Neutral Citation Number: [2023] EWHC 2475 (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 6 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
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice

Rolls Building
London, EC4A 1NL

Date: 6 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: 15 September 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 6 October 2023 at 10.30am

Mr Roger ter Haar KC :

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 ([2023] EWHC 301 (TCC)) 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 whether there was a valid payment application. 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. This case came before me for a second time on 1 June 2023. On that occasion the matters before me were 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.

6. In a judgment handed down on 16 June 2023, I determined issues (1), (2) and (7), and allowed application (5) in part. Otherwise I adjourned the applications.

7. My judgment handed down on 16 June 2023 can be found under Neutral Citation Number [2023] EWHC 1483 (TCC). This judgment should be seen as a supplement to that earlier judgment. Accordingly I do not repeat herein the background materials contained in that judgment.

8. As part of the Order following my judgment I ordered:

> Strike out
>
> 2. Items 3, 4 and 5 under the heading *"Value"* in A&V's claim form in action 6 of 2023 are struck out.
>
> 3. A&V is to file and serve a CPR compliant Amended Particulars of Claim in action 6 of 2023 by a date to be determined at the Adjourned Hearing (as defined below) in which:

a. The figure at item 2 under the heading *"Value"* is amended from £34,800 to £17,400.

b. The matters set out at paragraph 43 of the judgment dated 16 June ("the 16 June Judgment") are addressed in a manner compliant with the CPR.

c. Items 3, 4 and 5 under the heading *"Value"* are removed.

9. On 30 June 2023 A&V served a fresh pleading headed "Claimants' Particulars of Claim [Amended Pleading] in respect to matters of the Final Account Claim following the Approved Judgment dated 16th June 2023 of Mr Roger ter Haar KC sitting as a Deputy High Court Judge" ("the 30 June pleading").

10. I accept that this was a good faith attempt to comply with my Order. Mr. Frampton on behalf of J&BH submits that parts of the pleading should be struck out. As will be seen below, I take the view that in its present form the 30 June pleading does not comply with my previous order, and, in any event, is a somewhat inconvenient document as an agenda for the handling of the disputes in this matter.

11. Accordingly, the first matter with which I must deal is the state of that pleading.

12. As set out above, I had before me on the last occasion a number of applications which in one way or another turned upon the state of A&V's finances and the financial position of those standing behind A&V. I have further information now available to me, and consider applications (3), (4) and (6) in the list set out at paragraph 5 above.

The 30 June Pleading

13. It seems to me most useful to examine the pleaded case on a claim by claim basis.

14. The claim is said to be a claim for the assessment of the final account in the contract between the parties, but it includes claims for breach of contract which need to be identified and analysed.

15. What is needed is a pleading in a form to which J&BH can conveniently plead, and in a format from which the Court can easily see the differences between the Parties, that is to say a Scott Schedule. In the course of the hearing on 14 September the surveyor assisting A&V, Mr. Judd, made it clear that he fully understands what a Scott Schedule should look like and contain.

Value of original contract works done

16. Before each of the Adjudicators there was a dispute as to the amount of work contained in the original contract which had been done and therefore as to the value of that work.

17. What is needed here is an identification of the work item, the percentage of completion claimed by A&V and the resulting money claimed. The money claimed should be in a separate column.

18. This information is presently available, but in a separate document to the 30 June pleading itself. This is not convenient: the Scott Schedule will contain the above details.

19. The 30 June pleading contains a certain amount of narrative at paragraphs 2.1 to 3.10 explaining the merits of A&V's case. The problem with this is that it mixes up evidence, comment and claim in a way which makes it difficult to handle the claim.

20. In my view, the Scott Schedule should generally seek to avoid such commentary, however I can see that it would be helpful to have facts pleaded which support the factual basis of the state of the works: I have in mind in particular what I understand to be A&V's case that until a late stage J&BH accepted that elements of the work were far more complete than J&BH now contends: this can be done shortly (e.g. "in interim valuation No. Z, J&BH accepted that element X of the works was Y percent complete"). It may also be that cross-reference to photographs or the like illustrating the state of the works would be of assistance (e.g. "the state of completion of element X of the works at date YY is shown on photographs reference Z1, Z2 etc").

Variations 1 to 22

21. It was explained to me during the hearing that what are described as "variations" in the 30 June pleading are in legal analysis a mixture of variations properly so called and claims for damages for breach of contract.

22. Section 4 of the 30 June Pleading sets out A&V's case as to Variations. In order to understand the case, it is necessary to cross-refer to a Schedule at page 57 of the bundle placed before the Court by A&V for the June hearing. This is obviously inconvenient.

23. Within Section 4 of the 30 June Pleading and in that Schedule Variations 1 to 22 are conventional claims for additional work. So far as these are concerned, what the pleading needs to do is:

(1) Set out the date and form of the instruction: was it oral or in writing? If oral, who instructed the work, when and how? If in writing, identifying the relevant paperwork.

(2) Identify the physical scope of the work;

(3) Identify the materials and labour supplied;

(4) Set out the amount claimed;

(5) If it is said the J&BH has accepted that the work was varied work for which A&V is entitled to be paid, identifying when and how J&BH did so.

Variations 23 and 24

24. These seem to me to be in a different category from Variations 1 to 22, as these are claims for disruption and uneconomic working.

25. These are conceptually legitimate claims (I am not judging whether they are factually justified). It seems to me that it would be helpful to have these identified not as "Variation" claims, but as claims for uneconomic working.

26. As to the factual basis of these claims, that seems to me to be identified sufficiently clearly in paragraphs 4.12 and 4.13 of the 30 June pleading: what is needed is to insert those particulars in the Scott Schedule, coupled with a statement as to what sums are claimed and how they are calculated.

27. One thing which is essential is that when the case is re-pleaded, each separate paragraph and sub-paragraph must be numbered so that J&BH can plead thereto.

Variation 25

28. As with Variations 23 and 24, Variation 25 is not a Variation in the sense normally understood. What it is is a claim for loss and expense said to be caused by delays justifying an extension of time to the Contract.

29. Paragraph 4.14 of the 30 June pleading contains a lot of information which needs to be broken down into numbered sub-paragraphs. What is missing at the moment is a clear statement of how the sum of £30,000 claimed in the Schedule is calculated and justified.

No application for strike out of Variations 1 to 25

30. I should record that whilst I have criticised the format of the 30 June pleading and made suggestions as to how it should be reformulated, these are my comments and suggestions rather than the response to any application made before me. For J&BH, Mr. Frampton took the realistic approach of saying that there was no application to strike out, but there was a degree of unhappiness about the form of the pleading.

Variation 26

31. Paragraph 4.15 of the 30 June pleading puts this claim forward as follows:

> As a result of Hopkins breaches, A&V were not permitted to complete any further works or subsequent variations. Hopkins noted in the adjudication that other contractors undertook additional work totalling £320,744.00. A&V were deprived of this additional work as a result of Hopkins breaches and claim losses of 15% OH&P. A&V maintain that as other works were undertaken post 22nd March 2021 as Hopkins claim in the adjudication, A&V were denied the opportunity of undertaking this additional work as a result of Hopkins breaches and claim losses of 15% OH&P. A&V maintain that as other works were

> undertaken post 22nd March 2021 as Hopkins claim in the adjudication, A&V were denied the opportunity of undertaking this additional work if the acts of prevention (breaches) had not occurred. The works to the podiums were £34k this leaving a significant sum of works being completed by other whether these be further design changes, variations etc but in any case, A&V would have anticipated a recovery from those additional works. Mr Hill provided a signed witness statement as part of his previous adjudication regarding payment cycle 17 confirming the contra charge actual costs expended by J&B on the contract and within A&V works i.e. Towers 1-3 and the podium was in the total sum of £405,353.00. With a deduction of £95,409.00 for contract works purported not to be completed this left a sum of £309,994.00 purely for additional labour ….
>
> Mr Hill contends within his witness statement 2nd December 2021 that the contra charge figure has now changed to that which is significantly lower than previously advised. A&V can only conclude that either Mr Hill's previous statement of truth was a misrepresentation or indeed Hopkins did expend further sums on variations and design changes and attempted to reduce their potential liability within the adjudication. Mr Hill further confirms in his current witness statement that further variations were indeed instructed beyond the date A&V left site ….
>
> In any event as A&V were denied the opportunity to undertake these specifically Hopkins described further mechanical variation works that Hopkins previously evidence as *"Additional costs associated with concluding A&V's subcontract works"* A&V consider they are entitled to recoveries of loss of overheads and profit on the variations as a result of Hopkins breaches.

32. By reference to the Schedule, it can be seen that the amount claimed is £48,111.60.

33. Mr. Frampton attacks this claim on two bases: firstly, that it is inadequately particularised; and, secondly, that it is duplicative of other claims.

34. In my judgment, whilst there is strength in the suggestion that there is a lack of particularisation, discussion of this claim at the hearing on 15 September showed that this claim needs to be radically reviewed by A&V.

35. The claim starts from the premise that A&V were effectively prevented from concluding its works. I return to that premise below.

36. A&V then take figures put forward by J&BH in the adjudications as being the costs incurred by J&BH to complete the works which A&V were contracted to complete. I think the suggestion must be that the figures were so large that they must have included a significant volume of varied (additional) works. A&V says that if it had continued on the project it would have been instructed to carry out these varied works, and would have earned Overheads and Profit on the varied works.

37. I accept that if J&BH wrongfully prevented A&V from completing its works, and if J&BH instructed additional works falling within scope of A&V's contract, a claim for failure to recover overheads and profits is conceptually available. See for example *Amec Building Ltd v Cadmus Investments Co. Ltd* (1996) 51 Con LR 105.

38. However here what A&V is relying upon is what it (A&V) says is an exaggerated cost claimed to complete its contract works. Indeed, A&V has been successful in pushing back on J&BH's position in the first (Blizzard) adjudication so that in the second (Smith) adjudication the completion costs claimed dropped dramatically compared to the amount claimed in the first (Blizzard) adjudication.

39. The pleaded claim assumes that the amount originally claimed by J&BH represents in significant measure additional works which A&V would have been instructed to carry out if permitted to continue on site. However, the obvious alternative case on A&V's argued position is that the huge additional

costs had nothing to do with A&V's contractual scope, for example electrical works.

40. As I have said, this head of claim needs to be thought through. At the moment there is not a clear and simple narrative of A&V's case as to the circumstances in which A&V left site: this needs to be set out in simple terms – e.g. (1) on date X A&V asked for instruction Y, which was needed because (then explained); (2) A&V needed access to electronic system A because (then explained), without it the consequence was ….; (3) any other matters relied upon.

41. It is not for the Court to draft the pleading, obviously, but what is needed is a document which avoids trespassing repeatedly on past procedural issues and concentrates on the essential facts.

42. In large measure the factual basis for this claim is already set out in Section 7 of the 30 June pleading (*"I'Auditor Quality Assurance System"*), Section 8 (*"J&B Hopkins Breaches of Contract"*) and Section 9 (*"Summary"*), but it is difficult for J&BH to plead to those Sections, which are somewhat repetitive and do not identify what losses flow from which alleged breaches.

43. Once the grounds upon which A&V's case on liability have been set out, the case on quantum needs to be set out – which involves identifying from the information A&V already has what works it says it would have been able to carry out if still on site, and what profit it would have earned.

Variation 27

44. This is pleaded in the 30 June pleading as follows:

> As a result of Hopkins breaches, A&V were not permitted to complete any further works or subsequent variations. The works continued for a further 6 months by others thus depriving A&V of additional work and preliminaries. A&V claim 15% OH&P on this item. Preliminaries are £2,325.55 per month.

45. The factual basis for this claim appears to me to be the same as for Variation 26. I can see how it might be an alternative to Variation 26, but not how it could be additional. This needs to be explained.

Variation 28

46. This is pleaded in the 30 June pleading as follows:

> As a result of Hopkins breaches, A&V claim for their Directors and Consultants time in dealing with the recovery of outstanding sums due.

47. Mr. Frampton submits that this pleading is defective in that it does not identify the breaches alleged. I accept this criticism: from the explanation given to me during the hearing on 15 September, it appears that this involves the time involved in dealing with departure from site, sorting out payment issues and costs involved with the adjudications.

48. The amount of the claim is identified in the separate Schedule as being £15,282.

49. It is important that this claim should be repleaded to connect the amounts claimed with the grounds upon which it is said that they are recoverable. This is important: for example, there are clear legal difficulties in recovering consultants' costs involved with either or both of the adjudications. These are not the only potential legal difficulties.

Variation 29: Interest

50. This is a claim for loss of interest. Interest is claimed in more than one place. It is important to be sure there is no duplication. As well as being claimed as Variation 29 (which is inappropriate as it is not a variation), it is claimed in paragraphs 10.4, 10.5 and 10.11 of the 30 June pleading: this latter pleading is clear, although it would be helpful in the Scott Schedule to have a calculation as to the amount claimed under each of three bases identified, i.e. under Clause 12 of the Contract, under the Late Payment of Commercial Debts (Interest) Act 1998 and under Section 35 of the Senior Courts Act 1981, since the relevant dates and sums payable will be different under each heading.

Variation 30

51. Although not mentioned in the 30 June pleading, the Schedule has a further "Variation" pleaded as follows:

> As a result of Hopkins breaches A&V were not permitted to complete the works to the podiums in the sum of £33,860. A&V claim their losses of 15% ohp on this sum. The amount claimed is £5,079.00.

52. This claim appears to be a sub-set of, and overlap with, Variation 26. The pleading should make clear whether this is pursued, and, if so, how it overlaps with what is presently pleaded under Variation 26.

Retention

53. The next head of claim, in Section 5 of the 30 June pleading, is headed "retention". It seems to me that A&V's claim is now for credit for the whole amount of the Contract Price. This claim would therefore fall more naturally within the claims for the payment of the unpaid value of the original contract sum and of the unpaid value of variations 1 to 22, with J&BH justifying by way

of defence why it has any continuing right to retain any sums in the circumstances. It may be that on this basis, this would fall away as a separate head in A&V's claim now (I can see why it was relevant at the dates of the two adjudications).

Paragraph 10.1: Final Account

54. In paragraph 10.1 of the 30 June pleading a sum of £276,917.63 plus VAT is claimed. I am not sure how this is calculated, but it will fall away as a separate item when the Scott Schedule has been completed.

Paragraph 10.2: Mr Blizzard's fees

55. Some doubt has entered into this head of claim because of a reference to "*the claimant costs incurred in the earlier proceedings"*. This head of claim was dealt with in paragraph 46 of my 16 June judgment, and the present claim reflects the claim which I ruled could go forward. It would, however, be better if the wording set out above were to be omitted.

Paragraph 10.3: Legal costs

56. Paragraph 10.3 pleads as follows:

> £86,222.000 [Claimant costs incurred in the earlier proceedings caused by the breaches].

57. In paragraph 47 of my 16 June judgment I said:

> 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.

58. Mr. Frampton submits that paragraph 10.3 falls foul of my previous decision. Mr. Paduraru said in answer that the claim now put forward is for damages, rather than a claim for costs.

59. In my judgment that distinction is not sustainable. The courts have determined how the relevant legal costs are to be allocated and it is not permissible to go behind those determinations by an action for damages.

60. Paragraph 10.3 will therefore be struck out.

Paragraph 10.6: Business Financial Loss

Paragraph 10.8: Loss of profits/loss of opportunity

61. Paragraph 10.6 pleads as follows:

> £162,000.00 + VAT, [sums as a direct consequence of the breaches of the contract as a result of Hopkins breaches of the contract and duty of care which has caused damage and harm to A&V business for 27 Months (2.3 years). A&V claim the sum for business financial loss arising from JBH negligence and unlawful conduct (6k a month).]

62. Paragraph 10.8 pleads as follows:

> £80,000 + VAT, [A&V claim loss of profits/damages for loss of opportunity for 27 months (2.3 years) caused by the breaches].

63. Mr Frampton does not seek to strike out these claims on their merits, at least not at this stage, but upon the basis that the claims are underparticularised. He also makes the point that the claims appear to be duplicative.

64. Some further particularisation is given in paragraphs 9.12 to 9.16 of the 30 June pleading:

> 9.12 Hopkins prevented A&V from completing their contract works. As such the sum for the contract works undertaken to date by A&V have not been paid nor as requested by A&V any recompense from J&BH by failing to comply with their own contract by extending the contract period and/or agreeing additional sums as may be appropriate.
>
> 9.13 By contrast Hopkins have sought to unreasonably and vexatiously blame A&V for lack of labour which A&V do not concur as evidenced above. Without these instructions A&V considered Hopkins were in breach of the contract and as such included items of account that A&V consider they were genuinely entitled to and had communicated this to Hopkins initially during the works, in A&V letter dated 15th March 2021 and have unsuccessfully been in correspondence with Hopkins since.
>
> 9.14 As a result of J&BH breaches and a considered continued false representation regarding not only the non-acceptance of the breaches but further unsubstantiated and disingenuous contra charges, A&V have made this separate item for further direct breach sums in total £162,000.00. The separate direct consequence of the J&BH breaches of the contract resulted in a failure of a duty of care by J&B which had initially caused damage and harm to A&V business for 27 Months [2.3 years].
>
> 9.15 A&V had claimed the sum of £162,000.00 for business and financial loss arising from JBH negligence and unlawful conduct (6k a month) and also £67,500 for sums as a result of Hopkins's indirect breaches of the contract and A&V claim for their Director's distress and inconvenience for (2.5k per month). These sums were included with A&V Final account to Hopkins dated 26th May 2022. The claim at that point was for 14 months, but a further year has passed with still no acceptance of the breaches so therefore a 27-month period of compensatory claim during a time of total financial ruin for A&V as detailed at the 1st June 23 hearing.
>
> 9.16 A&V letter to J&B dated 20th and 24th June 2023 …. detailed A&V concerns regarding J&B continued denial of the breaches [despite the Blizzard adjudication and Court of Appeal providing judgment that J&B had breached] and potential continued false representation regarding the J&B breaches and contra charges, estoppel and the financial and legal consequences of such.

65. I accept Mr. Frampton's submission that it appears that these two claims are duplicative: "business financial loss" would appear to be the same as "loss of profits/damages for loss of opportunity". A&V should clarify what, if any,

distinction there is between these two heads of claim. There should also be a pleading of how the sum or sums claimed is or are calculated.

66. Mr. Frampton also submits that the pleading fails to particularise the breaches alleged. I do not accept that submission: it seems to me that the thrust of A&V's case is clear: it is that J&BH firstly prevented A&V from completing its works; secondly, failed to pay sums due under the Contract; thirdly did not honour Mr. Blizzard's decision. As a result, it is said, A&V was effectively prevented from trading for a period of 27 months (and continuing).

67. Given that I am requiring A&V to re-plead, it would be sensible for A&V to identify separately each limb of its case (including any elements I have not identified above) so that J&BH can plead to it.

68. As I have noted above, Mr. Frampton does not submit that these claims should be struck out on their merits. However it seems to me necessary, for reasons I expand upon below, to recognise that these claims are different in nature from the other claims made. In order to decide these claims it will be necessary first to determine the issue as to the circumstances in which A&V ceased work; secondly, it will be necessary to determine whether there were sums due from J&BH which were not paid, and, if so, when and why they were not paid; only then would it be possible to enter upon the somewhat difficult assessment of what A&V's financial position would have been if things had been different.

Paragraph 10.7/Mental Suffering/distress and physical inconvenience and discomfort

69. Paragraph 10.7 pleads:

> £67,500 + VAT, [sums as a result of Hopkins's breaches of the contract A&V claim damages for their Director's mental suffering/distress and physical inconvenience and discomfort caused by the breaches (£2.5k a month) for 27 months (2.3 years)].

70. As set out above, there is also a reference to this claim for £67,500 in paragraph 9.15 of the 30 June pleading.

71. Mr. Frampton submits that this claim is unsustainable as a matter of law, and should not be permitted by way of amendment. His submission is well-founded.

72. The relevant law has been settled for some time. The position was summarised by Lord Hutton in *Farley v Skinner* [2001] UKHL 49; [2002] 2 AC 732 at paragraphs 47 and 48:

> 47. It is clearly established as a general rule that where there has been a breach of contract damages cannot be awarded for the vexation or anxiety or aggravation or similar states of mind resulting from the breach. The principle was stated by Bingham LJ in *Watts v Morrow* [1991] 1 WLR 1421, 1445:
>
> > "A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy".
>
> This general principle has recently been approved by this House in *Johnson v Gore Wood & Co* [2001] 2 WLR 72 . The principle has particular application to commercial cases and in *Johnson v Gore Wood & Co* Lord Cooke of Thorndon observed, at p 108, that :
>
> > "Contract-breaking is treated as an incident of commercial life which players in the game are expected to meet with mental fortitude."
>
> But the principle is not applicable in every case and in *Watts v Morrow* [1991] 1 WLR 1421 Bingham LJ went on to state, at p

> 1445, that there was an exceptional category of cases which he described as follows:
>
> > "Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category."
>
> Bingham LJ. then stated:
>
> > "In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and mental suffering directly related to that inconvenience and discomfort"
>
> Cases such as *Jarvis v Swans Tours Ltd* [1973] QB 233 where a travel company in breach of contract fails to provide the holiday for which the plaintiff has paid and damages are awarded for mental distress, inconvenience, upset, disappointment and frustration are examples of this exception to the general principle.
>
> 48. In addition, the speeches of Lord Mustill and Lord Lloyd of Berwick (with which Lord Keith of Kinkel and Lord Bridge of Harwich agreed) in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344 established that in some cases the plaintiff, notwithstanding that he suffers no financial loss, should be compensated where the defendant is in breach of a contractual obligation.…..

73. In *Farley v Skinner* the House of Lords was concerned with applying the exception to which Lord Hutton referred at the beginning of paragraph of his speech to a case where a surveyor had negligently failed to give accurate information about aircraft noise affecting a property which the Plaintiff was intending to, and did, buy.

74. In Lord Scott's speech in the same case, he placed emphasis upon the application of the principles of remoteness flowing from the old case of *Hadley v Baxendale* (1854) 9 Exch 341. The same considerations were applied by Lord

Steyn under the heading "the very object of the contract": all the members of the Judicial Committee in different words emphasised that damages for non-pecuniary damage could only be awarded where the damage alleged was within the contemplation of the contracting parties as potentially flowing from a contractual obligation the achievement of which was at the heart (the very object) of the contract.

75. Here the breaches consist of breach of the construction contract and possibly breach of an agreement to refer disputes to adjudication. Those contracts could not in my view sensibly be regarded as having as an object preventing distress as a result of commercial decisions not to make payments or to allow A&V to continue on site. Such an argument would be difficult enough if the affected Director were a party to the contract(s), but is wholly impossible where the contracting party is a limited company.

76. For these reasons I refuse permission for A&V to amend to pursue the claim in paragraph 10.7 and the words "and also £67.500 for sums as a result of Hopkins's indirect breaches of the contract" should also be deleted from any re-pleading of the claims.

Summary of conclusions on the 30 June pleading

77. For the reasons set out above, the claims in paragraphs 10.3 and 10.7 must be excised.

78. For the rest, the claims can go forward but in a more user friendly format, and with further particulars given as indicated above.

79. Stepping back, it means that the claims going forward are:

(1) Assessment of the true value of the original contract works carried out by A&V, as to which the central issue is: how complete were the works?

(2) Assessment of variations 1 to 22, as to which the central issues are, were there instructions to vary the works? What was the scope of those instructions? What is the amount due in respect of work done and materials supplied in respect of those instructions?

(3) Did A&V suffer loss as a result of uneconomic working which it can recover from J&BH as alleged in "Variation 23"?

(4) Did A&V suffer loss as a result of uneconomic working which it can recover from J&BH as alleged in "Variation 24"?

(5) Was A&V delayed and did it suffer loss which it can recover from J&BH as alleged in "Variation 25"?

(6) Was A&V wrongly prevented from completing its works, and, if so, what losses can be recovered: "Variations 26 to 30"?

(7) Can A&V recover the losses claimed in paragraphs 10.6 and/or 10.8? If so, on what basis and in what sum(s)?

(8) Is A&V entitled to interest, and, if so, on what basis and in what sums?

J&BH's contracharges

80. In order to understand the landscape of action 6 of 2023, it is relevant to consider J&BH's contracharges which were the primary driver for Mr. Smith's Decision that monies were due from A&V to J&BH.

81. The claims at (1), (2) and (6) above are at the heart of the conclusions of Mr. Smith which led to his Decision that £82,956.88 was payable by A&V to J&BH. The important limbs of that Decision for this purpose are:

(1) His decision in paragraphs 27 to 49 which substantially rejected A&V's case as to the extent of completion of A&V's works: this led to a reduction in the amount due to A&V and to an increase in the cost allowed for other contractors completing A&V's works;

(2) His decision in paragraphs 50 to 60 substantially rejecting A&V's variation claims;

(3) His acceptance in paragraph 72 of J&BH's contracharge claim for the cost of completing the works, which is coupled with his rejection at paragraphs 20 to 24 of A&V's claims on various bases that A&V was wrongly prevented from completing its works;

82. Categories (1) and (2) in that list are categories of claims which adjudicators deal with on paper day in day out and .

83. Category (3) is different. Whilst adjudicators regularly deal with termination claims, this group of claims, if litigated in this Court, will turn upon oral evidence, which was not part of the procedure before Mr. Smith (and is unusual in adjudications).

The shape of action 6 of 2023 if it is not stayed

84. Whilst I have not heard submissions on the appropriate directions in action 6 of 2023, my provisional view based upon my reading of both adjudicators' decisions and the other relatively voluminous material placed before me is that

the factual issues between the parties are relatively limited save in respect of the claims for lost future profits (paragraphs 10.6 and 10.8 of the June 30 pleading). Also, it is my provisional view that save in respect of those claims, no disclosure is necessary or appropriate.

85. Again as a provisional view, it seems to me that all the surviving claims other than those two claims could be determined in a three day hearing. The Court can accommodate such a hearing in January 2024.

The State of A&V's finances

86. I turn now to the three applications before which are not directly linked to the pleading issues considered above. Those applications are:

(1) A&V's application for a stay of execution in action 444 of 2022;

(2) 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; and

(3) J&BH's application for security for costs in action 6 of 2023.

87. A&V's financial position is relevant to all of these applications.

88. In paragraph 53 of my 16 June judgment, I set out relevant parts of HHJ Pelling QC's judgment in *Andrew v Flywheel IT Services Ltd* [2021] EWHC 3746 (Comm). I do not repeat that citation here but record that I accept and apply the principles he there set out.

89. I then considered the financial information before the Court before concluding at paragraphs 67 and following:

> 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.

90. I then considered whether to permit A&V to adduce further evidence, to which Mr. Frampton objected. Despite his objections, in paragraph 78 of the judgment I permitted A&V to submit further evidence.

91. A&V did so in a witness statement dated 30 June 2023 with accompanying exhibits. I have considered that material and have concluded that it complied with the permission I granted in my 16 June judgment.

92. Some further information has since been submitted at and after the hearing on 15 September. That information supports the conclusion which I would have reached in any event on the material produced on 30 June 2023 (and before).

93. It is in my judgment clear beyond any doubt that A&V itself cannot afford to pay any further sums at present. The corporate cupboard is for all practical purposes bare, and it seems to me wildly improbable that any commercial lender would lend it any money now or in the foreseeable future.

94. That then means that I must consider whether those standing behind the company, the Paduraru family, can be expected to be able to provide any significant further finance to A&V.

95. The evidence before me shows that that family, and friends, have made loans to A&V. The evidence shows also that this well is running, and probably has run, dry. The evidence of Mr Paduraru, which I accept at this stage, shows that he has exhausted all obvious sources of finance. I do not rule out small loans in future from friends and family perhaps to enable A&V to get action 6 of 2023 to the trial which below I direct should take place, but I do not see any sensible chance of Mr. Paduraru raising any significant portion of the outstanding judgment sum, or the monies to provide security for costs, still less both.

The application for a stay of execution in action 444 of 2022

96. My jurisdiction comes from CPR 83.7. The Court has a discretion under that rule to order a stay of execution if is it 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."

97. I have referred already to my citation in my 16 June judgment to the decision of HHJ Pelling QC's judgment in *Andrew v Flywheel IT Services Ltd.* It is relevant also to consider the authorities in respect of granting a stay of execution in judgments enforcing adjudicators' decisions.

98. Applications for a stay of execution in this Court almost invariably refer to the judgment of HHJ Coulson QC in *Wimbledon Construction Company 2000 Ltd v Vago* [2005] EWHC 1086 (TCC); [2005] BLR 374. However that case and the many applying it are concerned with a situation where a defendant against whom judgment has been entered enforcing an adjudication decision seeks a stay because the Claimant's financial position is insecure, meaning that an eventual decision in the Defendant's favour following an arbitration or litigation may be an empty victory because the Claimant would not be able to satisfy a decision that decided that the adjudicator's decision (which was the subject of the enforcement judgment) was wrong. However the following parts of the judgment in that case at paragraphs [26] (a), (b) and (c) are relevant in the present circumstances:

> In a number of the authorities which I have cited above the point has been made that each case must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:

> (a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
>
> (b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.
>
> (c) In an application to stay the execution of summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind (see *AWG Construction v Rockingham Motor Speedway* [2004] EWHC 888 (TCC)).

99. In *Bewley Homes plc v CNM Estates (Surbiton) Ltd* [2010] EWHC 2619 (TCC); [2011] BLR 67 where the Claimant was seeking to obtain summary judgment (and enforcement of such judgment) in respect of a Settlement Agreement settling, inter alia, liability of sums due under an adjudication decision, Akenhead J., having granted summary judgment then had to consider an application for stay of execution of that judgment. He said, at paragraph [33]:

> It is then suggested that the Court can exercise its discretion under RSC Order 47 to stay execution where, in this case, CNM can not pay. In commercial cases, such as this, it must be rare and exceptional for the Court to stay execution of a judgement sum because the defendant can not pay. If it was at all common, impecunious defendants, who defaulted on their payment obligations, could always avoid having to pay through the exercise of this discretion and defendants would never go into liquidation. No authority has been put forward to suggest that in a case such as the present one the Court should exercise its discretion. For the same reasons as given above, the Court should be slow by use of a stay of execution discretion to prevent the execution of a legitimate money judgement which it has been decided should be given in circumstances such as the present; it would be wrong for CNM to obtain by way of a stay the very right which it gave away through the Settlement Agreement.

100. In *Galliford Try Building Ltd v Estura Ltd* [2015] EWHC 412 (TCC); [2015] BLR 321 Edwards-Stuart J. granted a partial stay of execution. At paragraphs [54] to [60] he said as follows:

> 54. Mr. Williamson referred me to the decision of Coulson J in *Hillview Industrial Developments (UK) Ltd v Botes Building Ltd* [2006] EWHC 1365 (TCC), where he said:
>
> > "Finally, I must consider whether or not to grant a stay in the circumstances of this case. I am satisfied that Hillview is entitled to judgment but I am also satisfied that the purpose of the 1996 Act is to provide a statutory framework which would enable justice to be done between parties to a dispute. It was not intended to cause injustice. This can, in appropriate cases, be dealt with by the grant of a stay. I am satisfied that the jurisdiction in adjudication enforcement cases to grant a stay under the CPR must be limited to cases where there is a risk of manifest injustice."
>
> 55. I agree entirely with those observations. Mr. Williamson submitted that enforcement should be stayed until the earlier of:
>
> > (i) The recovery by Estura of damages from P H Warr flowing from their breaches of contract and/or negligence in failing to issue the required payment notice. Estura has brought adjudication proceedings against its agents claiming damages in respect of these breaches.
> >
> > (ii) The conclusion of the final account process pursuant to clause 4.12 of the contract, although it submits that the difficulty here is that the initiation of that process lies in the gift of GTB.
>
> **GTB's submissions**
>
> 56. Mr. Hickey submitted that there is no precedent for a stay of enforcement of a judgment to enforce an adjudicator's decision just because the court considers that the decision might be wrong. To do that, he says, would run counter to the consistent robust policy of the court which has been followed from the outset to require compliance with adjudicators' decisions, right or wrong.
>
> 57. Mr. Hickey referred me to another decision of Coulson J in *Wimbledon Construction Company 2000 Ltd v Vago* [2005] BLR 374, in which he set out principles that were to be applied in relation to the grant of a stay. However, whilst I respectfully agree with his summary of the principles in the context in which

> they were made, the ground for seeking a stay in that case was the probable inability of the claimant to repay the judgment sum (that is the sum awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial in the event that the defendant was successful.
>
> 58. The position in this case is different. There is no suggestion that GTB might not be good for the money if the adjudicator's decision was overruled in subsequent litigation. The problem here is the predicament in which Estura will find itself between now and the conclusion of any litigation (assuming that it would be in a financial position to pursue such litigation if no stay were granted).
>
> 59. In this type of situation I consider that the overarching observations of Coulson J in *Hillview* are the ones that are applicable. Having regard to the figures that I have already mentioned, it is certainly possible that the adjudicator's decision has given GTB a windfall as Estura submit, although I am in no position to say whether or not this is in fact the case. However, it is clear that the unusual combination of factors that has arisen in this case may give rise to a risk of irreparable prejudice to Estura if the adjudicator's decision is enforced in full.
>
> 60. I must therefore consider whether in the unusual circumstances of this case it is appropriate to stay enforcement of the judgment to which GTB is entitled, either wholly or in significant part. I will first consider the prejudice that is alleged by Estura.

101. Thus the test applied by Edwards-Stuart J in deciding whether there should be a departure from the usual refusal of a grant of a stay of execution, was whether by doing so there was a risk of substantial injustice.

102. In *Equitix ESI CHP (Wrexham) Ltd v Bester Generacion UK Ltd* [2018] EWHC 177 (TCC); (2018) 177 Con LR 104, Coulson J. referred to his judgment in *Wimbledon Construction Co 2000 Ltd v Vago* and said at paragraphs [62] and [63]:

> 62. It was, of course, not my intention that this summary should be set in stone. It was simply a summary of the main points established by the cases up to that time. It does not, for example, deal with the position where allegations of fraud are made, particularly in circumstances where those might affect the

> financial standing of the referring party (who is almost always the party opposing the stay).
>
> 63. My attention has been drawn to two further cases, dealing with the topic of a stay, which are said to be relevant to the present dispute. The first is the well-known case of *Galliford Try Building Limited v Estura Limited* [2015] EWHC 412 (TCC). In that case, Edwards-Stuart J concluded that Estura were not entitled to start a second adjudication to establish the true value of an interim payment, in circumstances where they had failed to serve their own payless notice. However the problem in that case was that, although it concerned an interim application, it came after the end of the works and was an indicative final account. If Estura could not challenge the true value, it might be months or even years before the final account could be resolved, during which any over-payment would be retained by the contractor."

103. Dealing with the facts of the case before him, he said at paragraphs [68] to [77]:

> 68. Mr Owen argues, principally by reference to *Estura*, that what he calls a "wide-ranging" stay should be imposed, and that it should not be for a short period. He also said that it should in some way be tied in to the proceedings which the defendant's sub-contractor has commenced against the defendant in this court.
>
> 69. Mr Wygas said that the defendant knew that it was contracting with an SPV and knew that the contract provided for at least the risk that the Project may come prematurely to an end. He also said that the documents showed that the defendant's interest in the claimant's financial position was very recent and that, since it was as a result of the first adjudication that the die was cast, the defendant should not be permitted to be able to sit on its hands for seven months and then obtain a stay at the last minute.
>
> 70. In my view, when exercising the court's discretion as to granting a stay in this case (and if so, on what terms), I should have particular regard to the following matters.
>
> 71. First, I consider this to be an unusual case. Whilst I agree with what Stuart-Smith J said in *LXB*, that rather presupposes that the Purpose of the Special Purpose Vehicle is seen through to the end. In this case, the claimant is now an SPV with no P (because it has elected not to continue with the Project). That means that, not only does the claimant have no possible incentive to remain in existence for a minute longer than it needs to, once it has repaid its debts to its parent, but that it is also overwhelmingly likely that the claimant will be wound up sooner rather than later. Thus, the risk of overpaying and never being

> repaid faced by the defendant is very real and could not have sensibly been predicted when the contract was agreed.
>
> 72. Secondly, the provisions of clause 15.7 mean that, even if the claimant did remain in existence so as to resolve all outstanding arguments, that could be months or even years down the line. As noted above, clause 15.7 expressly provides that there can be no challenge to the second adjudication decision relating to the Interim Account, so the defendant is stuck with it until the final accounting process (involving the Net Loss Statement) has been concluded. And the contract is silent as to when that should take place.
>
> 73. Although Mr Wygas sought to argue that there was some correspondence which showed that the claimant's solicitors had agreed that this aspect of the contract needed to be rectified, I consider that the correspondence shows the opposite. The question of rectification of clause 15.7, so as to allow a challenge to the Interim Account, was raised by the defendant's solicitors in correspondence, and it was expressly rejected by the claimant's solicitors. Thus, the court can only approach this issue on the basis that any final reckoning by reference to the Net Loss Statement is far off in time.
>
> 74. Accordingly, this is a similar case to *Galliford Try v Estura*, involving a large disputed claim on an interim application and a final account off in the future, and no opportunity to redress the balance before then. It leaves the payer (in Mr Owen's words) 'caught between two stools'.
>
> 75. There is some force in Mr Wygas' submission that the defendant's difficulties arise directly out of the first adjudication which, beyond the Notice of Dissatisfaction served seven months ago, they have done nothing to address. Given the sums at stake, I think that there is an obligation on the defendant to get on with it. On the other hand, it is not as if the defendant's solicitors have spent those seven months idling: the second adjudication, which resulted in a 90 page decision, has obviously taken up much of the time since.
>
> 76. In my view, the court is entitled to consider that there is a bona fide challenge to the result of the first adjudication, and therefore the whole premise of the decision in the second adjudication. That cannot of course prevent summary judgment to enforce the adjudicator's decision, but it is a relevant factor when considering a stay.

104. Another case in which a stay was ordered was *JRT Developments Ltd v TW Dixon (Developments) Ltd* (Judgment dated 8 October 2020) in which one factor

which HHJ Sarah Watson took into account was the likelihood that if the relevant judgment were enforced the Defendant would be forced into liquidation and would not be able to pursue its claim to recover the judgment sum and its claim that it had already overpaid on a true valuation of the work (paragraph 121).

105. I should note that in that case the judge had come to the conclusion on the evidence before her that it was at least likely that following trial there would be a significant repayment to the Defendant.

106. In none of the cases was the decision based upon a firm conclusion that the financial position of the Defendant justifying the stay was a direct result of the Claimant's conduct.

107. From the above cases and the well-known principles applied in this Court towards the enforcement of adjudicators' decisions (including the matters to which I referred in paragraphs 33 and 34 of my first judgment in this matter) I draw the following conclusions:

(1) In cases involving the enforcement of adjudicators' decisions, the Court should first decide whether to grant summary judgment;

(2) In reaching that conclusion, the Court should not be distracted by a view that the adjudicator got his or her decision wrong or that the adjudicator's decision was less satisfactory than might be desirable;

(3) It may seem obvious that until a judgment has been entered, there can be no question of a stay of execution, but it is important to note that the issues which are relevant to a stay application are different from those relevant to

whether summary judgment should be granted. In the case of a stay, as the cases referred to above show, it may be relevant to the Court's deliberations to consider whether the adjudicator's decision is likely to be reversed or modified in later arbitration or liquidation. Such considerations are irrelevant to the grant of summary judgment, save in the rare cases where the Court will entertain a Part 8 claim at the same time as the claim for summary judgment: see *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC); [2017] Bus LR 908;

(4) Once summary judgment has been granted, there is a strong presumption against a stay of execution being granted, not only as a matter of general policy in all cases where judgment has been entered, but particularly in judgments enforcing adjudicators' decisions where the policy of the Courts, giving effect to the intention of Parliament, is to apply the principle "pay now, argue later";

(5) That presumption is, if anything, stronger where the disputing parties are commercial entities;

(6) However, the Court has a discretionary power to order a stay of execution of judgments enforcing adjudicators' decisions in cases falling within CPR 83.7 particularly where the enforcement of the summary judgment might or would cause manifest injustice.

(7) An applicant for a stay of execution relying upon its parlous financial situation so as to fall within CPR 83.7(b) does not have to establish that its financial situation is the result of any act or omission on the part of the judgment creditor, but, it seems to me, its position will be stronger if it does

demonstrate that link, particularly if it can be shown that that act or omission was a breach of contract.

108. There is another strand of policy which arises in respect of adjudication enforcement cases which does not arise in the general run of cases: in most cases before the Court a monetary judgment from the Court is (subject to appeal) the final word on the amount due from one party to the other on the litigated claims.

109. Adjudication is different, because there the Court is enforcing a rapidly reached decision on a provisional view as to liability, the final view to be determined, should the parties wish it, by a court or arbitral tribunal.

110. This has led to decisions of the Courts as to what should happen in respect of the effect to be given to such a provisional decision. Thus in *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448; [2019] BLR 1, it was held that a party is not entitled to resort to a fresh adjudication seeking a "true value adjudication" unless and until that party has first discharged its obligations to pay the amounts determined as payable in a prior adjudication.

111. Thus, the prohibition on a party starting an adjudication in order to sidestep an adverse (and unpaid) prior adjudication decision is clear.

112. However, the position where a party seeks to proceed to a determination by the court as to the true state of the account between the parties whilst refusing to honour an adverse adjudicator's decision is more nuanced. In this situation the victor in the adjudication may apply for a stay of any court proceedings by the losing party in the adjudication seeking a determination of the true state of accounts between the parties. The Court's approach in such a case was set out

in the judgment of Akenhead J. in *Anglo Swiss Holdings Ltd v Packman Lucas Ltd* [2009] EWHC 3212 (TCC); [2010] BLR 109; 128 Con LR 67 at paragraph [21]:

> (i) The court undoubtedly has the power and discretion to stay any proceedings if justice requires it.
>
> (ii) In exercising that power and discretion, the court must very much have in mind a party's right to access to justice and to issue and pursue proceedings.
>
> (iii) The power is one that is to be used sparingly and in exceptional circumstances.
>
> (iv) Those circumstances include bad faith and where the claimant has acted or is acting particularly oppressively or unreasonably.

113. In *Kew Holdings Ltd v Donald Insall Associates Ltd* [2020] EWHC 1862 (TCC); [2020] BLR 578, O'Farrell J. referred to *Anglo Swiss Holdings*, *S&T v Grove* and to the decision of Stuart-Smith J. in *M Davenport Builders Ltd v Greer* [2019] EWHC 318 (TCC); [2019] BLR 241 and said at paragraphs [22] and [23]:

> 22. It is clear from the above authorities that the Claimant would not be entitled to start a further adjudication in respect of the Defendant's fees (on substantive issues not yet determined) without paying the outstanding adjudication award. Further, the Claimant would not be entitled to rely on any subsequent 'true value' adjudication as a defence to the enforcement of the outstanding adjudication award. However, those issues do not arise in this case because the Court has already enforced the outstanding adjudication award by giving summary judgment in favour of the Defendant.
>
> 23. There is nothing in the HGCRA or in the above authorities that would render the current proceedings unlawful or an abuse of process as submitted by the Defendant. The HGCRA provides that an adjudication award is binding only until the dispute is finally determined by legal proceedings, arbitration or by agreement. Therefore, it expressly contemplates the commencement of legal proceedings to establish the parties' rights and obligations by way of a final binding determination.

> Unlike the adjudication provisions, which are subordinate to the payment provisions in the HGCRA, the right to bring legal proceedings to determine rights and obligations and seek remedies is more fundamental. The right of access to swift justice was guaranteed by Magna Carta and is enshrined in the Human Rights Act 1996, which gives effect to the Convention rights, including Article 6, the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. A party's right to access to justice is not unfettered but clear words would be required to make it subordinate to the payment provisions in the HCGRA.

114. On the facts of the case before her she held:

> 28. I am satisfied that the Claimant is in deliberate and persistent breach of the Order dated 5 February 2019. The Claimant's repeated promises to pay the outstanding sum indicate that it could satisfy the judgment but has chosen not to do so. The commencement of these proceedings without honouring the adjudication award and the judgment, in flagrant disregard of the "pay now, argue later" regime of the HGCRA, amounts to unreasonable and oppressive behaviour. However, I accept the submissions by Mr Smith that striking out the claim at this stage would be too draconian; the Defendant is entitled to the protection afforded by a stay of proceedings unless and until the judgment has been satisfied but the Claimant should be allowed to pursue its claims once it has paid the outstanding judgment sum.
>
> 29. For the above reasons, there should be a stay of proceedings pending payment of the outstanding judgment sum.

115. It is thus clear from the authorities that this Court will in appropriate cases exercise its discretion to stay a claim seeking a “true value” determination if the Claimant has refused to honour an adjudicator’s decision. However, it is also clear that in doing so the Court will exercise its power “sparingly and in exceptional circumstances” (per Akenhead J. in *Anglo Swiss Holdings* at paragraph [21(iii)]) and “having regard to all the circumstances of the case” (per O’Farrell J. in *Kew Holdings* at paragraph [44]).

116. In this case, the Court is considering both an application by A&V to stay execution of the judgment entered against it and by J&BH to stay the proceedings commenced by A&V.

117. In my judgment this is one of those cases where the Court should, exceptionally, grant a stay of execution of the judgment against A&V for the following reasons:

(1) The Court of Appeal has ruled in paragraph [43] of its judgment (*A&V Building Solution Ltd v J&B Hopkins Ltd* [2023] EWCA Civ 54; 206 Con LR 184) that as at April 2022 J&BH was in breach of contract because it had not paid the first adjudicator's decision "that should have been the first order of business";

(2) The Court of Appeal held (at paragraph [17]) that "the first adjudication was made more complicated than it needed to be, in particular because JBH's solicitors raised a number of unmeritorious jurisdictional challenges and generally failed to provide the sort of assistance to a lay adjudicator that I would expect";

(3) J&BH launched Part 8 proceedings raising arguments which the Court of Appeal held to be wrong (overruling the decision of Eyre J.);

(4) Whilst these actions were not the sole cause of A&V's financial difficulties, I am satisfied on the evidence before me that the costs arising from these actions exacerbated A&V's financial difficulties;

(5) The Court cannot ignore that J&BH is seeking to insist upon the "pay now, argue later" principle which it itself refused to honour;

(6) There is no doubt in my mind that A&V's case that the second adjudicator's decision was wrong is arguable. I say this for the following reasons:

a) The views of the two adjudicators were almost diametrically opposed;

b) As I pointed out in my first judgment, the reasoning of the second adjudicator was not in all respects as full as might be desired (not unusual in the limited time within which an adjudicator must produce the decision);

c) On the crucial issue of the circumstances in which A&V ceased work, this Court will probably have the advantage of hearing oral evidence, unlike the second adjudicator;

d) I have had the benefit of a substantial volume of evidence which seems to me to reveal live issues for determination at trial;

(7) There is no prospect of execution of the judgment producing any financial reward for J&BH. The consequence of execution of the judgment would probably be an order winding up A&V, effectively preventing A&V from pursuing its claim which I have held to be arguable.

118. For the above reasons I have concluded that to refuse a stay of execution in the circumstances of this case would or might cause a manifest injustice to A&V.

119. For the reasons set out above, I have formed the provisional view that the main core of the disputes between the parties can be considered in a hearing in about

4 months' time. At that stage the status of the position between the parties will inevitably be reconsidered.

The application for a stay in action 6 of 2023

120. I have referred to the relevant authorities above.

121. In my judgment an underlying factor justifying the stay in cases where a claimant has failed to honour an adjudicator's decision by making payment before seeking to a true valuation determination has been that such failure has been deliberate. (See for example paragraphs [24] and [25] of the judgment in *Anglo Swiss Holdings* and paragraph [28] of the judgment in *Kew Holdings*).

122. In this case, it seems to me that by the time that the second adjudicator issued his decision, it would have been very difficult for A&V to honour the decision even if J&BH had not complicated the matter by the Part 8 proceedings, and impossible for A&V to do so whilst raising money to deal with those proceedings, weakened as it was by J&BH's conduct before that date as held by the Court of Appeal as I have set out above.

123. For these reasons, this case is distinguishable on its facts from the authorities to which I have referred.

124. Further, it seems to me that it would be inconsistent for me to hold on the one hand that there should be a stay of execution of the judgment against A&V on the grounds of the risk of manifest injustice, and then on the other hand to order a stay of the proceedings brought by A&V.

125. Accordingly, J&BH's application for a stay of action 6 of 2023 is refused.

Security for costs

126. I have set out above my conclusions as to the financial position of A&V. It follows from all my conclusions above that any order for security for costs will result in a stifling of an arguable claim.

127. The application for security for costs is refused.

Conclusion

128. The result of this judgment is that action 6 of 2023 will proceed.

129. I invite the parties' submissions as to the appropriate directions to be given in that action and as to appropriate orders to give effect to this judgment.

130. In my view in the circumstances of this case that would probably best be done at a hearing of one hour preceded by the parties' suggestions in writing.

Addendum

1. In his list of suggested corrections to this judgment in draft, Mr. Frampton said:

> The Judgment does not address the argument, the factual premise of which was accepted by Mr. Paduraru in his submissions, that the sum claimed by A&V in these proceedings (once duplication and struck out claims are removed) is less that the sums it otherwise owed.

2. It is correct that the draft judgment did not do so. In order to understand the point(s) being made, it is convenient to refer to two of the grounds raised by J&BH in seeking permission to appeal:

> (1) The Court failed to take into account the fact that, as accepted by Mr Paduraru in his reply submissions for A&V, the sums A&V was claiming (once necessary amendments/striking out had been made) were less than the sums it owes to HMRC, NatWest and JBH regardless of the outcome of these proceedings (i.e. the costs of Action 444 of 2022 and the Adjudicator's fees). The premise of a stay on the basis that the applicant is unable to pay must be that the party is currently unable to pay but would be able to pay at the conclusion of the stay. That is not the case here.
>
> (2) The Court failed to take into account the fact that A&V's financial position was not wholly or in significant part due to JBH. Contrary to para. 107(7), this should, by analogy with the Wimbledon v Vago principles, have been a necessary (but not sufficient) condition. Even on the Court's assessment (addressed above), JBH only "exacerbated" A&V's financial difficulties. A&V's financial difficulties were caused by sums it owed to NatWest and HMRC.

3. It is correct that the amount owed by A&V to HMRC and its banks is more than the amount which can probably be legitimately claimed by A&V in action 6 of 2023 at the highest. This point needs to be considered in respect of the three different aspects covered by this judgment (other than the pleading issues):

> (1) Stay of execution of the judgment: if action 6 of 3023 is successful for A&V, then at the conclusion A&V as a company will be relieved of the greater part of any liability it is presently under to J&BH. The situation posited in the ground of appeal is that at the end of the stay the applicant will then

be able to make payment. However the point of action 6 of 2023 from A&V's viewpoint is to avoid there being any sum to pay or to reduce any sum which needs to be paid;

(2) Stay of action 6 of 2023: I do not understand the point to relevant to that application as it only relates a case where the applicant for a stay is the non-paying party;

(3) Security for costs: I do not understand how the point is relevant to that application for the same reason as the application for a stay of action 6 of 2023.

4. The second point presupposes that if, contrary to A&V's case, A&V had continued work and had been paid all the sums it says was due to it, A&V would have been in the same position vis-à-vis HMRC and its banks as it is now in. I have seen no evidence to support that proposition. To the contrary, it seems to me , that if A&V had concluded the work on the project, been paid what it claims it was owed, and gone on to work on other projects, its position might have been significantly better. I cannot and should not judge that case at present so as to form the firm conclusion pressed by Mr. Frampton.