

Neutral Citation Number: [2023] EWHC 1483 (TCC)

Case No: HT-2022-000444



IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: Friday 16th June 2023

Before :

MR ROGER TER HAAR KC

Sitting as a Deputy High Court Judge

Between:

J & B HOPKINS LIMITED

Claimant

- and -

A & V BUILDING SOLUTION LIMITED

Defendant

AND

Case No: HT-2023-000006

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice

Date: 16 June 2023

Between:

A & V BUILDING SOLUTION LIMITED

Claimant

- and -

J & B HOPKINS LIMITED

Defendant

James Frampton (instructed by **Hawkswell Kilvington**) for the **Claimant**
Alex Paduraru (a director of the Defendant Company) for the **Defendant**.

Hearing date: 1 June 2023

APPROVED JUDGMENT

This judgment was handed down by the court remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 16 June 2023 at 10.30am

Mr Roger ter Haar QC :

1. There are two actions before the Court arising out of disputes in respect of the same project.
2. The first of those two actions in time (“Action 444 of 2022”) was brought by J & B Hopkins Limited (“J&BH”) to enforce an adjudication decision of Mr Smith dated 6 July 2022 (“the Smith Decision”). In a judgment handed down on 15 February 2023 I granted summary judgment in the sum of £96,918.88.
3. The second of those two actions (“Action 6 of 2023”) was brought by A & V Building Solution Ltd (“A&V”) and claims various sums from J&BH as I discuss in more detail below.
4. There had previously been a third action started by J&BH in which J&BH challenged the legal basis of a decision of a different adjudicator, Mr. Blizzard. Mr. Blizzard produced a decision dated 19 January 2022. The action started as a pre-emptive strike before Mr. Blizzard had produced his decision. That action (“Action 464 of 2021”) was first decided by Eyre J. in a judgment dated 12 April 2022, but an appeal to the Court of Appeal was substantially successful ([2023] EWCA Civ 54).
5. The matters presently before me are as follows:
 - (1) To determine the amount of interest to be awarded in J&BH’s favour in action 444 of 2022;
 - (2) To determine the appropriate award of costs in action 444 of 2022;

- (3) To determine A&V's application for a stay of execution in action 444 of 2022;
- (4) To determine J&BH's application for a stay of action 6 of 2023 until the enforcement judgment in action 444 of 2022 has been complied with;
- (5) To determine J&BH's application for summary judgment and/or a strike out of the Claim Form in action 6 of 2023;
- (6) To determine J&BH's application for security for costs in action 6 of 2023;
- (7) To determine A&V's application for Judgment in Default to be entered for A&V against J&BH in the sum of £370,611.63.

Background

6. The background to what I have to consider in this judgment is largely set out in the judgment of the Court of Appeal referred to above and in my judgment in action 444 of 2022 ([2023] EWHC 301 (TCC)). I summarise that background briefly here.
7. J&BH was the mechanical and electrical contractor for a project at the University of Sussex. By a subcontract dated 18 December 2019, J&BH engaged A&V to carry out certain mechanical works only, as per the Subcontract Scope of Works.
8. A&V's works were delayed. A&V says that this was the result of sundry breaches of the subcontract on the part of J&BH. A&V's complaints are described in paragraphs 13 and 21 of my previous judgment.

9. Towards the end of A&V's time on site it submitted interim applications for payment. In particular A&V made an Application No. 14 on 22 March 2021. J&BH responded to the application, setting out its valuation and concluding that, in its view, no further sums were due to A&V.
10. On 17 November 2021 A&V commenced an adjudication based on its Application No. 14. This was the adjudication determined by Mr. Blizzard.
11. On 19 January 2022 Mr. Blizzard issued his decision. He decided that a further Interim Payment was due from J&BH to A&V in the sum of £138,010, excluding VAT. He also ordered J&BH to pay A&V 50% of his fees of £29,000 plus VAT, namely £14,500 plus VAT.
12. Meanwhile, on 2 December 2021, at a time when the adjudication was still ongoing, J&BH issued Part 8 proceedings ("action 464 of 2021"), seeking declarations as to the invalidity of application No. 14.
13. On 12 April 2022 Eyre J. made an order in action 464 of 2021 as follows:
 - (1) Declaring that:
 - a) Application 14 was not a valid payment application under the Sub-Contract because it was issued too late;
 - b) Payment Notice 14 was a valid payment notice under the Sub-Contract;
 - c) [A&V] was not entitled to any payment in respect of Application 14.

(2) Ordering A&V to pay J&BH's costs of the proceedings summarily assessed in the sum of £27,750.

14. A&V now commenced a further adjudication seeking in its Notice of Adjudication as its primary relief:

“The Adjudicator is requested to review and decide the matters pertaining to the Referring Party's claim for the breaches and subsequent Final Account for outstanding monies/late payment considered due for the works to the Moulescoomb project in the sum of £455,526.53 plus VAT or other such sums as the Adjudicator shall determine”

15. The Adjudicator in this second adjudication was Mr. Don Smith. He issued his Decision on 6 July 2022. As set out in my previous judgment, he decided that A&V had been overpaid and ordered A&V to pay £82,956.88 to J&BH and, in addition, ordered A&V to pay his fee of £13,962 and decided that, in the event A&V failed to pay his fee and J&BH was obliged to make payment, J&BH was entitled to recover the sum paid as part of his Decision.
16. A&V appealed against Eyre J.'s order in action 464 of 2021. Argument in that appeal was heard on 17 January 2023 and judgment was delivered on 27 July 2023. The appeal was successful to the extent that declarations 1(a) and 1(b) made by Eyre J. were quashed and his order as to costs was set aside.
17. Before that appeal was heard, J&BH issued action 444 of 2022 seeking to enforce Mr. Smith's Adjudication Decision. The enforcement application in that action came before me on 19 January 2023. I reserved judgment: judgment

was handed down on 15 February 2023. I granted J&BH summary judgment in the sum of £96,918.88.

18. On 23 February 2023 A&V issued an application seeking a Stay of Execution of my judgment in action 444 of 2022.
19. On 9 January 2023 A&V issued action 6 of 2023. I refer below to the relief sought in that action and the subsequent applications made by J&BH.
20. As set out at paragraph 5 above, there are a number of matters to be determined in both action 444 of 2022 and 6 of 2023. On 27 February 2023 Eyre J. ordered that all the applications should be listed for hearing at the same time. He also gave directions as to the filing and service of evidence.

Interest in action 444 of 2022

21. In his skeleton argument for the hearing before me on 1 June 2023 Mr. Frampton on behalf of J&BH sought a total of £119,786.97 or £118,565.20 including costs.
22. The difference in figures turns upon whether interest is awarded under the Late Payment of Commercial Debts (Interest) Act 1998 or under the Senior Courts Act 1981, the latter producing a slightly lower figure.
23. In argument before me, Mr. Frampton conceded that in this case the appropriate basis for the award of interest would be under the 1981 Act, and that is the basis upon which interest will be awarded. The amount claimed by J&BH on that basis appears to be appropriate.

J&BH's costs in action 444 of 2022

24. It is the practice of this court to award costs of successful adjudication enforcement applications upon the indemnity basis.
25. The amount claimed by J&BH is £20,822. Whether on the standard basis or on the indemnity basis this seems to me a reasonable sum, and I assess the amount of costs payable by A&V to J&BH as the costs of action 444 of 2022 in that sum. The costs of the application for a stay of execution are not included in that sum.

A&V's application for a stay of execution in action 444 of 2022

26. As set out above, A&V seeks a stay of execution of the judgment which I have given in action 444 of 2022.
27. The application is supported by a short witness statement from Alexandru Padurura, a director A&V (who represented A&V at the hearing before me on 1 June 2023).
28. The relevant part of that statement is very short and reads as follows:

“2. This Witness Statement is made in support of the Defendant's Application for a Stay of Execution of the Approved Judgment [HT-2022-000444] dated 15 February 2023.

“3. I make this Statement from the facts and matters within my own knowledge, which are contained within the files maintained by the Defendant in respect of this matter. Where I refer to facts and matters outside my own knowledge, I identify the source of those facts and matters. I confirm that the contents of this Statement are true to the best of my knowledge and belief.

“4, I make this statement to support that everything [which] is stated in the Defendants [A&V] submissions in relation to the Approved Judgment and Cost is true.”

29. The submissions referred to in that statement refer to five Grounds as follows:

“Ground 1:

“**Pending** the outcome of the High Court “Sealed” Claim Number – HT-2023-000006 [Judgment in Default] [**please refer to appendix 1 below**] which was duly served on the Claimant [JBH] on 1st of February 2023, an acknowledgment of service was issued on 2 February 2023 by JBH legal representatives [**please refer to appendix 2 below**] and JBH’s Defence to A&V’s claim is due to be provided by 1 March 2023.

“Ground 2:

“The Defendant is unable to pay to the Claimant the judgment sum of £110,880.88 if ordered to do so [**please refer to appendix 3 below**]

“Ground 3:

“The Defendant will be forced to stop trading and go into insolvency if ordered to pay the judgment sum of £110,880.88 [**please refer to appendix 4 below**]

“Ground 4:

“The Defendant cannot afford to refer this dispute to a Court of Arbitration if A&V must pay the summary judgment first in the sum of £110,880.88.

“Ground 5:

“The Defendants’ rights and the fair opportunity to refer this dispute to a Court of Arbitration will be prevented if A&V must pay the summary judgment sum first.”

30. I refer below in more detail to the Appendices referred to in those Grounds. It is to be noted that Ground 1 links the application for a stay of execution to action 6 of 2023. In those circumstances it is necessary to explain what A&V seeks in action 6 of 2023, and also J&BH’s responsive applications.

The Claim Form in Action 6 of 2023

31. The first page of the Claim Form in action 6 of 2023 sets out A&V's claim as follows:

“Brief details of claim

“1. The Claimant issued its Letter of Claim dated 2 December 2022 in accordance with Pre-Action Protocol for Construction and Engineering Disputes via email and post on 2 December 2022.

“2. The Letter of Claim was received by the Defendant on 5 December 2022 via the post office.

“3. The Defendant acknowledge[d] receipt of the Letter of Claim via email on 16 December 2022.

“4. In Accordance with paragraph 8.5 of the Protocol the Defendant should have [sent] a letter of response to the Claimant within 28 days from the date of receipt of the Letter of Claim (on or before 2 January 2023)

“5. Today's date is 9 January 2023 (7 days behind the allowed timeframe) and the Defendant has not provided any Response, Defence or Counterclaim. The Defendant failed to comply with the Protocol.

6. The Defendant has not complied with the Protocol. It has made no payments to the Claimant in respect to the Final Account.

“The Claimant therefore seeks Judgment in Default to be entered against the Defendant.

“Value

“1. £276,917.63 plus VAT and Court Fee (sum due for the Final Account of the Sub-Contract)

“2. £34,800 (sum due for [Adjudicator] Mr Keith Blizzard for Adjudication 1)

“3. £9,600 (legal cost incurred by the Claimant in Part 8 proceedings related to Final Account)

“4. £7,140 (legal cost incurred by the Claimant in Enforcement proceedings related to Final Acc)

“5. £21,840 (legal cost incurred by the Claimant in Court of Appeal proceedings related to F. Acc)”

32. On the third page of the Claim Form the following Particulars of Claim are set out:

“The Parties:

“The Claimant is and was at all material times a mechanical sub-contractor.

“The Defendant is and was at all material times a mechanical and electrical services contractor.

“Summary:

“The Claimant is entitled to and hereby seeks Judgment in Default to be entered against the Defendant and claims all the sums 1,2,3,4 and 5 shown in Value above as a debt due under the Sub-Contract, and the cost of [these] proceedings to be paid by the Defendant.

“Further to the Claimant Final Account letter dated 26 May 2022 (letter attached) matters of the Final Account have not been satisfactorily concluded between the parties. The Defendant has not provided any meaningful response to the Claimant and matters of the Final Account only being commented upon by the Defendant in Adjudication 3. The Claimant have sought to proceed to refer the matter to the Courts and issued its Letter of Claim on 2nd December 2022 via email and recorded delivery and in accordance with the Pre-Action Protocol for Construction and Engineering Disputes (letter attached). The Defendant acknowledges receipt of the Letter of Claim via email on 16 December 2022 (email/letter attached). In accordance with paragraph 8.5 of the Protocol, the Defendant should have sent a letter of response to the Claimant within 28 days from the date of receipt of the Letter of Claim respectively on or before 2 January 2023. To date 9 January 2023 (7 days behind the allowed timeframe) the Defendant has not provided any response, defence or counterclaim. The Defendant has failed to comply with the Pre-Action Protocol for Construction and Engineering Disputes. In Accordance with paragraph 8.6 of the Protocol the Claimant is now permitted to commence proceedings against the Defendant without further compliance with the Protocol as no response has been received by the Claimant within 28 days.

“The true value of the Sub-Contract works was £675,687.27 and based on the Defendant’s previous payments to date (£364,909.64) this notes a total sum due and outstanding of £276,917.63 plus VAT.

“Failure to comply with the Protocol

“As a result of the Defendant’s failure to comply with the Pre-Action Protocol for Construction and Engineering Disputes, the Claimant is now entitled to commence proceedings without further compliance with the Protocol.

“The Claimant is entitled to and hereby seeks Judgment in Default to be entered against the Defendant and claims all the sums 1,2,3,4 and 5 shown in Value above as a debt due under the Sub-Contract, and the costs of [these] proceedings to be paid by the Defendant.”

J&BH’s Applications in Action 6 of 2023

33. On 23 February 2023 J&BH filed an Application Notice seeking relief as follows:

“An application for:

“(1) A stay of these proceedings unless and until the Claimant complies with an adjudicator’s decision in the Defendant’s favour on the final account. The Defendant has already obtained a judgment from the Court enforcing the decision.

“(2) Summary judgment and/or strike out under CPR 3.4(2) of the whole, alternatively parts of, the Particulars of Claim on the Claim Form because the Claimant does not have a better than arguable case and/or there are no reasonable grounds for bringing the claim those parts of Claim Form. The Defendant’s attention is drawn to CPR 24.5(1).

“(3) If the claim for the final account sum is pursued on a true value basis, strike out of paragraph 1 under “*Value*” on the Claim Form under CPR 3.4(2)(b) and/or (c) because the lack of particulars is likely to obstruct the just disposal of the proceedings and/or a failure to comply with the CPR rules. In the alternative, JBH seeks an order requiring the Claimant to [serve an] amended CPR compliant Particulars of Claim.

“(4) Security for costs under CPR 25.12, namely an order that the Claimant gives security for the Defendant’s costs of these proceedings up [to] the first CMCC by paying into court the sum

of £30,000, or such other sum as the court deems fit, within 7 days of the order. The application is made because the Defendant considers that the condition in CPR 25.13(2)(c) is satisfied: the Claimant is a company and there is reason to believe that it will be unable to pay the Defendant's costs if ordered to do so.

“(5) An extension of time for the Defence until after the above applications are decided.”

34. The Parties' applications raise “chicken and egg” considerations: A&V's application for a stay of execution in action 444 of 2022 is for a stay “pending the outcome of [action 6 of 2023]”. If that action is struck out, as requested by J&BH, then the application for a stay of execution will necessarily fall away.
35. Conversely, if the application for a stay of execution is granted, then J&BH's application for a stay of action 6 of 2023 will be much weakened.
36. In my view, the proper order in which I should consider these matters is first to consider the strike out application in action 6 of 2023, then the stay of execution application in action 444 of 2022, and then return to the other applications in action 6 of 2023. In the event, for reasons set out below, this process will be interrupted to allow for further evidence to be served.
37. It should be noted that the financial considerations arising in respect of the stay of execution application overlap with similar considerations in respect of (i) the stay application and (ii) the security for costs application in action 6 of 2023.

J&BH's Strike Out Application in action 6 of 2023

38. The claims put forward by A&V in action 6 of 2023 can be divided into three parts:

- (1) The Final Account claim for £276,917.23 plus VAT;
- (2) The claim for £34,800 in respect of Mr. Blizzard's fees;
- (3) The three claims (no. 3 for £9,600, no. 4 for £7,140 and no. 5 for £21,840) for "legal cost".

39. As to the first claim, the claim for £279,917.23 plus VAT on the Final Account, the present position is that A&V is the subject of an adverse decision from Mr. Smith. A&V through Mr. Paduraru made it clear that it is deeply dissatisfied with that decision. It is clear to me that there is a significant and bona fide dispute about the amount of the Final Account.
40. The present Claim Form is a somewhat confusing document. It appears to claim judgment in default by reason of a failure by J&BH to comply with the Protocol. To an extent I dealt with this argument in paragraphs 18 to 32 of my previous judgment. Put shortly, a failure to comply with the Protocol does not entitle the Claimant to seek judgment in default. However A&V is correct to say that if a Defendant (here J&BH) does not respond to a Pre-Action Protocol Letter of Claim, it is open to the Claimant (here A&V) to proceed with its substantive claim for relief.
41. What is undoubtedly clear is that the present Claim Form does not even start to set out a claim in a form to which a Defence can sensibly be pleaded nor does it set out an agenda for a future trial by this Court.

42. In paragraph (3) of the strike out application, J&BH claims as an alternative to the striking out of the claim an order that A&V should serve a CPR compliant pleading.
43. This seems to me a sensible course. As I have said, A&V seems to me to have a bona fide case as to the amount of the Final Account. What is needed is a pleading which:
- (1) Sets out how the figure of £276,917.63 is calculated;
 - (2) To the extent that it is dependent upon quantities of work and materials, specifying those quantities;
 - (3) To the extent that it is dependent upon variations, identifying the relevant instructions and the value of such instructions;
 - (4) To the extent that it is dependent upon alleged breaches of contract, identifying the relevant contractual provisions, the nature of the breaches and the costs flowing from such breaches (this would appear to encompass delay related costs).
44. For the avoidance of doubt, in my previous judgment I expressed certain views upon various contractual arguments: in those respects it may be that evidence to be heard in this action (6 of 2023) may lead to different conclusions.
45. I will seek submissions as to the time which will be needed by A&V to produce the fresh pleading.

46. As to the second head of claim, the fees of Mr. Blizzard: Mr. Blizzard ordered J&BH to pay 50% of his fees. Given the result in the Court of Appeal, that amount remains outstanding and is a legitimate head of claim. To the extent of that 50% the claim can proceed. I can discern no basis upon which the claim for the other 50% can be argued. Accordingly A&V will be directed to amend item 2 to replace the figure of £34,800 with the figure of £17,400.
47. As to the third head of claim (the legal costs), I accept J&BH's submission that this Court has no jurisdiction to consider a claim for legal costs in respect of which this Court and/or the Court of Appeal has already given judgment.
48. Accordingly, the result of the strike out application is that items 3, 4 and 5 under the heading "Value" will be struck out. The other two claims will be permitted to continue (subject to J&BH's stay application) on condition that suitable amendments are put forward.

A&V's Application for Judgment in Default in action 6 of 2023

49. For the above reasons A&V's application for judgment in default is dismissed: it was in effect an application for judgment upon J&BH's failure to serve a Defence. As J&BH's application to strike out has succeeded to the extent set out above, no Defence is yet due from J&BH.

A&V's Application for a Stay of Execution in action 444 of 2022

50. I turn now to consider A&V's application in action 444 of 2022.
51. The Court's jurisdiction to grant a stay of execution comes from CPR 83.7. The Court has a discretion to order a stay of execution if it is satisfied that:

“(a) there are special circumstances which render it inexpedient to enforce the judgment or order, or

(b) the applicant is unable from any reason to pay the money.”

52. I have set out above the Grounds upon which A&V relies: those Grounds are all matters falling within CPR 83.7 (b), i.e. that it (A&V) is unable to pay.

53. In *Andrew v Flywheel IT Services Ltd* [2021] EWHC 3746 (Comm), HHJ Pelling QC (sitting as a Judge of the High Court) confirmed that where ground (b) is relied on:

(1) The burden is on an applicant to show that it is unable to pay, including that no funds would be made available to it including by its owner (at paragraph [11]):

“...where this ground is relied on the onus rests firmly on the applying party, here the Defendant, to make good that case. Further, it was not in dispute that Lord Wilson JSC’s dictum in *Goldtrail Travel Limited (in liquidation) v Onur Air Taşımacılık AŞ* [2017] UKSC 57, [2017] 1 WLR 3014, at [23] to [24] applies by analogy. As Lord Wilson JSC said in those paragraphs:

“In this context the criterion is: ‘Has the appellant company established on the balance of probabilities that no such funds would be made available to it, whether by its owner or by some other closely associated person, as would enable it to satisfy the requested condition?’

“... In cases ... in which the respondent to the appeal suggests that the necessary funds would be made available to the company by, say, its owner, the court can expect to receive an emphatic refutation of the suggestion both by the company and, perhaps in particular, by the owner. The court should therefore not take the refutation at face value. It should judge the probable availability of the funds by reference to the underlying realities of the company’s financial position; and by reference to all aspects of its relationship its owner with, including, obviously, the extent

to which he is directing (and has directed) its affairs and is supporting (and has supported) it in financial terms.””

(2) Even if the Court is satisfied that the applicant is unable to pay, it must still consider its discretion as to whether to grant the stay sought (at paragraph [12]).

(3) A no-set off clause is a very strong factor in the discretionary exercise.

54. The last point (as to a no set off clause) is relevant because J&BH contends as follows in paragraphs 52 of Mr. Frampton’s skeleton argument for the 1 June 2023 hearing:

“52. Further or alternatively, even if the Court considers (contrary to the above) that A&V has demonstrated it is unable to pay the Enforcement Sum, JBH submits that the Court should refuse to exercise its discretion to do so. JBH relies, in particular, on the following factors:

“52.1 Firstly, the “pay now, argue later” policy behind adjudication and clause 20.3 of the Sub-Contract (“*The decision of the adjudicator shall be binding until the dispute is finally determined by legal proceedings or by agreement.*” [D/8/47]) are analogous to a no-set off clause. Applying the principles set out in *Andrew v Flywheel*, it should be a very rare case in which the Court would grant a stay of execution of a judgment enforcing an adjudicator’s decision until legal proceedings on the same dispute are determined.

“52.2 This principle applies even more strongly in this case given that it was A&V which commenced the Final Account Adjudication. A&V chose to pursue the dispute as to the final account in adjudication first.....”

55. I have referred above, in paragraph 29, to A&V’s “Submissions in Relation to the Approved Judgment and Cost.”. This had a number of Appendices supporting A&V’s position that it was unable to pay the judgment sum.

56. Appendix 3 consisted of two letters. The first was from the National Westminster Bank dated 13 May 2022. This showed that A&V had four accounts with the Bank. Three were loan accounts being respectively in debit by £8,092.72, £48,932.19 and £93,055.60. The fourth was in debit by £31,841.88.
57. The other letter was from HMRC’s Debt Management Field Collections Unit 33 dated 2 June 2022 reminding A&V that it owed £143,295.28 and stating that A&V was in breach of an agreement to pay a debt to HMRC by instalments.
58. Appendix 4 consisted of a credit report dated 22 February 2023 showing that A&V’s Credit Rating was £510 and Credit Limit was £760.
59. Since then A&V has filed accounts to 31 January 2022 at Companies House. These are in the short form appropriate for small companies. This shows the following:

	2022	2021
	£	£
Fixed Assets	3,050	4,575
Current Assets	37,176	70,355

Creditors: amounts falling due within one year	-	(20,117)
Net current assets (liabilities)	37,176	50,238
Total assets less current liabilities	40,226	54,813
Creditors: amounts falling due after more than one year	(141,259)	(50,000)
Total net assets (liabilities)	(101,033)	4,813
Capital and reserves	(101,033)	4,813

60. Having received these accounts, J&BH’s solicitors, Hawkswell Kilvington, wrote to A&V on 5 May 2023 raising questions. As all the points raised in that letter were raised before me at the hearing on 1 June 2023, I set out the contents of that letter in full:

“We write with reference to the forthcoming hearing on 1 June 2023 and to seek clarification of A&V’s financial position following the filing of A&V’s accounts at Companies House on 20 April 2023 (attached for ease of reference).

“Please respond to the following queries:

“1. The lack of any creditors/amounts falling due within one year indicates that A&V did not trade. Please confirm whether or not A&V was trading in the accounting period following 31 January 2022.

“2. The accounts state that no amounts are falling due within one year. This appears to be contrary to both:

“a. Natwest’s letter to us dated 13 May 2022, in which Natwest confirmed that A&V was in debit across a number of current and loan accounts in the total sum of £181,922.39; and

“b. HMRC’s letter to A&V dated 2 June 2022, in which HMRC refer to an agreement to repay a debt of £143,295.28 by instalments.

“Please explain why these amounts do not seem to be reflected in A&V’s accounts.

“3. Similarly, the amounts falling due after more than one year of £141,259 do not reflect the sums due to Natwest or HMRC (which together total £325,217.67). Please provide a simple breakdown of the £141,259 owed to creditors after more than one year to include the name of the creditor and the sum owed.

“4. The accounts do not seem to reflect A&V’s claim or its liabilities to JBH. Please explain why not.

“5. In order to ensure that the Court has up to date information regarding A&V’s financial position, please provide us with a summary of A&V’s balanced sheet and copies of its management accounts for the period ending 31 January 2023.

“6. Given the negative ‘capital and reserves value of (£101,033), it appears that A&V is insolvent. Please confirm how A&V intends to support itself going forward.....”

61. On the same day, 5 May 2023, Mr. Paduraru responded to that letter by email:

“We are in receipt of your email/letter dated 05.05.2023.

“Please note that I am on my annual leave until the 22nd of May 2023. Therefore, I am unable to respond or to get in contact with our accountant until the 22nd of May 2023.

“However, and until then [22.05.2023] I can assure you that A&V Building Solution is not and has never been insolvent.

“Also, I can assure you that the up to date information regarding A&V’s financial position and your client [J&B] breaches would be formally provided to the Court prior to the forthcoming application hearing dated 01.06.2023.

“Until then, I would suggest that HK Legal and your client J&B Hopkins stop searching for my name on LinkedIn and all others social media profiles. I believe that our case/dispute it is commercial dispute between two companies and not a personal matter.”

62. Since then some further information relevant to A&V’s financial position has become available: This includes

(1) Fee Invoices from a member of the Bar, Mr. Charles Edwards: I refer to these further below.

(2) Reference by A&V to a letter to J&BH dated 30 January 2023 which shows that A&V has a bank account with Metro Bank as well as with Natwest;

(3) A letter from HMRC dated 22 March 2023 showing that A&V still owes HMRC monies: the figures are said to be “£55,343.13/£46,516.12/£33,485.73”; and

(4) Bank statements for the 4 NatWest accounts.

63. In his submissions to me, Mr. Frampton emphasised the burden upon A&V in seeking to show that it cannot pay the money.

64. In the passage from the speech of Lord Wilson cited at paragraph 54(1) above he said that the Court “*should judge the probable availability of the funds by reference to the underlying realities of the company’s financial position*”. That was said in the context of the familiar situation where a company pleads poverty whilst various indicia cast doubt upon that plea.
65. Here it seems to me that the “underlying realities” support the proposition that A&V as a company is highly unlikely to be able to pay the judgment debt:
- (1) On any view A&V is a small company;
 - (2) It appears no longer to be actively trading;
 - (3) It owes its banker and HMRC together sums well in excess of £300,000.
66. It is also to be noted that when it has suited its purposes, J&BH has emphasised A&V’s lack of resources, for example when seeking to resist payment of Mr. Blizzard’s Decision or when seeking Security for Costs in action 6 of 2023.
67. I fully accept that the points raised by J&BH raise real questions as to the true state of A&V’s finances, but I have no reason to suppose that further elucidation will reveal any prospect of A&V paying the judgment debt in action 444 of 2022 out of its own resources.
68. Nevertheless, it seems to me that J&BH is entitled to have accurate and up to date information in answer to the legitimate questions raised.
69. However, this is not an end of the matter. The authorities make it clear that whether it is a stay of execution which is being sought, or whether it is being

suggested that an order for security for costs will stifle a bona fide claim, the Court expects information not only as to the Company's position but also as to the position of those standing behind the Company, here Mr. Paduraru.

70. In that connection, Mr. Frampton points to the Fee Invoices of Mr. Charles Edwards who was paid at least £50,460 since January 2022. Mr. Frampton suggests that the obvious inference is that these fees must have been funded outside the Company, probably by Mr. Paduraru.
71. In his oral submissions, Mr. Paduraru confirmed that that was so and that others, including Mr. Judd, to whom I referred in my previous judgment, have also been paid using funds coming from outside the Company. He told me that this was done by raising loans and selling goods. He said that it would be impossible for him to raise the monies to pay the judgment debt.
72. I accept that this information should have been provided by Mr. Paduraru in a proper and detailed form before the hearing, and this was not done. As far as I can trace, J&BH's solicitors did not raise queries as to Mr. Paduraru's own financial position in correspondence, but the duty was and is upon A&V to adduce such evidence.
73. In my judgment it would be wrong for me to approach this application upon an overly strict procedural basis. Everything I have seen and heard suggests to me that what Mr. Paduraru told me was true. If that is so, it would be contrary to justice to ignore what he said.

74. I raised with the Parties the possibility of permitting A&V to adduce further evidence. Mr. Frampton resisted this, submitting. Firstly, that a Party who is not legally represented is not to be treated differently from a party which is legally represented: see Barton v Wright Hassall llp [2018] UKSC 12; [2018] 1 WLR 1119; and, secondly, that I should apply the principles set out in Denton v TH White Ltd [2014] EWCA Civ. 906; [2014] 1 WLR 3926.
75. As to the first point, I accept the general proposition, although noting that at paragraph [18] in Barton Lord Sumption JSC said that “...*lack of representation will often justify making allowances in making case management decisions and in conducting hearings*”. However, lack of representation “*will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court.*”. In my judgment, to permit A&V to serve further evidence would be a case management decision rather than applying a lower standard of compliance.
76. As to the second point, I accept that A&V is in breach of Eyre J.’s order as to service of evidence for the hearing before me insofar as it has not served necessary evidence.
77. However, in my view, as stated above, to deny A&V to adduce evidence would be an injustice, not least in circumstances where it has been J&BH’s own case that A&V would be unable to repay the sum found due by Mr. Blizzard if in due course it was found not to be due and in circumstances where it is J&BH’s own case that A&V will in due course be unable to satisfy an adverse order for the costs of these proceedings. I accept that in setting out its case in those regards

it was impossible for J&BH to, and it had no obligation to, shoulder the burden of establishing the extent to which Mr. Paduraru could step in. On the other hand, the evidence before me powerfully suggests that A&V is Mr. Paduraru's sole or principal business enterprise, so that it would be unsurprising if he personally had limited ability to intervene, particularly given the amounts which he has already raised and paid out.

78. In the circumstances, before finally determining whether A&V has established that it cannot satisfy the judgment sum, and then considering the discretion vested in the Court to grant a stay of execution, in my judgment it is just to permit A&V to submit further witness evidence, principally from Mr. Paduraru, but possibly also from A&V's accountant, as to the following matters:

- (1) Answering the points raised in Hawkswell Kilvington's letter of 5 May 2023;
- (2) Exhibiting full bank statements in respect of all A&V's bank accounts with any bank or other financial institution so far as those can be obtained from such bank or institution;
- (3) Explaining the current position of A&V with the tax authorities;
- (4) If possible, producing accounts to 31 January 2023;
- (5) Setting out how the Company's activities (including funding adjudications and litigation) have been financed since the end of A&V's presence on Site;

(6) Setting out the support which has been given to A&V by Mr. Paduraru and any other person, whether such support is likely to continue, and, if not, why not.

79. It was suggested by Mr. Frampton that a condition of this indulgence should be that A&V should pay forthwith the costs thrown away by the adjournment required to permit this evidence to be prepared and submitted. I do not accept this since until I have the evidence I do not know whether compliance with any such condition would be possible.

The Other Applications

80. Until the application for a stay of execution has been determined, I cannot determine the other applications made by J&BH in action 6 of 2023, which will therefore stand adjourned (save in respect of the application to extend time for service of the Defence, which is granted to allow for the re-pleading of A&V's claim).