A2/2005/0567(B)

Neutral Citation Number: [2005] EWCA Civ 1444
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 4 November 2005

B E F O R E:

LORD JUSTICE MOORE-BICK

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THE RUGBY GROUP LTD

Claimant/Respondent

-v-

PROFORCE RECRUIT LTD

Defendant/Appellant

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(Computer-Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
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Official Shorthand Writers to the Court)

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MR DEREK SWEETING QC (instructed by L M Solicitors, Rugby) appeared on behalf of the Appellant

MR ROMIE TAGER QC (instructed by CEMEX UK Operations, Surrey) appeared on behalf of the Respondent

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J U D G M E N T

1. LORD JUSTICE MOORE-BICK: I have before me two applications by the respondent to the appeal: the first is for security for the costs of the appeal in the sum of just under £12,000; the second is for an order that the appeal be dismissed unless the appellant pay the costs that it was ordered to pay below in the sum of £37,086.31, including interest.
2. The appellant, ProForce, is an employment and recruitment agency carrying on business in the Rugby area. It provides skilled and unskilled labour and security services to businesses in its local area. One of those businesses is the Rugby Group, part of Cemex UK Operations Limited, which is in turn part of a large international group involved in the production and supply of building materials.
3. The dispute that has given rise to these proceedings arose out of a contract made in July 2001 between ProForce and Rugby for the supply of workers to carry out cleaning operations at one of its premises. That contract was to continue for a minimum of two years and to be renegotiable at the end of that period. It contained a term providing that during the period of the contract ProForce would hold what was described as "preferred supplier" status. Part way through the contract it appears that Rugby started to use other employment agencies to obtain temporary staff in addition to the staff being supplied under the agreement with ProForce. As a result, ProForce alleged that Rugby had broken the contract by failing to give it an opportunity as a preferred supplier to provide those additional workers.
4. As a result, a question arose as to the meaning of the expression "preferred supplier" in the contract, and whether the term related to all workers or only to cleaning workers. Rugby applied for summary judgment dismissing the claim on the grounds that it only referred to workers employed for cleaning services. Having heard the application, The Senior Master concluded that it was at least arguable that it amounted to an agreement to treat ProForce as a preferred supplier for all types of workers. He therefore concluded that the claim had a real prospect of success and dismissed the application.
5. Rugby appealed to the judge and at that stage took a new point, namely, that the agreement that ProForce would hold preferred supplier status only meant that if Rugby decided to maintain a list of preferred suppliers ProForce should be on that list. The judge, Field J, held that on the true construction of the agreement, and disregarding any negotiations between the parties which he held were inadmissible in accordance with the well-known decision of the House of Lords in Prenn v Simmonds [1971] 1 WLR 1381, the term did only amount to an agreement by Rugby to include ProForce in its list of preferred suppliers if it decided to maintain one. He held that since Rugby did not maintain such a list during the relevant period there was no breach of contract and he therefore gave judgment for the defendant and awarded Rugby its costs. He invited submissions on costs and, in a separate decision, summarily assessed Rugby's costs at £35,500. There is an appeal against his decisions both in relation to liability and in relation to the assessment of costs, permission having been given by Waller and Clarke LJJ on 24 May 2005.
6. Notwithstanding the judge's decision, ProForce failed to pay the costs or any part of them and indeed failed even to make any proposals to pay the costs. As a result, on 11 August 2005 Rugby started execution proceedings by fi.fa. to obtain payment. An attempt was made to resolve the dispute by mediation, but that failed. The sheriff then attended the offices at 44A Regent Street on 27 August.
7. In a witness statement made quite recently in opposition to the applications Mr Bloor, the managing director and chairman of ProForce, says that the sheriff attended the offices at 44A Regent Street, having been given the wrong instructions because ProForce had moved to

different premises at 36-38 Regent Street in July 2003. However, it appears from the sheriff's officers' report that although they did first attend at the offices at 44A Regent Street, they were redirected and subsequently attended at number 36-38 Regent Street. It therefore appears that, despite what Mr. Bloor has said, they did attend at the correct offices. When they arrived there they found office furniture which they thought was worth only about £600 and the attempted execution was suspended because the amount likely to be raised was not thought sufficient to cover the costs that would be incurred in the process.

8. On 31 August ProForce made an application for a stay of execution of the judgment for costs which was supported by a witness statement made by its solicitor, Mr Miles. He put forward some assertions about the company's financial position, but he did not go very far in that direction and his statement is not supported by any documentary evidence. In the event, however, that application was dismissed by consent on 5 October and the costs were reserved to the next hearing.

9. On 28 September Rugby made the present application. Its first application is that ProForce should be ordered to provide security for costs under CPR Rule 25.13(2)(c), which provides that the court may order a limited company to provide security for costs if there is reason to believe it will be unable to pay the costs of the other parties to the appeal if it is ordered to do so.

10. The basis for the application was that the Sheriff had failed to find any assets of any significant value when his officers attended to execute with fi.fa. and that the then accounts for the company (made up to 31 August 2003) showed only a small amount of cash at the bank.

11. Notwithstanding that, in his witness statement made in August this year in support of the application for a stay of execution, Mr Miles said, somewhat surprisingly it seems to me, that ProForce could pay the costs order made against it. Indeed, he says the same in the second witness statement he made in September in opposition to this application for security.

12. That was how the position stood until the end of October when Mr Bloor made his witness statement which puts forward additional information about the company's position. In that statement he explains that ProForce has entered into a factoring agreement with its bank, HSBC, under which its book debts are effectively sold to the bank and funds are drawn down into a current account as they are needed for wages and other expenses. Otherwise, he says, the funds are held to the company's credit. He has exhibited, amongst other documents, a client statement from HSBC which shows that, as at 30 September 2005, the discounting accounts stood at £653,501.14 and a current account stood at £114,692.22 credit.

13. Mr Tager QC, who appeared on behalf of Rugby, submitted that this statement from the bank was not a bank statement in the ordinary form that one would expect to see, but it seems to me to bear out the evidence given by Mr Bloor and to support the conclusion that the company did at that date have quite significant funds available to it.

14. Mr Bloor explains that the company has funded the present litigation from its operating income, treating the cost as part of its ordinary administration expenses, and that in addition it has a facility of £50,000 with its bank for the purposes of funding the litigation which is so far untouched.

15. Mr Bloor has exhibited to his witness statement parts of the company's accounts for the years ending 31 August 2003 and 31 August 2004. For some reason he has not chosen to exhibit the whole of those accounts, but the part which he has exhibited does enable one to obtain some insight into the company's financial position. The 2005 accounts have not yet

been prepared, but he says he would expect to see a turnover of approximately £3.63 million and a net profit of £78,000. He also says that the company owns through a subsidiary its current premises at 36-38 Regent Street, which comprise two substantial period buildings. However, he gives no evidence about the nature of the interest in those buildings or the extent to which they had been purchased on mortgage or with other financial assistance. Thus it is impossible for the court to ascertain the extent of the company's financial interest in those buildings.

16. Mr Tager has pointed out quite rightly that the accounts for 2003 and 2004 were both filed very late, and that it ought to have been possible for ProForce to produce management accounts and other documents in support of Mr Bloor's evidence which would enable the court to understand much more clearly the company's financial position.

17. If this were a case in which ProForce were saying that an order for security for costs would stifle its appeal, I would of course expect it to have given very full disclosure of its financial position in order to enable the court to see that that was indeed the case. But that is not this case. It is for the applicant on an application of this kind to show the court that there are reasonable grounds for believing that the company will be unable to pay the costs of the other parties to the appeal if it is ordered to do so; and in those circumstances the court does not expect the company to go as far as it might need to under other circumstances.

18. Mr Tager has also pointed out that this is a case in which there were quite substantial interest free loans to the directors and he suggested that, together with the approach to the accounts, that suggests that those responsible for managing the company are prepared to take a somewhat cavalier approach to their obligations. I do not go so far as to draw that conclusion and I do not need to. It seems to me that the question that I have to consider on an application for security is whether there are sufficient grounds for thinking the company will be unable to pay any order for costs made against it on the appeal. It seems to me from the evidence before me that that is not made out for the reasons that I have already indicated.

19. The second application is for an order that ProForce should pay the order for costs made by Field J below by a date in advance of the date fixed for the hearing of the appeal and that in default the appeal should be dismissed. The position, as I have already indicated, is a curious one, since both Mr Miles on two earlier occasions and Mr Bloor in his own witness statement have affirmed that the company is well able to pay the order for costs. Indeed, Mr Sweeting QC, who appears on ProForce's behalf this morning, accepts that that is the case. In the end, he has reminded me that the court gave permission to appeal not only against the judge’s substantive decision on liability, but also against his order for costs, which he quite rightly said is somewhat unusual. Nonetheless, I do not think that that is sufficient to take the case out of the ordinary run of the mill for these purposes. In the ordinary way the court expects a judgment to be honoured unless the judgment debtor can show good reasons why there should be a stay of execution pending appeal. That is the position in relation to a judgment for payment of a sum by way of damages and I see no reason why it should be different in relation to a judgment for costs.

20. Ultimately, the submissions made by Mr Sweeting come down to this: since the appeal is likely to be heard within the next month, the court should adopt what he called a pragmatic solution and not require ProForce to pay the costs because it is, he submitted, quite likely that it will succeed in its appeal and some part of those costs, or perhaps all of them, will have to be repaid.

21. I do not find that a very attractive argument coming from a company which not only

asserts that it has the ability to pay these costs ordered against it but relies on its ability to pay those costs as a ground for not having to give security for the costs of appeal. The rules provide that the court may attach conditions to a grant of appeal, or may impose conditions on the hearing of an appeal, if there are compelling reasons to do so.

22. In Hammonds Suddard Solicitors and Agrichem International Holdings [2001] EWCA Civ 2065 the court considered just this question in relation to the payment of costs. In that case the company concerned was a company registered in the British Virgin Islands with no assets in the United Kingdom and to that extent the case differs from the present. But the thrust of the court's conclusion in paragraphs 41(6) and 48 is that a party should meet judgments for costs as the proceedings progress and that it is in general unacceptable that an appellant should be pursuing an appeal while at the same time disobeying orders of the court in relation to existing liabilities for costs.

23. In my view, it is right in this case that ProForce should pay the order for costs below, and I will hear counsel further as to the appropriate order to make in that respect.

24. (Application for security for costs dismissed; order for payment by appellant of an interim sum on account of costs in the sum of £35,000 by 14 November, failing which appeal to stand dismissed).