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Constructive discretion: Allowing legal proceedings during the statutory moratorium

By Matt Ford and Russell Hill on January 31, 2017
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Parties in the construction sector seeking to enforce an adjudicator’s decision against a company with the benefit of a statutory moratorium were given fresh guidance in the recent case of *South Coast Construction Ltd v Iverson Road Ltd* [2017] EWHC 61.



Facts

In September 2013 Iverson Road Ltd (“Iverson”) engaged South Coast Construction Ltd (“SCC”) to complete various building works in London. In June 2016 SCC halted the work for non-payment of sums due by Iverson.

Iverson then issued a non-completion certificate to SCC with a letter stating its intention to deduct liquidated damages. SCC responded by issuing an application for payment of work completed to the sum of £996,000. On 21 November 2016 the matter was decided by an adjudicator in favour of SCC.

Iverson failed to make payment to SCC under the adjudicator’s decision and SCC filed a High Court application for summary judgement. The case was listed to be heard on 18 January 2017.

On 16 January 2017, Iverson’s solicitor advised the court that Iverson had filed a notice of intention to appoint administrators (“NOI”) on 4 January 2017, which created a statutory moratorium over the company until 18 January 2017 and therefore the hearing should be vacated under paragraph 43(6) of Schedule B1 of the Insolvency Act 1986 (the “Act”). In response, SCC submitted that the court should use its discretion to allow the case to proceed.

Decision

Mr Justice Coulson hearing the matter acknowledged that by the time the judgement was handed down (19 January 2016) the statutory moratorium would have expired. However he took the view that a decision would be helpful in assessing the enforceability of an adjudicator’s decision during a statutory moratorium as well as assessing costs.

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He began by stating that allowing proceedings to continue during the statutory moratorium should be exceptional, particularly in monetary claims, because individual creditors should not have an unfair advantage over the general body of creditors when establishing claims against an insolvent company.

However in this case, his view was that SCC should be allowed to continue in its summary judgement application. Using the guidelines set out in *Re Atlantic Computer Systems plc [1990] EWCA Civ 20*, Mr Justice Coulson undertook a balancing exercise between the interests of SCC and the interests of the other creditors of Iverson. He considered that, firstly, an administrator or liquidator would be assisted by a court decision on the dispute between the parties when he or she came to assess debts owed by the company and secondly, SCC's position as a creditor would not be materially improved by a court judgement. This was because SCC was currently an unsecured creditor and would remain an unsecured creditor after any such judgement, albeit with a proven debt.

Mr Justice Coulson also took a dim view of Iverson's conduct during the so-called 'twilight zone'. The company had, on the balance of probabilities, played a 'double game' by providing very little information in the NOIs, filing three NOIs in a short period of time and failing to tell SCC about any of them.

For all these reasons, the Judge decided that he would exercise the Court's discretion, under paragraph 43(6)(b) of Schedule B1 to the Act and allow SCC's application to continue during the statutory moratorium. He went on to rule in favour of SCC for the sums awarded by the adjudicator.

Lessons

The case provides a number of helpful reminders for those advising distressed companies in the construction sector.

1. *Weight will be given to an adjudicator's decision even in a distressed situation.* Adjudicator's decisions are important to aid the speedy resolution of disputes for the benefit of both parties in the construction sector. Courts will be inclined to uphold these decisions even in distressed situations.
2. *In exceptional circumstances, courts will allow legal proceedings to continue during the statutory moratorium.* The court will balance the interests of an applicant creditor against the interests of the other creditors of the company when assessing whether to allow legal proceedings to continue during the statutory moratorium. The court will consider a number of factors such as whether a judgement would assist an administrator or liquidator who was subsequently appointed and whether a judgement will materially improve the applicant creditor's position at the expense of other creditors.
3. *Courts will continue to take a dim view of unscrupulous conduct by distressed companies.* Iverson filed three NOIs without appointing administrators or sufficient explanation being given. This is a reminder that directors or shareholders inclined to file multiple NOIs should ensure they have sufficient justifications for doing so.



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