

Neutral Citation Number: [2023] EWHC 2576 (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: 17 October 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
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TECHNOLOGY AND CONSTRUCTION COURT (KBD)

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Date: 17 October 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: 6 October 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 17 October 2023 at 10.30am

Mr Roger ter Haar KC :

1. In these two actions I have previously handed down three judgments:
 - (1) On 15 February 2023: [2023] EWHC 301 (TCC);
 - (2) On 16 June 2023: [2023] EWHC 1483 (TCC);
 - (3) On 6 October 2023: [2023] EWHC 2475 (TCC).
2. I do not repeat matters already set out in one or more of those judgments.
3. In this judgment, as in my previous judgments, I refer to J & B Hopkins Ltd as “J&BH” and to A & V Building Solution Limited as “A & V”.
4. This judgment is concerned with:
 - (1) J&BH’s application for permission to appeal my 6 October 2023 judgment;
 - (2) Directions in Action 6 of 2023 (brought by A&V);
 - (3) Certain costs issues.

Permission to Appeal

5. J&BH applies for permission to appeal my 6 October judgment in which I:
 - (1) Granted A&V’s application for a stay of execution of my 15 February 2023 judgment in Action 444 of 2022;
 - (2) Refused J&BH’s application for a stay of Action 6 of 2023;
 - (3) Refused J&BH’s application for security for costs in Action 6 of 2023.

6. In the usual way, the parties were provided with a draft of what became my 6 October 2023 judgment. Corrections were requested by 29 September 2023, with a remote hand down arranged for 2 October 2023.
7. Both parties provided proposed corrections: J&BH's proposals included a suggestion of substance, saying (correctly) that I had not dealt with an argument put forward.
8. On 29 September 2023 J&BH filed an application for permission to appeal.
9. It seemed to me that I should provide an addendum to the judgment dealing with the matters which I had not dealt with, and consequently adjourned the hand down of the judgment to 6 October, ordering a hearing to deal with all matters consequential to my judgment.
10. Unfortunately, when the hearing took place on 6 October, the corrected judgment was not available. Accordingly the hearing went ahead, but I gave J&BH permission to file supplemental submissions to deal with the addendum to the judgment. In the event no further submissions in respect of the application for permission to appeal were filed.
11. In considering the application for permission to appeal, it may be convenient to start at the end with the application for security for costs. My decision in that regard is a standard decision that security for costs will be refused where such an order will stifle a claim. I have no hesitation in refusing that part of the application.
12. The position in respect of the other two applications is different because in each case the result is unusual – thus a stay of execution of a judgment will generally be refused, particularly in respect of a judgment enforcing an adjudication decision; and an action seeking a true value determination before an adjudicator's decision has been

honoured will generally be stayed particularly if the non-payer is perceived as playing games.

13. However, in my judgment I have recognised that in each case the result is unusual, but in doing so I have sought to apply decisions of this Court which set out guidance which has not thus far been doubted – decisions which J&BH did not suggest were wrongly decided or laid down principles which were erroneous.
14. Thus, it seems to me that I was applying principles which in this Court are contained in authority. It would be wrong for me to grant permission on the basis that this case gives rise to new principles: rather it raises issues as to the application of well established principles to a case which is, happily, exceptional in many respects.
15. Of course I accept that the consequence is that J&BH faces litigation which may be expensive against an impoverished opponent. I suggested that it might be possible to move to a relatively rapid and economical trial, but, as will be seen below, that course did not find favour with J&BH.
16. A recurrent theme in the application for permission is a challenge to my finding that A&V's financial position was aggravated by J&BH's conduct: that was, in my view, a statement of the obvious. J&BH's conduct caused A&V real time financial problems as it had to deal with J&BH's conduct which caused it cash flow problems as it dealt with the obstructions placed in the way of the Blizzard adjudication and the wrongfully issued Part 8 proceedings. Whilst the Court of Appeal questioned the continuance of the appeal to that Court following the Smith adjudication, in the real world much damage had already been done.

17. A further point is taken that I found that A&V might yet be able to raise further small loans. There is a significant difference between friends and family of Mr. Paduraru possibly supporting A&V's costs in pursuing Action 6 of 2023 and them lending money to be paid over to J&BH in circumstances where it would not enable that action to be pursued and would therefore be money spent simply to advantage J&BH with no practical advantage to A&V.
18. For these reasons I refuse permission to appeal in what, as I have said, are happily highly unusual circumstances: unusual because a party who has been found by the Court of Appeal to have flouted the proper principles in an adjudication case seeks to use those self-same principles to stifle what may yet prove to be a legitimate attempt to set aside a wrong decision on the part of the second adjudicator.

Directions in Action 6 of 2023

19. As an opening point, J&BH contends that there should be a stay of this action pending appeal. As I have refused permission to appeal, it follows that I also reject that submission.
20. In my 6 October 2023 judgment I floated the idea that the disputes between the parties (other than the loss of profits claims) could be resolved as soon as January 2024.
21. This would have involved to a considerable extent accepting that the relevant evidence has already been gathered and placed before the two adjudicators. That course has not proved acceptable to J&BH, and I accept that such a rapid procedure would not be satisfactory in the absence of agreement.
22. However, it will be seen below that I think that J&BH's proposals are unnecessary in both content and period.

Split Trial

23. I had suggested that there might be a trial of all issues other than the loss of profits claims. However neither party was enthusiastic about this, and the case will proceed to trial on all issues.

Pleadings

24. Here there is agreement between the parties:

- (1) A&V will serve its Re-Amended Particulars of Claim and Scott Schedule by 27 October 2023;
- (2) J&BH will indicate whether it agrees or objects to that pleading by 3 November 2023;
- (3) J&BH will serve a Defence (and Counterclaim if any) by 1 December 2023;
- (4) A&V to serve a Reply (and Defence to Counterclaim) if any by 22 December 2023.

Disclosure

25. J&BH considers that extended disclosure is required, and submits that the list of issues for disclosure cannot be finalised until pleadings are disclosed. It suggests that the following (non-exhaustive) categories of documents are likely to be disclosable:

- (1) Documents showing why A&V stopped work in March 2021;
- (2) Documents showing A&V's ability to continue with the works in March 2021;

- (3) A&V's correspondence with Mike Judd (and other consultants) relating to the termination and its final account claim;
 - (4) Documents relevant to A&V's labour resources on site such as timesheets, invoices and evidence of payments;
 - (5) Documents relevant to A&V's claims for loss of profits such as accountancy evidence regarding overheads and profits and documentation and correspondence regarding projects that A&V says it lost and why;
 - (6) Documentation relevant to the contra-charges including theft of the copper investigation records, sub-contractor correspondence, quotations, invoices, progress records, evidence of payment.
26. Mr. Paduraru says that all relevant documentation in A&V's possession has already been disclosed in the two adjudications – and I would have expected J&BH to have disclosed documents falling within category (6) in those adjudications, particularly the second adjudication.
27. Thus it seems to me likely that disclosure in this case will be either unnecessary or a pure formality. However, for the sake of good order I will direct the parties to provide Model B disclosure of documents in the above categories at the same time as their pleadings: obviously the bulk of A&V's disclosure will come on 27 October, but there may be some other documents the relevance of which will only become clear when the Defence (and Counterclaim) is served.
28. Both parties will be at liberty to identify relevant documents by reference to exhibit numbers in one or other adjudication.

29. Mr. Frampton has kindly sent to Mr. Paduraru a link to the relevant parts of the CPR to enable him to understand on behalf of A&V its duties of investigation and certification.

Witness Statements

30. It might have been thought that all relevant witness evidence would have been brought to the attention of one or other or both of the adjudicators. However it appears that this was not so: J&BH has indicated that it wishes to call at least 5 witnesses. Somewhat by way of reaction, as it seemed to me, Mr. Paduraru, indicated that A&V would wish to call 4 witnesses.
31. This desire on the part of both parties makes my suggestion of a hearing in January 2024 impractical: I had assumed that both parties would have put before the adjudicators at least the substance of all relevant evidence, an assumption which it now appears was ill-founded.
32. I direct that witness statements for both parties should be served by 16 February 2024.
33. An issue arises as to the application of PD 57AC in the circumstances of this case. There is no reason why it should not apply to J&BH with full rigour, but I think it may well cause complications in respect of statements from Mr. Paduraru and A&V's Quantity Surveyor, Mr. Judd, since it seems to me that compliance with paragraph 3.2 of the Practice Direction may be problematical where both have been immersed in this dispute for so long and where it seems likely that no solicitor will be involved in the taking of the witness statements. Notwithstanding that concern, A&V should use its best endeavours to comply with PD 57AC: as Mr. Paduraru and Mr. Judd prepare

their statements, they must both keep a record of the documents they go back to in order to refresh their memories.

34. In addition to the document listing requirement, the remainder of paragraph 3.2 also applies, as does paragraph 3.4. It is very important that both parties' witness statements should be confined to relevant facts and avoid commentary.

A Delay Expert

35. J&BH has indicated that it would wish to call a delay expert.
36. At this stage I am unconvinced that evidence from such an expert would do anything other than make factual assertions as to what delays actually occurred and why. Those are matters which I would expect to be dealt with by J&BH's factual witnesses.
37. I do not rule out completely allowing such evidence if an application is made at the CCMC. However, my working assumption at present is that no such evidence will be permitted.

A quantum expert on the measured works, variations and contra charges

38. I am a little surprised that J&BH regards this evidence as being necessary, as I would expect these matters to have been the subject of detailed analysis within J&BH for the purposes of preparing the contractual interim and final valuations and for the purposes of the adjudications.
39. There was considerable discussion about this before me. Having considered the submissions for the purpose of this judgment, I have concluded that at this stage if J&BH wishes to engage a quantum expert on the above issues, it will do so at its risk as to whether such evidence will eventually be permitted and as to whether the cost of

engaging such an expert will have been reasonably incurred. However, J&BH will be at liberty to return to this issue at the CCMC.

A forensic accountant on A&V's loss of profits claims and the alleged financial impact on its business

40. I accept that the nature of the loss of profits claims presently in paragraphs 10.6 and 10.8 (and the similar loss of profits claims in respect of “variations”) of the 30 June 2023 pleading is such as to justify such expert evidence.

41. However, as to timing, I would expect J&BH to have had the substance of this evidence in order to plead its defence. I would not expect this evidence to be extensive as the claims are conceptually very simple, and are of a nature which will only succeed if A&V presents convincing evidence of lost workload and its overhead and profit margins.

CCMC

42. In my judgment it should be possible to hold a CCMC in early March 2024.

Trial

43. J&BH estimates a trial length of 5 days excluding judicial pre-reading but including oral closing submissions. As J&BH's proposed directions include the calling of expert evidence on loss of profits, I understand this estimate on the basis of a trial on all issues.

44. I intend to reserve all future steps in this action, including the trial, to myself given the extensive involvement I have now had in this case.

45. Mr. Frampton, for J&BH, suggested that this is not a case in which expedition should be ordered, and draws my attention to the decision of Laddie J. in *Ifone Ltd v Davies and another* [2005] EWHC 1504 (Ch) and of Henderson J. in *J.W. Spear & Sons Ltd and others v Zynga Inc* [2012] EWHC 1374 (Ch). He submitted in his skeleton argument:

- (1) There has been no application for expedition.
- (2) This case does not meet the threshold test for expedition, in that there is not a real, objectively viewed, urgency which justifies giving it such preference (see *JW Spear and Sons Ltd v Zynga* [2012] EWHC 1374 (Ch) at [20]). Expedition is normally reserved for patent and trademark cases, employment law cases and cases seeking an interim injunction (which can include procurement cases where the automatic suspension is not listed) (see the commentary in the White Book at 29.2.7). While not a closed list, A&V's general financial position is not a good reason for real urgency particularly where the financial position is not caused wholly or in significant part by JBH and the sums claimed by A&V are less than the debts it owes (particularly if paragraphs 10.6 and 10.8 are not part of the earlier trial). In *Daltel*, the Court held that the risk that the money which the claimant said the defendant had misappropriated would be dissipated (from accounts in Lebanon) and become less susceptible to recovery (para. [16]) may make it urgent for the claimant's point of view to get to trial but was not a sufficient reason for expedition (paras. [17] and [22]).
- (3) Even if the Court considers that the case of urgency was potentially made out, the delay by A&V to date is a strong factor against, and in this case should be fatal to, any order for expedition (*Ifone Limited v Davies* [2005] EWHC 1504 (Ch) at para. [11]). It would, with respect, be incongruous to order JBH to face a trial in 3 months in circumstances where:
 - (a) A&V delayed for over 6 months after the FA Adjudication Decision before issuing these proceedings.
 - (b) A&V has then delayed these proceedings by its, continued, inability to properly plead its case.
 - (c) A&V has never applied for an order for expedition.

46. On the timetable I have directed above, this case if heard in May 2024, would come on for trial in about 8 months from now. I accept that that would be somewhat faster

than would be otherwise expected, but given the history of this case it seems to me that the sooner finality is reached the better.

47. I understand from TCC Listing that a 5 day hearing can be accommodated starting with a pre-reading day on 13 May 2024, followed by 4 days of evidence (as usual, not sitting on Friday 17 May 2024).

Costs

48. J&BH seeks costs orders as follows:

(1) Order 1: A&V should pay JBH's costs, and bear its own costs, from 2 June 2023 (the day after the June hearing) to 15 September 2023 inclusive (the day of the adjourned hearing in September).

(2) Order 2: The other costs of the applications should be costs in the case.

49. It is the case that I ordered A&V to re-plead its case in both my 16 June and 6 October judgments. J&BH will have incurred costs in considering the pleadings. In my judgment it is right for A&V to pay the costs thrown away by J&BH as a result of the re-pleading of the case by A&V.

50. As to the other costs, including in particular the hearings on 1 June 2023, 15 September and 6 October 2023, it seems to me:

(1) Part of the costs were incurred in considering and dealing with the deficient pleadings;

(2) Part of the costs were incurred in A&V seeking the stay of execution, which costs would generally be borne by the party seeking such a stay;

- (3) Part of the costs were incurred in J&B's unsuccessful application for a stay of Action 6 of 2023;
- (4) Part of the costs were incurred in J&B's unsuccessful application for security for costs in Action 6 of 2023;
- (5) Part of the costs were incurred in A&V's unsuccessful application for judgment in default (although I suspect these costs were minimal).

51. In my judgment, save as set out at paragraph 49 above, it seems to me that costs in the case is the appropriate order. In reaching that conclusion I have taken into account the fact that the June hearing was adjourned. That adjournment was partly necessitated by the deficiency in the pleading and partly by a belt and braces approach on the part of J&BH as to proof of the state of A&V's (and its shareholder's) finances, which I had already regarded as pretty obvious. Doing broad justice, I think that the order above is fair in respect of the costs of that adjournment as well as the other costs of the sundry applications. This is somewhat less favourable to J&BH than Order 1 sought by it, but seems to me to better reflect the relative successes and failures in the proceedings.