) Ltd* v *Brodie* 1986 SLT 354 per the Opinion of the Court at pp 357L - 358C. That was clear. *Gillespie* v *Toondale Ltd* dealt with a different context. While in *Ralph Lauren London Ltd* v *Trustee of Southwark LBC Pension Fund* [2011] CSOH 103, 2011 Hous LR 29, Lord Glennie had proceeded on the basis that the discussion relating to *prima facie* case in *Gillespie* v *Toondale Ltd* applied equally to cases where interim interdict was sought (see paragraph 5 of his Opinion), the Inner House had allowed a reclaiming motion but it had not issued a written Opinion. Lord Glennie had later

acknowledged that in those circumstances it would be unsafe to rely upon what he had said in *Ralph Lauren* (see *Schuh Ltd* v *Shhh... Ltd* [2011] CSOH 123, at para 12). The pursuer's case was that the defender had misrepresented that the pursuer would be contracting with a substantial commercial entity which had a proven track record and a significant asset base. During the pre-contract discussions the defender's representatives had misled the pursuer into thinking that the projects described in the brochure and the projects discussed were projects that had been carried out by the party with which they would contract, and that that party had the wherewithal to execute such projects. The position in fact had been that the defender had been a dormant company with no assets and no track record, albeit that other entities in the same group had such a track record. It was not a defence to a case of fraud that the pursuer could have carried out checks on the defender: *Alliance & Leicester Building Society* v *Edgestop Ltd* [1993] 1 WLR 1462, per Mummery J at pp 1474F – 1475F. So far as the suggestion that the pursuer ratified the contract by its actings from March 2019, the onus was on the defender to establish that. While by that stage the pursuer knew that according to the most recent accounts lodged with Companies House the defender had only nominal assets, it had not yet discovered that the defender had no track record at the time of the pre-contract discussions. The pursuer had continued to be unaware that the contract could be reduced on the ground of misrepresentation. The pursuer's election to proceed with the contract had not been a knowing election in full knowledge of the facts and its legal rights. Reference was made to *TGC Pubs Limited (in administration) & Others* v *The Master and Wardens or Governors of the Art or Mystery of the Girdlers of London* [2017] EWHC 772 (Ch), per Mann J at paragraphs 74-78.

[8] So far as the balance of convenience was concerned, it was submitted that there was a strong *prima facie* case. The pursuer wished to stop any adjudication process, but there was

good reason for that. The harm likely to be suffered by the pursuer if the orders were recalled was greater than the harm likely to be suffered by the defender if they remained in place. If they remained in place the defender would be deprived of the right to any adjudication of disputes, but it could litigate and if successful it could recover any sums which were found to be due together with interest on those sums. On the other hand, if the adjudication proceeded and the defender obtained an award the pursuer's prospects of recovering that sum from the defender at the end of the day (or any other sums which the court might ultimately find were due to it) may be illusory if the defender had no assets to satisfy any decree. It was accepted that the pursuer could seek diligence on the dependence of the action and, if granted, might attempt to arrest any sum paid to the defender in satisfaction of an adjudication award, but there was no guarantee that would be successful (eg the defender's bank account into which payment was made might be in substantial deficit).

Decision and reasons

[9] I approach the issue of *prima facie* case applying the test set out in *Reed Stenhouse (UK) Ltd* v *Brodie, supra,* per the Opinion of the Court at pp 357L - 358C and in *Toynar Ltd.* v *Whitbread & Co. plc* 1988 SLT 433, per the Opinion of the Court at p. 433E, which test is well-established. I am not persuaded that the decision in *Gillespie* v *Toondale Ltd* qualified or innovated upon that test. In my opinion that case dealt with the requirement for a *prima facie* case in the context of diligence upon the dependence, where different considerations may apply (see the considerations discussed at paragraph 13 of the Opinion of the Court in *Gillespie*).

[10] Here the issue of *prima facie* case is to be determined on a broad *prima facie* view. Adopting that approach I am satisfied that there is a case to argue and a case to answer. However, I am very far from persuaded that I ought to go a step further and hold that there is a strong *prima facie* case (*NWL Ltd* v *Woods* [1979] 1 WLR 1294, per Lord Fraser at p 1310; *Toynar Ltd* v *Whitbread & Co plc*, *supra*, per the Opinion of the Court at p 434). Taking a broad view of the pursuer's case and the defender's defence I am not satisfied that the pursuer's *prima facie* case even approaches that sort of territory.

[11] I turn then to consider the balance of convenience.

[12] I recognise that if the interim orders are recalled but ultimately the pursuer succeeds in obtaining reduction of the contract and an order for repetition of sums paid in so far as they exceed the *quantum meruit* value of the work done, there is a risk that the defender will have insufficient assets to satisfy a decree. Similar risks are likely to be present in many cases where adjudication awards are made, but that consideration did not cause the legislature to modify the provision which it made. Although since the autumn of 2018 the defender has been actively trading and it appears to have generated significant turnover, its present asset position is unvouched. If that remains the position the pursuer may be able to seek diligence on the dependence of the action with a view to arresting funds paid over in satisfaction of any adjudication award. Nevertheless, there is a real risk of harm to the pursuer and I take that into account.

[13] On the other hand, if the interim orders remain in place the defender will certainly be deprived of the right to go to adjudication. It will not have the opportunity of persuading an adjudicator that a provisional decision should be made in its favour. Rather, it will require to vindicate its position by litigation or arbitration, with the delay and expense that that is likely to involve.

[14] In my opinion in the present case there are further important factors that go to the balance of convenience and which favour the defender. First, the pursuer did not raise the challenge to the contract until very late in the day - after the adjudication had been commenced. Second, Parliament intended that parties to construction contracts should have the right to refer disputes to adjudication. The court should be very wary indeed of preventing a party from pursuing a right to adjudication. In *T Clarke Scotland Limited* v *MMAXX Underfloor Heating Limited* 2015 SC 233 an Extra Division of the Inner House observed in relation to section 108(1) of the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009) and The Scheme for Construction Contracts (Scotland) Regulations 1998 (as amended by The Scheme for Construction Contracts (Scotland) Amendment Regulations 2011):

> "29 ...The purpose of the legislation was to introduce a speedy mechanism for settling disputes in construction contracts on a provisional, interim basis. The decision of an adjudicator is binding and is to be complied with until the dispute is finally resolved (*Carillion Construction Ltd v Devonport Royal Dockyard Ltd*). It is therefore an important practical procedure available to those who operate in the construction industry. It is a right provided by Parliament and one which was incorporated into the contract between the pursuer and the defender in the present case. These considerations would in themselves indicate that the court should be slow to intervene in such a process.
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> ...
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> 32 As to whether the court has power to grant an interdict to prevent the pursuit of a particular adjudication, we note that in *Mentmore Towers Ltd v Packman Lucas Ltd* the court found that it had jurisdiction. That was a matter of concession. Edwards-Stuart J concluded (para 22):
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> > '[T]here is no difference in principle between the approach to be adopted by the court when considering whether or not to order a claim brought by way of litigation to be stayed on the grounds that it is being brought unreasonably and oppressively, and the approach to be adopted when considering whether or not to restrain the further pursuit of an identical claim by way of adjudication on the same grounds.'

> In *Twintec Ltd* v *Volkerfitzpatrick Ltd*) (para 69) the same judge expressed the view that a party should not be prevented from pursuing its right to adjudication save in the most exceptional circumstances.
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> 33 With the latter proposition we would agree. It is not necessary in the context of this case to express a view on the circumstances in which the court might interfere in a particular adjudication. What is clear is that neither of these cases provides any support for granting the type of interdict against future reference for adjudication as sought by the pursuer."

[15] In the whole circumstances I am satisfied that the balance of convenience favours the recall of the interim orders. Had the pursuer had a strong *prima facie* case - considerably and demonstrably stronger than the defender's *prima facie* defence - the position may have been different. However, as already indicated, in my opinion the pursuer's *prima facie* case is not in that territory.