The Commodities Board v Alain Herbreteau S.A.

Supreme Court, Nuku'alofa
Martin C. J.
Civil Case No. 90/1990

3 October 1990

Injunction – interim – principles applicable
Civil procedure – interim injunction – principles applicable

The plaintiff was a sub contractor to the defendant for the construction of Teufaiva Outdoor Stadium at Nuku'alofa. The stadium was completed in August 1989, but there was a maintenance and guarantee period of a further 12 months. Later in 1989 the owner of the stadium, the Tongan Government, sent a list of defects to the defendant, which notified the plaintiff claiming that these were caused by faulty workmanship by the plaintiff and withholding further payments until the defects were remedied. The plaintiff claimed that the defects were due to faulty design by the defendant and said that it would not carry out any works on the building because it was unsafe. The defendant sent a team of its own workmen to remedy the defects, whereupon the plaintiff issued a writ for the sums witheld by the defendant and obtained an interim injunction prohibiting the defendant from carrying out any remedial work. The interim injunction was issued for a short period only in the first instance, to enable the plaintiff to have the stadium inspected by an expert, but the court was then asked to extend the injunction until the date of trial.

HELD

Dismissing the application:

1. To obtain an interim injunction a plaintiff must show that he was a good arquable claim, and that the balance of convenience favours the granting of an injunction; an interim injunction will not be granted if damages would be an adequate remedy, or if more harm will be done by granting it than by refusing it;
2. Under English law, which is applicable in Tonga under the Civil Law Act, a contractor has an obligation (and in most cases a right) to remedy defects which arise within the maintenance period; in this case since the defects would get worse unless remedial action were taken immediately, and since the defendant was willing to start work immediately while the plaintiff would only start work if the defendant paid the amount claimed by it, the interim injunction should not be continued until the trial but should cease after a further 3 days required to enable the plaintiff to complete its tests on the stadium.

Cases considered:
American Cyanamid Co. Limited v *Ethicon Limited* [1975] 1 All E. R. 504
London Borough of Hounslow v *Twickenham Garden Developments Limited* [1970] 3 All E. R. 326

Counsel for the plaintiff : Mrs F. Vaihu
Counsel for the defendant : Mr L. M. Niu

Judgment on Application for Interim Injunction

Backround

The plaintiff ("the Board") was subcontractor to the Defendant ("Herbreteau") for the construction of Teufaiva Outdoor Stadium at Nuku'alofa. On 19th September 1990 it issued a writ against the Defendant claiming.

(i) $156,180 in respect of the unpaid balance of the contract price (which includes $39,223 retention money), and

(ii) $41,180.00 in respect of extras.

The agreement provides for a "maintenance and guarantee period of 12 months from completion of head contract works." Practical completion was on 19th August 1989.

A dispute arose between the parties marked by apparently letters followed by long periods of inaction. The details do not matter at this stage. It is enough to say that the owner (the Government of Tonga) has complained of certain defects which it attributes to faulty design, and threatens to close the stadium as unsafe. Herbreteau blames any faulty work by the Board; and the Board blames the design and says that it has complied with the contract in all respects. Herbreteau refused to pay any more and sent a team to Tonga to carry out remedial work. The Board promptly obtained an interim injunction to prevent it from doing so.

Events relevant to this application are:

10.08.89: Practical completion;

27.12.89: Employer sends list of defects to Herbreteau;

08.12.89: Herbreteau sends list of defects to the Board;

10.04.90: Herbreteau requires the Board to submit a programme of remedial works by return, in default of which they will undertake the work themselves;

17.04.90: The Board replies that the building is unsafe and they will not carry out work inside until it is made safe; they will do other work on payment of the outstanding balance; and drawing attention to alleged design defects.

19.09.90: A team from Herbreteau arrives in Tonga to carry out remedial work; Writ issued;

20.09.90: Interim injunction granted restraining Herbreteau from carrying out any work.

The injunction was initially granted ex parte for one day; it was renewed until 24th September, and on that day extended to today to give the Board time to have the construction inspected by an independent engineer before any further work was done. This has now been done, save for exposing joints and taking a few samples, which can be done within a very short period. The time has come to decide whether the injunction should continue until trial.

The Law

An interlocutory injunction preserves the right of one party until trial. To obtain such an order the plaintiff must first show that he has a good arguable claim to the right he seeks to protect. Having established that, he must then show that the balance of convenience favours the grant of an injunction. An injunction will bot be granted if damages would be an adequate remedy, or if more harm will be done

by granting it than by refusing it. *(American Cyanamid Co. v Ethicon Ltd. [1975]* 1 All E.R. 504).

There is no Tongan Law relating to building contracts. By virtue of the Civil Law Act English law therefore applies. In English law contractor (and also a subcontractor) has the obligation, and in most cases the right, to make good at his own cost any defects which arise within the maintenance period. The contractor can normally do any such work at lower cost. Therefore if such work is carried out by others without the contractor being given the opportunity to do it, any addtional cost may not be recoverable from him.

The Arguments

The Board says that it has the right to carry out any necessary repairs, and that it is willing and able to do so – but not until it is paid what is claimed. Herbreteau says that the Board has already done some work which was indequate; and has failed to submit a programme of remedial work when asked to do so; it has been given the opportunity to do the work but has shown that it is unable or unwilling to do so. They therefore claim to be entitled to retain any money otherwise owned to the Board, cover the cost of such work.

These are all matters which can only be determined at the trial.

Conclusions

The only issue today is whether the injunction should be continued until trial. The Board says that delay will not make the situation any worse, and would not increase the cost of remedial work. Herbreteau says that delay will cause the damage to become worse. As a matter of common sense it seems likely that further ingress of water into the concrete structure will damage it further. The greater the delay the greater will be the cost of the work. I believe that remedial work needs to be done without further delay.

There are only two alternatives:

(1) discharge the injuction and allow Herbreteau to do the work, or

(2) continue the injunction to prevent Herbreteau from carrying out the work, provided the Board will do whatever is required.

It is irrelevant to argue, as the Plaintiff does, that to refuse the injunction would make it more difficult for it to obtain payment. Herbreteau is and will reimain resident out of the jurisdicxtion, in a state which has no agreement with Tonga for reciporcal enforcement of judgements. But that difficulty exists now, and would not be made any greater whatever order is made today.

There is a presumption that the Board should be allowed to do the work, but there is a substantial difference between the parties as to what work is required. Subject to receiving payment, or to the amount claimed being paid into court, the Board is willing to do certain work. Herbreteau thinks that much more extensive work is required. At this stage it is impossible to say which is right. It is possible that the work envisaged by the Board will suffice, but if they are wrong the more extensive repairs proposed by Herbreteau are more likely to correct any faults.

Counsel for the Board referred me to *London Borough of Hounslow v Twickenham Garden Developments Ltd* [1970] 3 All E.R. 326, which contains dicta suggesting that the public interest in completing a contract should not be allowed to override the rights of a contractor. In that case a contractor was on site and

the employer wanted to remove and replace him. The court would not grant a mandatory injunction unless fairly sure that plaintiff would succeed after a full trial. That case argues against the Plaintiff. Unless the Board can show that it is highly likely to succeed at trial, an injunction should not be granted. In this case there
150 is complete disagreement about the cause of the defects, and it is impossible at this stage to say that one party is more likely to succeed than the other. The Board has not shown such a strong case on its contractual rights that the injunction should be continued.

The priority is to have any necessary work done without further delay. Herbreteau will do more extensive work than the Board. They are prepared to do it now, and to argue later about who has to bear the cost. The Board wants to be paid before it will do any work at all. Herbreteau refuses to pay. If the injunction continues, no work will be done at all. On a balance of convenience, Herbreteau
160 should be allowed to do it. It can be determined at the trial what extra (if any) was necessary, and whether any deduction should be made from the sums due to the Board. But that should not prevent the work being done now. If the Board is right, it can be adequately compensated by damages and interest.

To allow time for the Plaintiffs consultants to complete their tests, the injunction made 20th September is continued until 5th October and discharged from 0001 hours on 6th October 1990. Since it is impossbile until trial to know which of the opposing views is correct, costs will be in the cause.