JUDGMENT : JUDGE COULSON: TCC. 9th February 2007

Introduction

1. There are before me two applications by Hart against Larchpark. The first is an application for security for costs in respect of Larchpark's counterclaim, with an order that the counterclaim be stayed until security is provided. The second is an application that Larchpark's counterclaim be stayed as a result of their failure to make two payments in accordance with specific court orders. The applications are opposed.

2. The history of this matter is set out in paragraphs 1 and 2 of my Judgment of 3rd November 2006 ([**2006**] **EWHC 2857 TCC**), dealing with the setting aside of the default judgment entered against Larchpark on 31st July 2006 and my refusal to enforce the adjudicator's decision in Larchpark's favour of 18th April 2005. In essence, Hart's principal claim against Larchpark, which is also made against the engineer, Mr. Fidler, is in respect of the collapse of the property on which Larchpark were working in February 2004. The damages claimed in relation to that collapse are estimated in a sum of over £1 million. Hart has a separate, smaller claim, to the effect that, from September 2004 to January 2005, Larchpark were trespassing on the site. Larchpark's counterclaim was originally based solely upon the adjudicator's decision. As a result of my order of 3rd November 2006, Larchpark were obliged to re-plead their counterclaim for money due for works done for Hart at the property. It is in respect of this amended counterclaim that Hart seeks security for costs.

3. Given its importance to these applications, I propose to outline the nature of Larchpark's amended counterclaim, and Hart's defence to it, before considering the principles relevant to an application for security for costs of this kind. I then go on to consider the various factors relevant to the exercise of my discretion. I also deal briefly with the second application relating to Larchpark's failure to comply with specific court orders.

Larchpark's amended counterclaim and Hart's reply

4. The essential features of Larchpark's counterclaim are as follows:
   (a) They carried out work pursuant to a contract with, or at the request of, Hart and/or their agents, Chinmans, from November 2002 to September 2004;
   (b) The vast bulk of the work for which a claim is now made was carried out after the collapse on 5th February 2004. It is that collapse which lies at the heart of Hart's claims against Larchpark and Fidler;
   (c) Work to the value of £180,639 was certified by Chinmans in post-collapse valuation documents dated 8th March 2004, 16th July 2004, 20th August 2004 and 20th September 2004. Less than half this sum has been paid by Hart;
   (d) Larchpark's counterclaim for work done is in the total sum of £132,490.57.

5. Hart's defence to this claim emphasises the following:
   (a) That the collapse in February 2004 was the result of Larchpark's breaches of contract;
   (b) That the contract came to an end in September 2004;
   (c) That the sums claimed were not due because they included profits, establishment costs and provisional sums and such claims were excluded by the letters on which Larchpark rely as giving rise to the contract and/or do not properly form part of a quantum meruit claim;
   (d) That, despite requests, Larchpark have failed to produce any material which might justify a claim for that quantum meruit.

6. I am not sure that the response to the counterclaim always grapples with the detail of Larchpark's new case. For example, Hart argue that Chinmans' documents were valuations, not certificates. That may well be right, but I do not think that this affects the point that, on the face of it, Hart's agent was valuing Larchpark's work in sums that were higher than those Hart chose to pay. Furthermore, I regard the suggestion that some of the items of claim were excluded by the original letters of intent as being difficult to sustain, in circumstances where, so it seems to me, this claim is likely to be resolved on some sort of quantum meruit basis. Furthermore, as to the valuations, I would have thought that Hart can do rather better than to say, as they do at paragraph 32 of their defence and counterclaim, that they simply do not admit the amount of Chinmans' valuations.

7. In the round, therefore, it seems to me that a sum will be due from Hart to Larchpark for the work carried out on site. However, I am quite unable to say what that sum would or might be or what proportion of the £130,000 claimed it might comprise. In addition, I am acutely aware that:
   (a) Hart have repeatedly complained in correspondence, and make the same point in their pleading, that Larchpark have substantially failed to provide any documentary material to support the claims now being made;
   (b) A full investigation before and at the trial of the detail of the counterclaim will be potentially time-consuming and expensive, unless there are careful case and trial management directions. Moreover, that investigation will not be required for the purposes of Hart's principal claim for damages arising out of the collapse;
   (c) If Hart are successful in the claim against Larchpark in relation to the collapse, then either Larchpark will have no entitlement at all to the monies due on the counterclaim, or, if they do, Hart's claim for damages will still overtop to a significant extent the real value of Larchpark's counterclaim.

Principles relating to security for costs

8. Section 726(1) of the Companies Act 1985 provides as follows: *"Where in England and Wales a limited company is plaintiff [claimant] in an action or other legal proceeding, the Court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the defendant's*

costs if successful in his defence, require sufficient security to be given for those costs and may stay all proceedings until the security is given."

9. Even if there is credible testimony of the inability to pay, the court has a discretion whether or not to order security. The relevant factors in the exercise of that discretion were listed by Lord Denning MR in ***Sir Lindsay Parkinson & Co. v. Triplan*** [1973] QB 609. The matters there listed which are relevant to this particular application include:
   (a) Whether the counterclaim has a reasonably good prospect of success;
   (b) Whether the application for security is being used oppressively so as to stifle a genuine claim;
   (c) Whether the claimant's want of means has been brought about by the conduct of the defendant, such as delay in payment or in doing their part of any work;
   (d) Whether the application for security is made at a late stage of the proceedings.

10. Other authorities which have some bearing on the present application for security are:
   (a) ***Aquila Design (GRB) Products Limited v. Cornhill Insurance plc*** [1988] BCLC 134, where the Court of Appeal held that, where an order for security for costs against the claimant company might result in oppression, in that the claimant company would be forced to abandon a claim which has a reasonable prospect of success, the court is entitled to refuse to make that order notwithstanding that the claimant company, if unsuccessful, will be unable to pay the defendant's costs.
   (b) ***Keary Developments Limited v. Tarmac Construction Limited*** [1995] 3 All E.R. 534, where the Court of Appeal held that, before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that in all the circumstances it is probable that the claim would be stifled.
   (c) ***Kufaan Publishing Limited v. Al-Warrack Bookshop Limited*** March 1st 2000, where the Court of Appeal held that, in all but the most unusual cases the burden lies on the claimant company to show that, apart from the question whether the company's own means are sufficient to meet an order for security, there will be no prospect of funds being available and forthcoming from any outside source.

11. Because this application is for security on a counterclaim, it is also right to note two authorities relied on by Mr. Quiney on behalf of Larchpark which deal with the relevance of the relationship between claim and counterclaim. They are:
   (a) ***Neck v. Taylor*** [1893] 1 QB 560, in which Lord Esher said: *"Where, however, the counterclaim is not in respect of a wholly distinct matter but arises in respect of the same matter or transaction upon which the claim is founded, the Court will not, merely because the party counterclaiming is resident out of the jurisdiction, order security for costs."*
   (b) ***Hutchinson Telephone UK Limited. v. Ultimate Response Limited*** [1993] BCLC 307, in which Bingham LJ (as he then was) said: *"At that point, one moves on to the largely discretionary area. The trend of authority makes it plain that, even though a counterclaiming defendant may technically be ordered to give security for the costs of a plaintiff against whom he counterclaims, such an order should not ordinarily be made if all the defendant is doing, in substance, is to defend himself. Such an approach is consistent with the general rule that security may not be ordered against a defendant. So the question may arise, as a question of substance, not formality or pleading: is the defendant simply defending himself or is he going beyond mere self-defence and launching a cross-claim with an independent vitality of its own?*
   It seems to me that Field J. put his finger on the appropriate question when he pithily observed in ***Mapleson v. Masini*** (1879) 5 QBD 144 at 147: 'The substantial position of the parties must always be looked at.'"

Larchpark's financial position

12. Larchpark are in liquidation. The liquidator has admitted in his statement of 16th June 2006 that Larchpark would be unable to pay Hart's costs if the counterclaim failed. Accordingly, the necessary test under s.726 has been made out.

The exercise of discretion

13. I deal with the exercise of the court's discretion by reference, first, to the counterclaim point (sub-paragraph **(a)** below). I then go on to consider the four relevant factors extracted from ***Sir Lindsay Parkinson*** (sub-paragraphs **(b)** to **(e)** below). I also consider two other points that have arisen in argument in sub-paragraph **(f)** below. My conclusion is then set out in sub-paragraph **(g)** below.

(a) Counterclaim

14. In my judgment, the counterclaim raised by Larchpark has an independent vitality of its own. It does not arise as a matter of defence either to the collapse claim, which focuses solely on the events of 5th February 2004, or to the trespass claim, which focuses on the period after the contract came to an end in September 2004. It is true, as Mr. Quiney points out, that claim and counterclaim arise out of Larchpark's work on site. But it seems to me that what matters, in accordance with the authorities, is what has been called "the substantial position of the parties". The substantial position of the parties seems to me to be that, on the main claim, which may be determinative of the whole litigation, Hart will be looking at the relevant events in February 2004 and endeavouring to explain by reference to expert evidence how the collapse came about and how and why that collapse can be said to be the responsibility of Larchpark and/or Mr. Fidler. That will have nothing whatsoever to do with the detail of Larchpark's counterclaim and whether or not, for example, they are entitled to be paid for two, rather than four, scaffolding boards on a date in June 2004. In other words, Larchpark's cross-claim is a claim for the value of

work done over a lengthy period and is nothing to do, in substance or in fact, with their defence to the collapse claim.

15. I was initially troubled by the suggestion that, unlike the collapse claim, the separate trespass claim maintained by Hart was bound up with Larchpark's counterclaim. This was because it seemed to me that, if the trespass claim and Larchpark's cross-claim covered the same period, there might well be an overlap as to what it was that Larchpark were doing on site at the time.

16. However, having considered the documents in detail, I have concluded that, in fact, there is no such overlap. Larchpark's counterclaim is in respect of work done up to September 2004. Although there is a reference in the pleading to a later invoice of December 2004, Mr. Quiney properly accepted that that relates solely to a claim for retention: in other words it relates to a further claim for money due, but in respect of work done some time before the invoice. Hart's claim for trespass only starts in September 2004. There is therefore no factual link between those two claims, and they do not overlap at all. Thus I have concluded that the counterclaim has an entirely independent life from, and is irrelevant to, the substance of Larchpark's defence to Hart's claims. The counterclaim is therefore susceptible in principle to an application for security.

(b) Reasonable prospect of success

17. I have already said that, on the documents before me, I consider that, subject to the provision of proper proof, it is more likely than not that Larchpark will recover something from Hart. However, as I have also said, I cannot say what they will recover, and I do know that the counterclaim will be potentially time-consuming and expensive to resolve by way of conventional litigation. At this stage, it seems to me that the most that can be said is that it is likely to give rise to an amount due to Larchpark. If Hart's collapse claim is successful, then the counterclaim will simply operate as a reduction in the damages otherwise due to Hart.

18. Whilst I am prepared to assume that Larchpark's counterclaim has a reasonable prospect of some success, I make the same assumption in respect of Hart's main claim, relating to the collapse. Indeed, it seems to me that this is an inevitable assumption on the evidence as it presently stands. As I pointed out to Mr. Quiney in argument, it is a conclusion that I reached as part of my Judgment on 3rd November 2006 when I said: *"A claim which blames a catastrophic collapse of a part of a property on the builder who had excavated the ground next to the property immediately before the collapse cannot fairly be categorised as fanciful or speculative."*

Thus it seems to me that the question of the parties' respective prospects of success becomes an entirely neutral factor in the exercise of my discretion on the application for security for costs.

(c) Stifling a genuine claim

19. On behalf of Hart, Mr. Joseph submits that it is not directly alleged that the counterclaim would be stifled if security is ordered, and he says that there is no evidence to that effect. Therefore, on the authorities of ***Keary*** and ***Kufaan***, he submits that this argument is not even open to Larchpark. He points to the fact that somebody is continuing to fund Larchpark's position in this litigation, and therefore it by no means follows that an order for security means that the counterclaim would be stifled.

20. In all the circumstances, I consider that Mr. Joseph's submissions are correct. It is right that nowhere in Mr. Anwar's statements is there a statement to the effect that, if security were ordered, the counterclaim would be stifled, and/or that funds could not be provided from elsewhere. Thus, in the present case, the sort of evidence required by the court in ***Keary*** and ***Kufaan*** is simply not available. I therefore decline to find that an order for security would lead to a stifling of the claim.

(d) Responsibility for Larchpark's financial position

21. It is Larchpark's case that their financial position has been caused, or at least been significantly contributed to, by Hart. In the liquidator's evidence he says that Hart's failure to pay up on the adjudicator's decision was the cause of Larchpark's insolvency. It seems to me that that evidence has to be rejected for a number of reasons.

22. First, an examination of the chronology demonstrates that the point cannot be right. The meeting of creditors which decided to place Larchpark in liquidation took place on 16th February 2005, which was before the adjudication had even started, and over two months before the adjudicator published his decision. Therefore, I accept Mr. Joseph's submission that the adjudication was ultimately irrelevant to Larchpark's liquidation.

23. The more important point, it seems to me, relates to Larchpark's overall financial position in February 2005. There is a useful document in the evidence which is entitled "Approximate statement of affairs as at 16th February 2005." This is the best evidence of Larchpark's financial position at the time when they went into liquidation. By comparing that document with the earlier accounts, a number of points can be made.

24. First, it seems clear that, as at February 2005, Larchpark had other contracts and other creditors and debtors. By reference to the statement of affairs, it seems that, by February 2005, Larchpark accepted that they owed £153,805 to creditors including the Revenue. It is also apparent from other documents that there were a number of unsatisfied County Court judgments against Larchpark. There was nothing to suggest on the face of the papers that these increasing financial difficulties were anything to do with Hart.

25. I made the point to Mr. Quiney during argument that, often on applications of this sort, statements of affairs like this make clear that the company's financial difficulties can be linked back to one particular contract that might have gone wrong. Indeed, the party seeking security is often named in the document as the party responsible for the financial difficulties. Neither of those factors exists here. There is nothing on the face of the approximate

statement of affairs which demonstrates that Hart were or could be responsible for Larchpark's financial difficulties.

26. Second, on the evidence I find that Larchpark's financial difficulties were just as likely, if not more likely, to have been self-inflicted, particularly because:
    (a) Some time prior to February 2005, the directors withdrew £104,697 from their loan account, because no such asset was shown in the statement of February 2005, although the amount is demonstrated in the accounts for 2004. Mr. Quiney is quite right to say that the directors were entitled to take that money out, but, given the relatively modest sums with which the counterclaim is concerned, and given that even the adjudicator's decision was only worth £128,000-odd, it is not difficult to conclude that the withdrawal of the money from the loan account was just as causative (if not more so) of Larchpark's difficulties as Hart's alleged failure to pay the sums said to be due;
    (b) Also by February 2005 it appears that the directors withdrew an additional £56,544, because that was demonstrated in the 2004 accounts as being retained profits, but was not shown on the face of the statement of affairs of February 2005. Again therefore, it seems to me that, although that money was capable of being withdrawn by the directors, it is another relevant factor for me to take into account in concluding that there is just as much (if not more) evidence to demonstrate that Larchpark's financial position was the responsibility of its own directors as the responsibility of Hart.

27. It is a little difficult not to conclude from all the evidence that, by late 2004/early 2005 Larchpark's directors saw some of these impending difficulties and decided to take what was theirs before a liquidation that, by February 2005, was looking increasingly inevitable. It is also right to note in connection with this point that one of the directors, Patrick Ryan, had a record for such conduct, and there was a caution, identified in the company search, that he had held five or more directorships in companies which had been wound up or gone into administration. That again seems to me to be a relevant factor in the exercise of my discretion.

28. Therefore, for these reasons, I reject the suggestion that Larchpark's financial difficulties were the responsibility of Hart. In my judgment on the evidence, they were just as likely, if not more likely, to have been self-inflicted.

(e) Timing of application

29. Whilst it is true that the trial is due to start later next month, it must be noted that the application for security was first made as long ago as 20th July 2005 in the Romford County Court and has been adjourned for various reasons as the litigation has changed direction, and eventually been transferred to the TCC. Moreover, the amended counterclaim against which the security application is now made was only formulated in December 2006. In all those circumstances, I do not accept that the application can be said to have been made late. To be fair to Mr. Quiney, this was not a submission that he made before me this afternoon, but there is a suggestion of it in one of Mr. Anwar's statements, which is why I deal with and dismiss it now.

(f) Other matters

(i) Larchpark's failure to comply with orders

30. As noted above, Hart have a separate application to stay the counterclaim as a result of:
    (a) Larchpark's failure to pay the court fee for their counterclaim of £900. This sum has been outstanding for over a year and, despite chasers, has never been paid;
    (b) Larchpark's failure to pay the sum of £900 in respect of Hart's costs of an earlier application, which I ordered them to pay in the autumn of last year.

31 Hart submit that these failures are all of a piece with Larchpark's failure to conduct the litigation properly, their refusal to pay any costs unless absolutely forced to do so, and is a sign of the sort of difficulties that they will experience if they do not get security on the counterclaim.

32. I accept Hart's submissions on that point. I do think that Larchpark have added to the cost of this litigation by their failure to comply with other orders of the court. It is important for all parties to litigation to ensure that they comply with court orders. In this case Larchpark not only defend the claims made against them but seek to run their own counterclaim. In those circumstances, it is even more important that Larchpark ensure that they comply with the orders of the court. It therefore seems to me that the failure to pay these two, albeit modest, sums is again a matter which I should take into account in the exercise of my discretion.

(ii) Timing

33. The final point relevant to the exercise of my discretion is this. Mr. Quiney argues that if, as may well be the case, the trial next month is concerned solely with the collapse claim, and that that trial may be determinative of the case as a whole, it would be wrong at this stage to order security on the counterclaim. Mr. Joseph's riposte to that was to say that, if it was otherwise appropriate for security to be ordered, it would be wrong not to order security just because the counterclaim may not be tried for some months.

34. I have concluded that Mr. Joseph's submission must be right. If, in the exercise of my discretion, an order for security on the counterclaim is appropriate, it cannot matter when the counterclaim is actually heard.

(g) Summary

35. In all the circumstances set out above, I have concluded that I should exercise my discretion in favour of Hart and order Larchpark to provide security for costs on the counterclaim. It is a wholly separate claim. Whilst the factors

going to discretion at sub-paragraphs **(b)** and **(e)** above are neutral, my findings at sub-paragraphs **(c)**, **(d)** (in particular) and **(f)** lead me to conclude that I should grant the order sought.

Amount of security/Form of order

36. Security is sought on the counterclaim in the sum of £75,420. In my judgment, that sum is not properly supported by the evidence. Moreover, I regard it as excessive. In the light of a counterclaim that is worth at most £130,000-odd, this court would ensure by careful case and trial management that the parties did not spend more than, say, £25,000 each on the counterclaim. Otherwise the trial of the counterclaim would become a completely futile exercise, with the costs being larger than the amount at stake.

37. Accordingly, I consider on an entirely broad-brush basis that the right figure for security for costs on the counterclaim is £25,000. I consider that this sum is neither illusory nor oppressive, and is fair and reasonable in all the circumstances of the case in accordance with the test formulated as long ago as ***Dominion Breweries v. Foster*** [1897] 77LT 507.

38. This sum of £25,000 must be paid into court within 14 days. Until it is paid, the counterclaim is stayed. That may have little practical effect for the foreseeable future if the parties are now concentrating on the trial of liability for the collapse, due to take place next month.

39. In the light of those findings, it is unnecessary for me to consider in any detail the separate application to stay the counterclaim because of the failure to pay the two sums of £900. I order that those two sums of £900 should also be paid within 14 days and that, again, the counterclaim will be stayed until those two sums are paid.

MR. C. JOSEPH (instructed by Hunt & Hunt, Romford) appeared on behalf of the Claimant.

MR. B. QUINEY (instructed by Ellis Taylor) appeared on behalf of the Second Defendant.