Neutral Citation Number: [2024] EWHC 2800 (TCC)

Case No: HT-2024-BHM-000012

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

Birmingham Civil and Family Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Date: 6 November 2024

Before :

HHJ Sarah Watson

- -

Between :

Complete Ceiling and Partitioning Systems Limited	**Claimant**
- and -	
DE1 Limited	**Defendant**

- -
- -

Mr George Eyre (instructed by **Buckles Solicitors LLP**) for the **Claimant**
Mr James Malam, (instructed by **Petherbridge Bassra**) for the **Defendant**

Hearing dates: 22 July 2024

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JUDGMENT

Her Honour Judge Sarah Watson:

Introduction

1. This case concerns an application by the Claimant for summary judgment to enforce an adjudicator's award following the Defendant's failure to issue a pay less notice and a cross application by the Defendant for a stay of enforcement

of the judgment. The Defendant did not dispute that the Adjudicator's award was enforceable and that the Claimant is entitled to summary judgment. However, it had concerns about the Claimant's solvency and its ability to repay the judgment following proceedings for a determination of the true value of the sums due between the parties. The only ground on which it resisted the Claimant's application was that it sought a stay of the enforcement of the judgment to which it accepted the Claimant was entitled.

2. Before proceedings were issued, the Defendant raised its concerns with the Claimant and indicated it would seek a stay of enforcement. In correspondence, it asked the Claimant to demonstrate its ability to repay the award if the Defendant was successful in its claim for repayment of the Adjudicator's award in due course.

3. The Claimant refused to provide more information until after the Defendant had made its application to stay enforcement. In response to the Defendant's evidence, the Claimant filed evidence as to its ability to repay the award. As soon as that evidence was filed, the Defendant indicated it would not pursue its application for a stay.

4. The only issue before me is the question of the costs of the application to enforce the award and the application to stay enforcement.

5. In these applications, the Claimant was represented by George Eyre of counsel and the Defendant by James Malam of counsel. I am grateful to them for their submissions and for the skeleton arguments they provided.

6. Despite the hearing having been listed for 2 ½ hours, and despite Mr Eyre's optimism that the hearing would take less than that length of time given the narrow issues, there was insufficient time to deliver judgment at the end of the hearing.

The parties' positions

7. In brief summary, the Claimant's case is that it is entitled to its costs of enforcing the award and resisting the Defendant's application for a stay on an

indemnity basis, the Defendant having withdrawn its application for a stay. The Defendant's position is that there should be no order for costs, on the ground that the Claimant failed to provide information the Defendant had requested before the Claimant issued its application to enforce the award and before the Defendant issued its application for a stay. The Defendant argues that the costs of both applications would have been avoided had the Claimant behaved more reasonably by disclosing at an earlier stage the information on which it eventually relied, in accordance with the Overriding Objective. The Claimant argues that the burden of proof that the Claimant is likely to be unable to repay the judgment, should it be ordered to do so, is on the Defendant and the authorities make clear that the Claimant is under no obligation to disclose financial information to assist the Defendant to discharge that burden.

The facts

8. On 27 April 2024, the Adjudicator, Barrie Green, issued his decision in an adjudication between the parties. His decision required the Defendant to pay the Claimant £94,921.10 plus interest and costs. At the date of the Particulars of Claim, which was 3 June 2024, the total sum due pursuant to the award was £117,641.28.

9. On 28 April 2024, and after that time, the Claimant demanded payment of the award.

10. In a letter dated 8 May 2024 from its solicitors, the Claimant required the Defendant to confirm that payment would be made, failing which the Claimant would commence enforcement proceedings and would be entitled to recover its costs on an indemnity basis.

11. Later that day, the Defendant's solicitors responded as follows:

> *"DE1 is concerned to note the recent deterioration in CCP's finances shown at Companies House, in that the last filed accounts show that CCP had total available shareholders' funds of £239,111 as at 31 March 2022 but -£369,470 as at 31 March 2023. Should DE1 make payment in*

> *satisfaction of the Adjudicator's award it is therefore seriously concerned that it would not be able to recover those monies should it successfully seek adjudication as outlined above under either the SFS contract* [ie the contract that was the subject of the Adjudication] *or the dry lining contract* [ie a different contract between the parties].
>
> *So that we may take instructions upon both the further adjudications referred to above and also your client's request that payment be made in satisfaction of the Adjudicator's award, please confirm by return your client's current financial position, including in particular whether (and on what basis) it says it would be able to repay the amount of the award should our client succeed in either of the adjudications referred to."*

12. The Claimant's response later that day was to state that the letter's contents "*display a fundamental misunderstanding of the law concerning enforcement of adjudicators' decisions*" but did not explain why.

13. On 9 May 2024, the Defendant's solicitors wrote to the Claimants' solicitors stating that they did not understand that comment, since there had been no explanation of it. They sent a copy of the judgment of Pepperall J in *WRB (NI) Ltd v Henry Construction Projects Ltd* [2003] EWHC 278 (TCC), and pointed to paragraph 21 of the judgment, in which Pepperall J had cited the dicta of HHJ Coulson QC (as he then was) in *Wimbledon Construction Company 2000 Limited v Derek Vago* [2005] EWHC 1086 (TCC) to the effect that, if there is no dispute on the evidence that the Claimant is insolvent, a stay will usually be granted.

14. On 13 May 2024, the Claimant's solicitors responded as follows:

> *"CCPL is not obliged to provide the financial information which you have requested prior to commencing enforcement proceedings. See Farrelly (M&E) Building Services Ltd v Byrne Brothers (Formwork) Ltd [2013 EWHC 1186 (TCC).*

CCPL is not obliged to provide any financial information prior to enforcement proceedings to enable DE1 to assess where the CCPL is insolvent.

The onus rests with DE1 to demonstrate in support of any application for a stay of enforcement that CCPL is insolvent; it is not for CCPL to establish otherwise prior to enforcement proceedings.

That said your suggestion that CCPL is insolvent is misguided.

The shareholders funds are just one of a number of metrics by which to measure CCPL's financial performance.

CCPL continues to trade profitably and has a full order book.

The reduction in shareholders' funds was a direct result of DE1's refusal to pay sums due to CCPL under both the SFS and dry lining contracts.

If necessary, and in response to any application for a stay of enforcement, CCPL's accountant can, and will, provide a written explanation of the treatment of the shareholders' funds in CCPL's accounts .....

We are not prepared to debate matters further with you. Service of enforcement proceedings will now be effected on you without further delay."

15. That letter did not explain what was meant by "*continues to trade profitably and has a full order book*" Nor did it explain what was meant by "*the treatment of the shareholders' funds in CCPL's accounts".*

16. Mr Eyre submitted that the Defendant had not actually asked for specific financial information or evidence, such as management accounts, but had asked only for confirmation of the Claimant's financial position, which this letter provided. I disagree. Any reasonable Claimant or solicitor would understand exactly what the Defendant was asking for, which was up to date financial information or some explanation why, in the light of the filed accounts showing balance sheet insolvency and a deterioration of more than

£600,000 in the balance sheet over the year, the Claimant might contend it was likely to be able to repay the judgment sum if ordered to do so. Indeed, the request included: *"in particular whether (and on what basis) it says it would be able to repay the amount of the award should our client succeed in either of the adjudications referred to."* The Defendant was clearly seeking evidence to satisfy its concerns, not merely a bald statement that its concerns as to solvency were "*misguided*" without any explanation as to why they were misguided.

17. In any event, the letter did not provide confirmation of the financial position, but only assertions that the suggestion that the Claimant was insolvent was misguided, that it was trading profitably with a full order book, and that the accountant could provide more information if an application for a stay was made.

18. On 14 May 2024, the Defendant's solicitors responded as follows:

> *"Whilst your client may not be obliged to provide the financial information we seek, it will clearly be required to do so in response to our client's stay of execution application*".

19. On 15 May 2024, the Claimant's solicitors responded that the Claimant had no choice but to prepare the proceedings for issue.

20. The proceedings were issued on 5 June 2024.

21. On 8 July 2024, the Defendant served its evidence in response, including a witness statement from Tajinder Uhbi. In that witness statement, Mr Uhbi explained why he believes that the Defendant is likely to succeed in its claim to recover the award following a true value adjudication. I will not set out those reasons here. In addition, he explained the Defendant's concerns that there is a serious risk that the Claimant would be unable to repay those monies when the time comes for it to do so. He referred to the recent deterioration in the Claimant's finances shown at Companies House as follows:

"Their last filed accounts showed that CCP had total available shareholders' funds of £239,111 as at 31 March 2022 but a deficit in shareholders' funds of £369,470 as at 31 March 2023. I am told by those advising me that CCP's latest accounts therefore show that it is insolvent on a balance sheet basis. Also, the Claimant's latest accounts show that its total assets are less than its current liabilities by £261,137, which I understand may suggest possible problems in the Claimant paying its debts as they fall due. Should DE1 make payment in satisfaction of the Adjudicator's award it is therefore seriously concerned that it would not be able to recover those monies should it successfully seek an adjudication as outlined above under either the SFS Contract or the Dry Lining Contract. Thus while DE1 accepts that the Claimant is entitled to judgment on its enforcement claim, D1 accordingly applies for a stay of execution.

In contrast to its latest accounts, at the time the parties entered into the SFS contract, the latest filed accounts for the Claimant showed that its total assets exceeded its then current liabilities by £109,048. However, DE1 accepts that those accounts showed available shareholders' funds of -£1,962. DE1 was not aware of those accounts, which were filed on 11 November 2020, 14 days before it entered into the SFS contract, at the time it entered into that contract…… Had DE1 been aware of the Claimant's 2020 accounts it would have been reassured by the fact that this was a very small deficit in shareholders' funds and that it was not consistent with the substantial shareholders' funds shown in the Claimant's previous accounts for several years previously."

"It will be deeply frustrating if, having refused to provide details of its finances prior to issuing these proceedings, it turns out that CCP is able to provide information which demonstrates that it is now solvent. If that information is provided I do not understand why it could not have been provided before the costs of this claim were incurred."

"The Claimant's failure to provide DE1 with comfort that it will be able to repay any payment of the award made by DE1, despite DE1 making

clear that those concerns were the reason why the Award had not been paid, has served to heighten the concerns that DE1 has as to the Claimant's insolvency."

22. Mr Uhbi exhibited the statutory accounts filed at Companies House to his witness statement. The filed accounts for the period ending 31 March 2023 showed total shareholders' funds of -£369,470, and net current liabilities of £261,137. Amounts falling due to creditors within one year amounted to £922,741. The notes to the accounts show, of that sum, £573,402 was due to "other creditors" ie creditors other than banks, trade creditors and Social Security and other taxes. They do not disclose who the "other creditors" are.

23. On 15 July 2024, the Defendant issued proceedings against the Claimant seeking a declaration as to the true liabilities of the parties. The amount claimed is stated to be nil. Mr Eyre criticises those proceedings as difficult to understand and states that the claim could never support an application for a stay of enforcement because it contains no claim for a payment of money. He argues that the Defendant could not have established it had a claim against the Claimant of the kind that is required to justify a stay of enforcement in these proceedings as a result of that fact. It is convenient to deal with that point here.

24. Since the Defendant was resisting payment of the award by seeking a stay of enforcement of the judgment to which it conceded the Claimant was entitled and since the Defendant had not paid the award, I do not find it surprising that it did not plead an entitlement to payment of any sum in the proceedings seeking determination of the sums due. To be entitled to claim repayment, it would first have to make the payment. I infer that the Defendant, if it had failed in its application for a stay and was ordered to pay the judgment, would have amended its claim to include a claim for repayment of the amount it was ordered to pay. I therefore do not consider the failure to claim a specific sum weakens the Defendant's case on the issue before me.

25. On 15 July 2024, in accordance with the Court's directions, the Claimant filed its evidence in reply. It served witness statements from Alan Henry, a

quantity surveyor employed by the Claimant and William Kerr, the Claimant's external accountant.

26. In brief summary, Mr Henry gave evidence of the Claimant's cash flow for the next 6 months (the likely income, costs and profit) and the value of the order book. In addition, there was evidence from Mr Kerr with regard to the Claimant's trading history and the treatment of a Director's loan in the accounts. Mr Kerr's evidence was that three companies had gone into liquidation between 2019 and 2023 owing over £2m to the Claimant, which adversely affected the Claimant's cash reserves. His evidence was that Mr Gordon Rath, the owner and a Director of the Claimant, stopped taking significant sums from the Claimant and provided a loan of £541,288 to enable the Claimant to trade through the period of loss of profit caused by the insolvencies and resultant bad debts. He states:

> *"The loan remains outstanding to Mr Gordon Rath and will only be repaid when CCP is able to do so without putting into question CCP's ability to meet all its liabilities as they fall due".*

27. He does not state how he knows that is the case. As I have said, Mr Rath did not give evidence as to his intention. I infer that Mr Kerr had the assurance of Mr Rath in order to enable him to make that statement, but that is not set out in his witness statement.

28. Mr Kerr also states:

> *"The Management Accounts are prepared on a different basis to the Statutory Accounts filed at Companies House. The Director and Shareholder Mr Gordon Roth has provided long term support in the form of a loan to the value of £541,248, this loan was made several years ago and whilst technically repayable on demand is not going to be repaid until CCP is able. The loan is of a longer-term capital nature, hence for Management Accounts the amount is shown as "Shareholders' Loans" in the Capital and Reserves section of the balance sheet. The statutory accounts show this amount as a Liability within "Creditors". The*

> *Management Accounts in all other respects are prepared as per the Statutory Accounts.*

29. Mr Kerr also exhibits management accounts for the year ended 31 March 2024 to his witness statement. Those accounts contain the balance sheet for years ending 31 March 2023 and 2024. Those management accounts treat the sum of £541,448 described as "shareholder loans" as part of the capital and reserves both in 2023 and 2024. I infer that the figure of £573,402 for "other creditors" in the statutory accounts must include the Director's loan shown in the management accounts in the Capital and Reserves section. As I understand it, Mr Kerr, for the Claimant's internal accounting purposes, has treated the shareholders' loan of £541,248 as capital in the management accounts, notwithstanding that it is, as he describes it in his witness statement as "technically repayable on demand".

30. Mr Kerr's witness statement contained information that was not possible to discern from the statutory accounts. It exhibited management accounts showing a different treatment of the shareholder's loan. It also contained assurances that Mr Rath has provided long term support, that his loan will not be repaid until the Claimant is able to do so without jeopardising its ability to pay its debts as they fall due and that the loan is of a longer term capital nature. The statutory accounts only showed the loan as part of a figure for "other creditors" repayable within a year, as Mr Kerr acknowledges it technically is.

31. The Claimant's evidence therefore is that what appears in the statutory accounts as a liability, because it is a loan that is "technically" payable on demand, is being treated by the Claimant and its accountant as long term support of a capital nature to enable the Claimant to pay its debts as they fall due.

32. On 17 July 2024, the Defendant's solicitors wrote to the Claimant's solicitors in the following terms:

> *"We have now reviewed your client's witness evidence which now includes the financial information we had previously requested by letter*

dated 8th May 2024 and by e-mail dated 9th May 2024 prior to the issue of proceedings.

The only information we had available at that time indicated that your client was insolvent and we had sought information to alleviate our client's concerns that your client would be unable to satisfy any subsequent awards made in our client's favour. Our 8th and 9th May 2024 correspondence explained this and our client's requests were perfectly reasonable in the circumstances. For reasons we still do not understand (and you have not explained) you refused to provide any more up-to-date information as to the Claimant's finances in response to our correspondence and instead the Claimant issued enforcement proceedings…. We do not understand why your client could not, or chose not, to provide that information earlier. For the avoidance of doubt nothing has changed since our requests of 8th and 9th May 2024, except that significant costs have been incurred in the interim.

Our client's position is that had the financial information been provided at the outset of this case it would have been satisfied as to your client's financial status and would have settled the sums outstanding at that time. Enforcement proceedings would not have been necessary.

In the light of the evidence now served we are instructed that our client will no longer seek a stay of enforcement of the adjudicators award….. However we do not see why our client should pay your client's costs incurred as a result of its refusal to provide earlier the information it has belatedly provided. In the circumstances our client proposes that the order the court should make on your client's claim is as follows:

1 Our(sic) will pay the Adjudicator's award in the sum of £94,921.12 plus VAT of £4,706.06, interest the sum of £7,593.69 and further interest at £20.80 per day from 8th March to today amounting to £2,724.80 = total £109,9459.68 (sic)

2 our client will pay the Adjudicator's fees in the sum of £8,550 including VAT.

3 Each party shall pay their own costs of the proceedings.

We invite you now to agree to the above offer in the hope that some of the costs of this unnecessary litigation may be avoided."

33. That offer was not accepted and I am asked to determine the question of costs.

The law and its application to the facts of this case

34. The general principles of adjudication enforcement are not in issue between the parties and I shall not rehearse them here.

35. Nor do I understand there to be any difference between the parties as to the circumstances in which the court may stay enforcement of a judgment enforcing an adjudication award in circumstances where the Claimant is insolvent. In very brief summary, the onus is on the Defendant to prove that it is likely that the Claimant will be unable to repay the judgment at the time it may be required to do so and that the Claimant's financial position has deteriorated since the contract was awarded for reasons that are not wholly or in significant part due to the Defendant's failure to pay the sums that were the subject of the award.

36. It is not suggested that the Claimant's financial position has not deteriorated since the contract was made. Mr Kerr accepted in his evidence that, before the Claimant entered into the contract, it was in a financially stronger position than it is now.

37. Despite the assertion by the Claimant's solicitors in correspondence that *"the reduction in shareholders' funds was a direct result of DE1's refusal to pay sums due to CCPL under both the SFS and dry lining contracts"* the point was not pursued. In any event, there was no evidence that the substantial negative balance on the balance sheet as at 31 March 2023 was caused by the Defendant's failure to pay the debt that was the subject of the award in April 2024, being a debt of £94,921.10. Mr Kerr's evidence was that it was the result of the insolvency of three companies who failed to pay over £2m between 2019 and 2023.

38. Where the parties disagree is whether the Claimant was under any obligation to provide the financial information on which it now relies before the Defendant had applied to stay enforcement if it wished to avoid any risk as to costs.

39. Mr Eyre submits that it has been settled law for more than a decade that the Claimant is under no obligation to provide financial information to assist a Defendant in its decision as to whether an application for a stay ought to be made. He submits that the Claimant is entitled to provide no information, wait to see what evidence in support of its application the Defendant serves, and respond to that evidence, and that it is at no risk as to costs for taking such an approach. He submits that the Defendant must take the costs risk of making an application for a stay and, if the Defendant fails in its application due to evidence being available at the hearing that was not available to it before it made its application, it must bear the costs of the application. He submits that the provisions of the CPR and the Overriding Objective do not override the clear law derived from the authorities in relation to applications to stay the enforcement of judgments in adjudication enforcements proceedings.

40. Mr Malam submits that the overriding objective requires the Claimant to provide in advance the evidence on which it will need to rely to oppose the application for a stay in appropriate circumstances, in the interest of saving costs. He argues that the authorities make plain that, generally, if a Claimant is insolvent, a stay will be granted, and that, once it is clear that the Defendant will discharge its burden of satisfying the court of the Claimant's insolvency, the Claimant should disclose information on which it may rely if it wishes to avoid costs risk. He concedes that the Claimant is not obliged to disclose information, in the sense that it cannot be compelled to do so, but submits that the usual principles of compliance with the Overriding Objective apply so that, if it fails to disclose its case in time to avoid costs that would otherwise be avoided, it is at risk that the court may not exercise its discretion on costs in the Claimant's favour. It was therefore appropriate for the Defendant to ask for further information and incumbent on the Claimant to assist by providing

the information on which it intended to rely in advance, to avoid wasted costs and court time.

41. In support of his position, Mr Eyre relies on the following authorities and the particular extracts from them referred to below.

42. In *Farrelly (M&E) Building Services Ltd v Byrne Brothers (Formwork) ltd* [2013] EWCA 1186, Ramsay J said:

> *"…there is no general obligation on a party when seeking enforcement to disclose to the other party confidential information of its financial and business position so that the other party can consider whether there are grounds for applying for a stay of any judgment. If there were such an obligation it would mean that parties could gain the benefit of that confidential information which in the competitive construction industry would have serious consequences in relation to the ability of contractors and subcontractors when tendering or dealing with disputes."*

43. In *BN Rendering Ltd v Everwarm Ltd* [2018] EWHC 2356 (TCC), O'Farrell J said that

> *"the evidential burden lies with the party applying for the stay and the burden is high….. The party seeking the stay is not entitled to embark on a fishing expedition and demand access to confidential commercial information from the respondent."*

44. He relies also on similar statements in *Brosely London Ltd v Prime Asset Management* [2020] EWHC 944 (TCC) and *WRW Construction Ltd v Datblygau Davies Developments Ltd* [2020] EWJC 1965 (TCC), and *Toppan Holdings Ltd v Simply Construct (UK) LLP* [2012] EWHC 2110 (TCC).

45. Mr Eyre submits that the effect of those authorities is that it is settled law that there is no obligation to provide financial information to the Defendant in order to inform its decision as to whether an application for a stay ought to be made, so that a Claimant should not be criticised or penalised in costs if it fails to do so. He accepts that an exception to that rule is where an insolvent

Claimant offers a guarantee, when it might be required to provide evidence as to the financial standing of the proposed guarantor, such as was the case in *FG Skerritt Ltd v Caledonian Building Systems Ltd* [2013] EWHC 1898 (TCC), but argues no such exception applies in this case.

46. I do not agree that the principles to be derived from the authorities are as absolute as Mr Eyre submits. I agree with Mr Malam's submission that the dicta in the authorities must be read in context. I read the authorities as establishing that there is no general obligation to provide financial information, particularly confidential financial information. That is not the same as saying that a Claimant can always refuse to answer a reasonable request for information without any risk to itself as to costs, no matter what the circumstances of the case.

47. None of the authorities to which I was referred relate to the situation where a Claimant's most recent filed accounts show that it is seriously insolvent, so that the Defendant would be able to rely on them to discharge its burden of proof that the Claimant was insolvent. In *Farrelly*, Ramsay J found that there was, on the evidence, no basis on which the Claimant's solvency could be challenged. Ramsay J made clear that the Defendant cannot reverse the burden of proof by requiring the Claimant to disclose confidential information to prove that it is not insolvent.

48. In this case, the Claimant's own filed accounts show serious balance sheet insolvency with a shortfall of shareholders' funds of over £369,000, and with its net assets having deteriorated by more than £600,000 since the previous year's accounts, which also showed a significant deterioration from its previous filed accounts.

49. Although the Claimant's solicitors suggested in correspondence that the Claimant was not insolvent and Mr Eyre stated in his submissions that it was not accepted by the Claimant that it was insolvent, I do not understand how the Claimant could maintain that position in the light of the shortfall of assets over liabilities shown in the filed accounts for the year ended 31 March 2023. On the basis of those accounts, the Claimant was plainly insolvent on a

balance sheet basis. Whilst Mr Kerr's evidence is that, in the light of the support form Mr Rath, the Claimant is not insolvent, he does not give evidence that the filed accounts do not show insolvency, only that the management accounts are prepared on a different basis. I read his evidence as accepting that, without the support of Mr Rath, the Claimant would not be able to pay its debts as they fell due. The Claimant clearly appeared to be insolvent at the time of the Defendant's application. It is a moot point whether it remains so now, given Mr Rath's loan to the company in its support is, as Mr Kerr acknowledges, "technically" repayable on demand.

50. Mr Eyre submitted that the Defendant's capitulation was inevitable from before the proceedings were issued, that its application for a stay was hopeless. He argues that, had the Claimant adduced no evidence, the Defendant would not have satisfied the court that, when the time came to pay the judgment (which he submitted would be in about 2 years' time) the Claimant could not have paid £100,000, because the Claimant was trading profitably.

51. The Defendant relies on the dicta of HBJ Peter Coulson QC, as he then was, in *Wimbledon Construction Company 2000 Limited v Derek Vago* [2005] EWHC 1086 (TCC)

> *"26 (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…"*

52. I agree with Mr Malam that, without more information, the application for a stay appeared likely to succeed. If the Claimant had filed no evidence in opposition to the Defendant's application, it is highly likely that I would have ordered a stay. The only evidence of the likelihood of the Claimant being able to repay the judgment would have been the statutory accounts. The only evidence of the Claimant's profitability in future would have been the bald assertion in its solicitors' letter that it was trading profitably and that its order books were full. That is not evidence. Nor does it give any indication of the level of profit that might be generated over the period, or the likelihood of the

Claimant being able to continue to trade notwithstanding its insolvency. I consider I would be likely to have found that the Claimant was seriously insolvent on a balance sheet basis, showing a net shortfall of £369,470. That is a significant sum of money in absolute terms and also as a proportion of the Claimant's assets, which were £463,605. In addition, the statutory accounts showed its assets were declining.

53. Therefore, the facts in the case before me are very different from the sort of fishing expeditions with which the authorities suggest Claimants are not obliged to cooperate. It is not a case where an apparently solvent Claimant is being asked to provide evidence to reassure a Defendant that its financial position has not worsened since it statutory accounts were filed. This is a case in which the Claimant was obviously insolvent according to its most recently filed statutory accounts, so the Defendant was clearly able to discharge its burden of proof.

54. Whilst there was no obligation requiring the Claimant to disclose information, in the sense of any compulsion, I do not consider that the authorities mean that it is never appropriate for a Defendant to expect a Claimant to disclose information that might explain that, despite its statutory accounts, that it is not insolvent or that for some other reason it can be expected to meet a claim for repayment of the judgment debt when ordered to repay it.

55. CPR 1.3 requires the parties to help the court to further the Overriding Objective. The Overriding Objective includes saving expense and allotting an appropriate share of the court's resources. The court, and parties to litigation, expect parties to behave reasonably and avoid unnecessary costs and unnecessary hearings.

56. It must have been obvious to the Claimant that, faced with its statutory filed accounts and no further information, the Defendant would not be able to understand that the Claimant was treating a very substantial debt shown in "other creditors" due to be paid within 12 months as long term support that would not be repaid until the Claimant was able to pay its debts as they fell due. Nor could it be expected to understand that the Claimant had suffered

bad debts of around £2m between 2019 and 2023 and that it expected to trade profitably out of its current difficulties. Indeed, its solicitors not only made no reference to those facts, but stated that *"The reduction in shareholders' funds was a direct result of DE1's refusal to pay sums due to CCPL under both the SFS and dry lining contracts"* an assertion that was not borne out by the Claimant's own evidence.

57. The Defendant did all it could to ascertain the position from the Claimant before incurring the costs of making an application for a stay. It asked for any information on which the Claimant would rely in opposition to any application that might render such an application unnecessary. The Claimant's intransigence in refusing to cooperate is not consistent with the court's expectations of the way litigation should be conducted.

58. Mr Eyre submitted that the Claimant is not obliged to provide the information, as it is confidential. I do not consider the authorities are consistent with an incontrovertible rule that a Claimant who chooses not to disclose confidential financial information in response to an application for stay is at no risk as to costs from its failure to do so, no matter what the circumstances. It would clearly be obliged to disclose the information in response to the application for a stay if it intended to oppose it, the Defendant having satisfied the burden of showing the Claimant was insolvent on the available information. The effect of Mr Eyre's submissions would be that a Defendant facing an enforcement claim from an apparently insolvent Claimant, and which reasonably wishes to check whether there is any information not available to it that would suggest that the Claimant is no longer insolvent or can otherwise be expected to repay the judgment when ordered to do so, cannot protect itself in costs. It would be obliged to issue the application and then be subjected to an adverse costs order because it did not have information available to the Claimant that would have allayed its costs.

59. There is also some irony in the fact that, by refusing to disclose the confidential information to a party with which it is in ligation, with a legitimate reason for receiving it, the Claimant has instead chosen to disclose it in witness evidence referred to in open court and in this judgment, making it

more widely public. Its argument that the need for confidentiality trumps the Overriding Objective is difficult to understand in those circumstances.

60. I consider that, faced with the latest financial information available to it, being the statutory accounts, which clearly showed the Claimant was insolvent, the Defendant reasonably requested the Claimant to provide any information that it may wish to rely on to explain why it would be able to repay the award should it be ordered to do so. It rightly pointed out that, given the Claimant's apparent insolvency, it expected to succeed on an application for a stay. It referred the Claimant to the relevant authorities in support of its position. It invited the Claimant to provide information as to why that was wrong. The Defendant was not on a fishing expedition trying to establish whether an apparently solvent company might be unable to repay the award in due course. It knew that the Claimant was insolvent and it expected to succeed in an application for a stay, absent any information that only the Claimant could provide.

61. The Claimant's conduct, in refusing to provide the information when requested but instead insisting that it need do so only after it had incurred the costs of its enforcement application and after the Defendant had incurred the costs of its application for a stay and court time had been taken up in listing the applications for hearing, was contrary to the principles of the Overriding Objective and the way the TCC expects parties to conduct litigation.

62. Mr Eyre argues that, even if I am minded not to award the costs of the application for a stay of enforcement to the Claimant, I should nonetheless award the costs of the enforcement claim, since there was no defence to it. I disagree. The Defendant made clear at all times that the only basis on which it challenged the claim was that it sought a stay of enforcement. Had the information contained in the Claimant's evidence been provided when it was first requested, the Defendant would have paid the award and there would have been no need for the proceedings to be issued at all. In fairness, the Defendant does not seek its own costs of the applications but seeks no order for costs.

63. Mr Eyre also argues that not all the costs of the application to enforce should be disallowed. The request for information was first made on 8 May 2014. The parties entered into protracted correspondence. The Claimant's solicitors indicated on 15 May 2024 that they had no choice but to prepare the proceedings for issue, which suggests that they had not already done so. The proceedings were issued on 5 June 2024. I am not persuaded that any substantial part of the Claimant's costs of the proceedings were incurred before the Defendant had asked for the information that I have found the Claimant should have provided if it wanted to avoid any costs risk.

64. I consider the appropriate order to be no order for costs on either application. I will make no order for costs.