

Neutral Citation Number: [2024] EWHC 2516 (TCC)

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: Thursday 3rd October 2024

Before :

MR ROGER TER HAAR KC

Sitting as a Deputy High Court Judge

Between:

A & V BUILDING SOLUTION LIMITED

Claimant

- and -

J & B HOPKINS LIMITED

Defendant

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

Decision on the papers

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 3 October 2024 at 10.30am

Mr Roger ter Haar KC :

1. In this action and an associated action, I have previously handed down six judgments:
 - (1) On 15 February 2023: [2023] EWHC 301 (TCC);
 - (2) On 16 June 2023: [2023] EWHC 1483 (TCC);
 - (3) On 6 October 2023: [2023] EWHC 2475 (TCC);
 - (4) On 17 October 2023: [2023] EWHC 2576 (TCC);
 - (5) On 18 June 2024: [2024] EWHC 1510 (TCC);
 - (6) On 6 September 2024: [2024] EWHC 2295 (TCC).
2. In this judgment, as in my previous judgments, I refer to J & B Hopkins Ltd as “J&BH” and to A & V Building Solution Limited as “A & V”.
3. In the Fifth judgment handed down on 18 June 2024, I decided almost all the issues between the Parties on the merits. At paragraphs 521 and 522 I decided:

521. Accordingly the amount due to A & V is as follows:

Claim	Amount Awarded
Measured works	£407,156.25
Variation account	£53,200
Loss of profit	£6,096.56
Less paid	-£364,909.64
Amount due	£101,543.17

522. This does not allow for interest or adjudicators’ fees.

4. In the Sixth judgment handed down on 6 September 2024 I determined the issues between the Parties as to adjudicators’ fees and interest.

5. Issues have now arisen as to the amounts which I should award which have not previously been raised. There are some issues also outstanding as to the calculation of interest.
6. The issues which I am asked to consider are:
 - (1) The calculation of the sum due for the measured works claim;
 - (2) VAT;
 - (3) The effect of the Construction Industry Scheme;
 - (4) Interest;
 - (5) The sums due to J&BH;
 - (6) Appropriate order at this stage.

The effect of the Fifth and Sixth Judgments

7. Before going to each of these issues in turn, it is necessary to consider the effect of the Fifth and Sixth judgments.
8. As I have said above, in my Fifth judgment I decided all the issues between the Parties except for sums due in respect of adjudicators' fees and interest.
9. Thus, subject to those two exceptions, I determined the amounts due from one Party to the other under the Sub-Contract.
10. Before that judgment was handed down, the Parties had the usual opportunity to suggest corrections to a draft of the judgment which had been circulated. None of the matters with which I am concerned in this judgment were suggested as corrections to the

judgment or as being matters which should lead to handing down of judgment being delayed.

11. My Sixth judgment dealt only with the reserved matters, namely adjudicators' fees and interest.
12. As will be seen below, in my judgment I have to consider the extent to which both Parties in different ways are asking me to go behind matters which, rightly or wrongly, I decided in the Fifth judgment or which should have been raised before the Fifth judgment was handed down.

The calculation of the sum due for the measured works

13. As set out above, in calculating the amount due from J&BH to A & V, I gave credit for £364,909.64 which had already been paid by J&BH to A & V.
14. That sum had at all stages been the agreed amount in respect of amounts already paid.
15. In its submissions in respect of the hand down of the Sixth judgment, A & V submitted that there was an error in the amount paid, as it should have been the sum of £344,255.75, not £364,909.64.
16. A & V asks the Court to correct this error.
17. In response, J&BH submits, firstly, that the calculation was correct, and, secondly, that in any event "it is too late for any change to the sum previously paid. The sum previously paid was common ground between the parties and was determined in the June Judgment which has previously been handed down".
18. I agree with this second point. I decline to "correct" the alleged error as, in my judgment, I have no jurisdiction to do so.

VAT

19. A & V's Claim Form and Particulars of Claim (which went through several iterations) claimed VAT.
20. In respect of the amounts claimed by A & V (except the claims for amount for Mr Blizzard's fees) the amounts I have awarded are net of VAT.
21. A & V submits, and J&BH accepts, that I have still to deal with the amount, if any, to be awarded in respect of VAT on the other amounts I have awarded.
22. The amount of £6,096.56 awarded in respect of loss of profit is an award of damages, upon which VAT is not payable.
23. On the other sums awarded, it is A & V's position that 20% should be awarded in respect of VAT.
24. J & BH's position is contained in paragraphs 17 to 19 of its Note prepared for the purposes of the handing down of the Sixth judgment:

17. JBH reasonably assumed that the approach to VAT was common ground, given it was the approach the parties had adopted throughout the works on the Project.

18. In particular:

(1) JBH had made gross payments to A&V of £369,040.

(2) It was common ground, as explained in Section B above, that this was a net, i.e. exc. VAT, payment of £364,909.64.

19. The VAT payable on the Project was ratified by HMRC (via VAT audits) and has been applied to all previous payments to A&V.

(1) The vast majority of the project was zero rated. The works were for new student accommodation, which is generally subject to zero rating (<https://www.gov.uk/hmrc-internal-manuals/vat-construction/vconst15380>).

(2) A small part of the works (those relating to commercial areas) was subject to VAT at the standard rate.

(3) The agreed approach was that 5.66% of the value of the Works would be subject to VAT (at 20%).

(4) I.e. if the value of the works was £100, £5.66 of the works would be subject to VAT at 20%, giving VAT of £1.132 (or an effective VAT rate of c.1.1%).

25. J&BH has produced documentation which appears to me to support this case.
26. In those circumstances in my judgment I should add VAT at 20% on 5.66%, in the sum of £1,069.22, calculated as follows:

Measured works	£407,156.25
Variation account	£53,200
Less paid	-£364,909.64
Amount due	£95,466.61
5.66%	£5,346.13
VAT at 20%	£1,069.22

27. That is the sum which I award, but subject to this caveat, that there will be liberty to A & V to apply within 6 months of the handing down of this judgment to vary this order in the event that HMRC contends that the rate of 20% is applicable to the whole sum of £95,466.61. I make it clear that I grant this liberty in case HMRC disagrees with J&BH's interpretation of the application of VAT, but I do not determine what is the correct interpretation.

CONSTRUCTION INDUSTRY SCHEME

28. J&BH has raised an issue as to the appropriate payee as to 20% of the sum of £95,466.61 which I have held to be due to A & V in respect of the measured works and the varied works.

29. It is J&BH's position that by reason of Section 61(1) of the Finance Act 2004 and Regulation 7(1) of the Income Tax (Construction Industry Scheme) Regulations 2005 it is obliged to deduct 20% of the sum of £95,466.61 (namely £19,089.32), pay that amount to HMRC, and only pay the balance of 80% to A & V.
30. In paragraphs 34 to 42 of its Note prepared for the purposes of the handing down of the Sixth judgment, J&BH submits:

34. Historically, A&V had gross payment status so JBH was not required to and did not make any CIS deductions. A&V had recognised in its applications, for example its Application 14, that *“IMPORTANT- This Valuation is exclusive of VAT & CIS Deductions”*

35. However, as the Court is aware from the evidence it has received, A&V has not met these tests, including its failure to pay its tax on time.

36. On 15 March 2024, JBH received a letter from HMRC dated 5 March 2024 notifying it that A&V's tax treatment for the CIS was changing from 9 April 2024. The letter stated: [Appendix D – HMRC letter]

“From that date any payments that you make to this subcontractor, including any payments for work done before that date, must be made net, with tax deducted at 20%.”

37. On 2 September 2024, JBH searched for A&V on the CIS portal and the entry confirmed that it was registered for standard rate, i.e. 20% deduction. [Appendix E – HMRC CIS Portal Check]

38. It follows that while the Court has decided the sum due to A&V for the Contract Sum, any order should reflect, or allow, for the fact that JBH has a legal obligation to deduct 20% of the £95,446.61 and instead pay it directly to HMRC.

39. There is no basis for A&V to assert that this statutory obligation and mechanism should not apply.

40. Even A&V's final account had stated *“IMPORTANT- This Final Account is exclusive of VAT & CIS Deductions”*

41. The obligation to pay CIS sits with JBH. If the gross Contract Sum is paid in full to A&V, JBH has very real concerns that it will not be paid to HMRC as there is no primary obligation on A&V to pay CIS. Further, JBH would be required to pay CIS on top of the gross sum paid which would produce an unfair result.

42. In contrast, there is no reason for the Court to doubt that JBH would pay the deducted sums to HMRC. JBH has a statutory obligation to do so and will do so. JBH is content for its confirmation that it will pay the deduction of £19,089.32 to HMRC by a certain date to be included as a recital to the Court's order.

31. In A & V's Submissions dated 4 September 2024, it submits:

4.1 Within JBH letter dated 02.09.2024 first paragraph of section C (CIS Deduction) JBH are saying (miraculously) that they have to comply with the Law now and that any payment made from JBH to A&V has to be subject to a statutory of 20% CIS deduction because they have received a purported Letter from HMRC dated 5 March 2024 saying that A&V's tax code has changed now and that any payments made to A&V must be made net, with tax deduction at 20%. Also, within paragraph three of section C, JBH insist to remind A&V that they are Legally required to deduct this 20% and pay it directly to HMRC.

4.2 If JBH would have not breached the contract several times but instead have respected the Sub-Contract clauses and their obligations; the Construction and Regeneration Act and the Law back in Feb-March 2021 then JBH would not have to be now so legally required to deduct the 20% CIS but instead should have paid the sums in full as gross payment including the CIS as previously made. The sum that JBH are due to pay now is the Judgment award sum that JBH should have paid this in May 2021 when A&V were registered and entitled to receiving gross payments.

4.3 Furthermore, A&V has not been informed of any changes to its CIS tax code, it is a bit strange that JBH has been notified about these changes but not A&V, I will raise the issue with HMRC. However, even if this is the case, I do not trust that JBH will make any payments to HMRC in respect of any CIS deduction for A&V, putting A&V in even worse situation then it is already with HMRC.

4.4 A&V, therefore, disagree with JBH position regarding CIS deduction. A&V respectfully requests that the Court clarify that it is for A&V to manage its CIS obligation with HMRC and that JBH should not unilaterally deduct CIS from any payments as A&V is [no] longer JBH subcontractor and that the payment that JBH should make is following the Judgment award sum and not following a subcontractor payment application.

32. On one view, this point is a point which should have been raised by J&BH before the hand down of my Fifth judgment, insofar as it goes to the amount payable by J&BH to A & V. I do not understand that to be how J&BH puts its case, and, for the avoidance of doubt, I record that my Fifth judgment stands as determining the amounts due from one Party to the other subject to the exceptions in respect of adjudicators' fees and interest, and in respect of the enforcement proceedings between the Parties (Mr Smith's fees and the Enforcement Costs).

33. If the point does not go to the state of account between J&BH and A & V, then no issue of res judicata arises.

34. In my judgment, the time at which this point will become relevant is when I decide whether there should be a stay on any part of the judgment in favour of A & V against J&BH, and, if so, upon what terms.
35. At that stage, if J&BH wishes there to be a stay of execution, I would expect evidence to be available as to how my judgment would be treated in circumstances where my judgment records sums which should have been paid to A & V some years ago and which would not have been the subject of the CIS deductions if paid by J&BH when I have found they should have been paid.
36. For the moment, no adjustment is made in respect of the amounts which I have found due and payable.

Interest

37. Some limited issues arise in respect of interest.
38. Firstly, on the fees of Mr Blizzard, J&BH says that interest should only be payable on the net fees payable to Mr Blizzard, not the VAT element of those fees. The reason given is that A & V could have reduced its liability for VAT by setting this VAT liability against other sums by way of VAT which A & V should otherwise have paid to HMRC.
39. In my judgment, this was a point to be raised in respect of the arguments placed before me when I was considering the issues leading to my Sixth judgment, or by way of correction to my Sixth judgment. I cannot trace that this was done: in my view it is now too late for this point to be raised.
40. Accordingly, interest will be calculated on the full sum of £17,400.

41. The resulting amount is £3,428.04: there is a minor difference of £17.16 between the Parties. I take the lower figure.
42. Secondly, A & V has calculated interest on a sum due on the basis that I would correct the “error” I have discussed above. I have rejected the claim to correct that error: accordingly the amount upon which interest will be calculated is £95,466.61. This will be increased by £1,069.22 in respect of VAT.
43. Interest should be recalculated on this basis.
44. Thirdly, on damages there is a difference between the Parties of about £30 in respect of the interest payable on damages. This is de minimis, and I accept J&BH’s figure of £1,389.81.

The sums due to J&BH

45. I have already determined the basis upon which these should be calculated.

The appropriate order at this stage

46. I accept J&BH’s submission to the extent that at this stage it is too early to determine what sum should be paid by either Party and when, which will depend very much on what is contained in the Court’s orders as to costs.
47. It is time for this drawn out litigation to be brought to a close, at least in this Court (there has been an indication that I may have to consider an application for leave to appeal).
48. I direct that each Party submits its submissions as to the costs by 27 September 2024 with each Party having a right to reply by 4 October 2024.

