



Neutral Citation Number: [2023] EWHC 2269 (TCC)

Case No: HT-2023-000242

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

Rolls Building
Fetter Lane, London EC4A 1NL

Date: 13 September 2023

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

Between :

ALUN GRIFFITHS (CONTRACTORS) LIMITED

Claimant

- and -

CARMARTHENSHIRE COUNTY COUNCIL

Defendant

Peter Brogden (instructed by **Brodies LLP**) for the **Claimant**
Mischa Balen (instructed by **Geldards LLP**) for the **Defendant**

Hearing date: 5 September 2023

Approved Judgment

This judgment was handed down remotely on 13 September 2023
by circulation to the parties and by release to the National Archives.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. By this claim, Alun Griffiths (Contractors) Limited seeks summary judgment in the sum of £3,316,487.55 in order to enforce an adjudicator's decision in its favour against Carmarthenshire County Council. The claim arises out of civil engineering and construction work carried out by Alun Griffiths to the council's order on the A48 between Swansea and Carmarthen.
2. The council does not accept that the adjudication decision reflects the true state of the parties' account. Accordingly, it intends to refer the issue of the true value of the works to adjudication. While the council accepts that Alun Griffiths is entitled to summary judgment, it seeks a stay of execution pending the outcome of such further adjudication on the grounds that the contractor is insolvent and its parent company's guarantee is inadequate to safeguard the council's position.

THE APPLICATION FOR A STAY

3. Rule 83.7(4)(a) of the Civil Procedure Rules 1998 provides that the court may stay the execution of a judgment or order if there are "special circumstances which render it inexpedient to enforce the judgment or order." In Wimbledon Construction Company 2000 Ltd v. Vago [2005] EWHC 1086 (TCC), (2005) 101 Con LR 99, His Honour Judge Coulson QC, as he then was, helpfully summarised the applicable principles at [26]:
 - "(a) Adjudication ... 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 ... with considerations a) and b) firmly in mind (see AWG Construction Services v. Rockingham Motor Speedway [2004] EWHC 888 (TCC)).
 - (d) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances ... rendering it appropriate to grant a stay (see Herschell Engineering Ltd v. Breen Property Ltd (unreported) 28 July 2000, TCC).
 - (e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see Bouygues (UK) Ltd v. Dahl-Jensen (UK) Ltd (2000) 73 Con LR 135, [2001] 1 All E.R. (Comm) 1041, CA and Rainford House Ltd v. Cadogan Ltd [2001] B.L.R. 416).
 - (f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:
 - (i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see Herschell); or
 - (ii) the claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see Absolute Rentals v. Glencor Enterprises Ltd [2000] C.I.L.L. 1637)."

4. It is common ground that in cases in which the court might otherwise grant an application for a stay on the basis of concerns as to the claimant's solvency, such application may be defeated by offering a bond or guarantee which provides sufficient security: see FG Skerritt Ltd v Caledonian Building Systems Ltd [2013] EWHC 1898 (TCC), Ramsey J, at [58].

ALUN GRIFFITHS (CONTRACTORS) LIMITED

5. Alun Griffiths is a wholly-owned subsidiary of Tarmac Holdings Limited which is itself owned by CRH plc. Alun Griffiths' most recent filed accounts are for the year ended 31 December 2021. They record a loss for the trading year of £38.1 million upon a turnover of £279.9 million. Comparison with earlier accounts shows a deteriorating financial position despite the company's growing turnover:

Accounts of Alun Griffiths (Contractors) Ltd				
All figures in thousands of pounds sterling				
Year ended	31 Dec 2018	31 Dec 2019 (Restated)	31 Dec 2020	31 Dec 2021
Turnover	202,723	223,439	225,773	279,869
Cost of sales	(192,898)	(218,445)	(228,648)	(308,286)
Gross profit/(loss)	9,825	4,994	(2,875)	(28,417)
Profit/(loss) after tax	418	(4,867)	(11,492)	(38,080)

6. Such mounting losses have wiped out the company's asset position leaving it balance-sheet insolvent with a total deficit of over £58 million at 31 December 2021. Further, the company's growing net current liabilities are an indicator of cashflow pressure:

Accounts of Alun Griffiths (Contractors) Ltd				
All figures in thousands of pounds sterling				
Year ended	31 Dec 2018	31 Dec 2019 (Restated)	31 Dec 2020	31 Dec 2021
Net current liabilities	(1,859)	(12,304)	(22,373)	(33,198)
Net assets/(liabilities)	1,564	(8,754)	(20,246)	(58,326)

7. Recognising that the company's accounts give rise to legitimate concerns as to its solvency and, in particular, as to whether Alun Griffiths would be able to repay the judgment sum in the event that the council succeeds in its true-value adjudication, it sensibly offers a parent-company guarantee from Tarmac. The issue before me is as to the adequacy of that guarantee and therefore whether it is inexpedient to enforce the adjudication decision.

TARMAC HOLDINGS LIMITED

Balance sheet

8. Tarmac is not a trading company but, as its full name implies, holds investments in a number of group companies. Its most recent accounts show a very positive net-asset position of over £1.5 billion at 31 December 2021:

Accounts of Tarmac Holdings Ltd				
All figures in millions of pounds sterling				
Year ended	31 Dec 2018	31 Dec 2019	31 Dec 2020	31 Dec 2021
Investments in subsidiaries	1,810.9	1,810.9	1423.3	1,810.9
Net current liabilities	(97.8)	(97.7)	(94.1)	(295.7)
Net assets	1,712.5	1,712.6	1,324.2	1,510.2

9. The council's forensic accountant, Geoff Mesher, comments on the 2019 accounts:
- “Tarmac's balance sheet is solvent - i.e. it showed a positive net asset position; however, this is only due to the carrying value of its investments in its subsidiaries. I have not reviewed or investigated each of the subsidiaries to consider whether their carrying values as at 31st December 2019 represents their recoverable values.”
10. As to the 2021 accounts, Mr Mesher adds:
- “The company's balance sheet for FY2021 shows a significantly reduced net asset position than in FY2019 (£202.4 million lower), even after taking into account of the reversal of the impairment in investments of £387.6 million ... Accordingly, the company remains balance-sheet insolvent.”
11. Mischa Balen, who appears for the council, initially relied on this passage. It is, however, plain that it contains a very unfortunate typographical error and that Mr Mesher's true opinion is that Tarmac remains balance-sheet solvent. Indeed, he makes that clear later in his report:
- “Tarmac was not balance-sheet insolvent as at 31st December 2019 and 31st December 2021, primarily due to the carrying value of its investments in its subsidiaries.”

12. I do not consider that it is helpful to observe that a holding company that does not itself trade is only solvent because of the value of its investments. In my judgment, it is not remotely surprising that the bulk of the value in a holding company's balance sheet should be in its investments in subsidiaries. Indeed, Mr Mesher reports that Tarmac has interests in over 200 subsidiaries. While lower in 2021, the total net-asset position recorded by the latest accounts is still in excess of £1.5 billion.
13. Mr Mesher has not himself sought to review or investigate the true value of Tarmac's investments in its subsidiaries. While I accept that the valuation of investments is not something that can be achieved with precision, there is accordingly no evidence before the court to undermine Tarmac's accounts or the supporting reports from the board and of the independent auditors, Deloitte LLP. I therefore proceed on the basis that Tarmac has a substantial positive net-asset position and that it is clearly balance-sheet solvent. Ultimately Mr Balen did not seek to dissuade me from this view once the error in Mr Mesher's report had been identified.

Cashflow

14. Mr Balen argues that whatever the net asset position, Tarmac's accounts show substantial and growing net current liabilities which are an indicator of cashflow insolvency. Commenting on the 2019 accounts, Mr Mesher reports:

“Notwithstanding the fact that the company's net asset position is positive, its balance sheet shows a net current liability position of c. £98 million; meaning that the company's more liquid assets do not cover its short-term liabilities ... The company's net current liability position of c.£98 million is a potential indicator of cash-flow insolvency. The directors' report for FY2019 includes a section on going concern, and ... the directors consider the company to be a going concern but only due to the continued support of the Group.”

15. Turning to the 2021 accounts, Mr Mesher adds:

“The level of net current liabilities has increased significantly from £97.7 million in FY2019 to £295.7 million in FY2021, due to the increase in amounts owing to group companies ... Bearing in mind the fact that the company does not hold any cash and has significant short-term liabilities the company would appear, prima facie, to be cash-flow insolvent.”

16. Mr Mesher observes, however, that the directors prepared the accounts on the going-concern basis due to the continued support of the Group and that the auditors concurred with that view. As to Tarmac's ability to pay its debts as they fall due, he reports:

“[Tarmac]'s ability to generate cash depends on the performance of its subsidiaries and interest earned on funds lent to group companies.

Tarmac does not hold any cash. It participates in the Group's zero balancing cash-pool arrangement whereby each company participating in the cash-pooling arrangement has cash swept automatically to/from its account on a daily basis so that the balance sheet balance reverts to zero at the end of each day.

... the directors state in their directors' report that the Tarmac Group is profitable and cash-generative and there is sufficient headroom to allow the Tarmac companies to continue to operate with significant cash headroom whilst meeting

daily cashflow requirements over the next 12 months from the date of signing the FY 2021 financial statements (which was on 30th September 2022).

Accordingly, the ability of Tarmac to repay a sum of £2.7 million to £3 million between September and December 2023 including interest and costs very much depends on the cash holdings within the Group.”

17. Simon Paley, the forensic accountant instructed by Alun Griffiths, responds that a cash-management system is operated by many large groups with multiple subsidiaries. Further, he considers the accounts of Tarmac’s ultimate parent company, CRH plc, for the year ended 31 December 2022. Such accounts report:
 - 17.1 a consolidated group profit after tax of US\$2.7 billion;
 - 17.2 total net assets of US\$22.3 billion; and
 - 17.3 total cash reserves of US\$5.9 billion.
18. Mr Paley reports:

“In my view, this indicates that the group is in very strong financial health. In light of this, I can think of no clear commercial reason why the group would not continue to provide financial support to [Tarmac].”
19. Mr Balen argues that the cash-pooling arrangements have not been adequately explained and that, given Tarmac’s net current liabilities, its guarantee offers no better protection than a claim against Alun Griffiths. He submits that it would have been easy for Tarmac to have supplied evidence of the liquidity arrangements within the group and to have placed formal evidence before the court of CRH’s continued support of its subsidiary.
20. There is, in my judgment, no merit in these arguments. Upon the evidence before me, I make the following findings:
 - 20.1 Tarmac is a company with a very healthy balance sheet showing a net asset position of £1.5 billion. It is plainly balance-sheet solvent.
 - 20.2 Since Tarmac is not a trading company, it does not hold cash and has net current liabilities.
 - 20.3 The existence of net current liabilities does not of itself mean that a company cannot pay its debts as they fall due, but can be an indicator that cash will be very tight and that without careful management a company *may* be insolvent. Here, however, Tarmac’s cash position is driven by the cash-pooling arrangements operated by the group of companies.
 - 20.4 In any event, the ultimate parent company has a very substantial positive cash position and there is no evidence that it will not continue to support Tarmac’s own cash position. Indeed, once it is accepted that Tarmac has a strong positive net-asset position, it is fanciful to suggest that the group would not support its cash requirements and that Tarmac will not be able to repay a judgment sum of circa £3 million in the event that it is called upon to do so. When I put that proposition to Mr Balen, he countered that there was nothing to stop Tarmac divesting itself of its investments to another group company at an undervalue. Such submission is neither commercially realistic nor correct in law since it would appear to contemplate a transaction at an undervalue with a connected party that might be set aside by the court pursuant to section 238 of the Insolvency Act 1986.

21. Accordingly, I conclude that the guarantee offered by Tarmac more than protects the council's position and that there are no proper grounds for staying the enforcement of this judgment.

COSTS

22. It is common ground that Alun Griffiths is entitled to its costs of these enforcement proceedings. Peter Brogden, who appears for Alun Griffiths, argues that such costs should be awarded on the indemnity basis in view of the council's unreasonable and obstructive behaviour. He particularly relies on the following matters:
- 22.1 Alun Griffiths provided Tarmac's guarantee to the council as long ago as 31 March 2023.
- 22.2 By an email sent on 13 April 2023, the council's solicitors responded that, in view of the guarantee, the council would make payment provided that it received a valid VAT invoice and that it was satisfied that the invoiced sum had been calculated correctly.
- 22.3 As to these conditions, Alun Griffiths raised an invoice on the following day and the council has not subsequently taken issue with the maths.
- 22.4 On 18 April 2023, the council suggested a new payment date of 4 May 2023 and asked that the date of expiry of the guarantee be extended to 31 October 2023. By a further email that day, it indicated that it was seeking "a bit of additional time to make the payment" and again referred to a new deadline of 4 May.
- 22.5 Alun Griffiths' solicitors explained that it would take some time to obtain board approval for a new guarantee but put that matter in hand. Meanwhile, on 9 May 2023, the council changed tack observing that it had been "reflecting on the inadequacies of the [guarantee]." It particularly identified the expiry date of 30 September which it argued was inadequate time to complete a true-value adjudication. This, it argued, was a particular risk given the possibility of Alun Griffith's insolvency and the consequential need for applications to the court to allow the council to commence or proceed with its planned adjudication. The letter concluded that the court might well not, in such circumstances, grant summary judgment and that, even if it did, the court would grant a stay of execution.
- 22.6 On 16 June 2023, Alun Griffiths sent a further copy of the guarantee in response to the issues raised by the council in late May. In error, the wrong draft was sent but that was corrected on 26 June 2023. The new guarantee had an expiry date of 31 December 2023.
- 22.7 When the council failed to respond substantively, Alun Griffiths commenced these proceedings on 12 July 2023.
23. Mr Balen describes the promise to pay as a "misstep" on the basis that the council had not then investigated Tarmac's financial position. Accepting that the council's application for a stay has not succeeded, Mr Balen argues that it did not act unreasonably in acting upon its concerns as to the protection offered by the guarantee.
24. Rules 44.2(4)-(5) of the Civil Procedure Rules 1998 provide:
- “(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including–
- (a) the conduct of all the parties;
- (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

- (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.
 - (5) The conduct of the parties includes—
 - (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
 - (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
 - (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
 - (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.”
25. The proper approach to applications for indemnity costs is not in dispute. In Elvanite Full Circle Ltd v. AMEC Earth & Environmental (UK) Ltd [2012] EWHC 1643 (TCC), [2013] 4 All E.R. 765, Coulson J summarised the applicable principles at [16]:
- “(a) Indemnity costs are appropriate only where the conduct of a paying party is unreasonable ‘to a high degree.’ ‘Unreasonable in this context does not mean merely wrong or misguided in hindsight’: see Simon Brown LJ (as he then was) in Kiam v. MGN Ltd (No. 2) [2002] 1 W.L.R. 2810.
 - (b) The court must therefore decide whether there is something in the conduct of the action, or the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs: see Waller LJ in Excelsior Commercial & Industrial Holdings Ltd v. Salisbury Hammer Aspden & Johnson [2002] EWCA Civ 879.
 - (c) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, provided that the claim was at least arguable. But the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an order: see, for example, Wates Construction Ltd v. HGP Greentree Allchurch Evans Ltd [2006] B.L.R. 45.
 - (d) If a claimant casts its claim disproportionately wide, and requires the defendant to meet such a claim, there was no injustice in denying the claimant the benefit of an assessment on a proportionate basis given that, in such circumstances, the claimant had forfeited its rights to the benefit of the doubt on reasonableness: see Digicel (St Lucia) Ltd v. Cable & Wireless plc [2010] EWHC 888 (Ch).”
26. In this case, the council has not defended the enforcement claim and has not resisted the entry of judgment. There are, accordingly, no grounds for ordering it to pay indemnity costs of the claim itself. That said, there was no merit whatever in its application to stay judgment. Further, it was unreasonable to a high degree to promise payment in the event that it was provided with a VAT invoice and correct calculation, only then to raise spurious objections to the guarantee provided.
27. Accordingly, I order the council to pay the costs of these proceedings. Such costs will be assessed on the standard basis save that the costs of the council's application for a stay will be assessed on the indemnity basis.