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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**22/03/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

COMMERCIAL DIVISION

_____

Between:

KEVIN WATSON CONSTRUCTION LTD

Plaintiff

and

RADIUS HOMES LTD

Defendant

_____

Mr McCausland (instructed by Davison McDonnell, Solicitors) for the Plaintiff
Mr Dunlop KC with Mr Fletcher (instructed by Mills Selig Solicitors) for the Defendant

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McBRIDE J

Introduction

[1] The plaintiff seeks summary judgment pursuant to Order 14 of the Rules of the Court of Judicature (Northern Ireland) 1980, to enforce a decision of an adjudicator dated 13 September 2023. The defendant seeks a stay of execution of that decision.

[2] The plaintiff was represented by Mr McCausland of counsel instructed by Davison McDonnell, solicitors. The defendant was represented by Mr Dunlop KC and Mr Fletcher of counsel instructed by Mills Selig, Solicitors. I am grateful to all counsel for their detailed and well-researched skeleton arguments which were of much assistance to the court.

Background

[3] The plaintiff is a limited company involved in construction and has a registered address in London. The defendant is a housing association with a registered address in Northern Ireland.

[4] The plaintiff and defendant entered into a contract dated 20 March 2018 for the construction of 222 houses, 21 apartments and a community hub (including all utilities, site works and drainage) at Black's Road, Belfast ("the contract").

[5] A dispute arose between the parties and on or about 20 July 2023 the defendant terminated the contract because of alleged substantial non-compliance.

[6] To date there have been five adjudications between the parties. The first and second and fifth adjudications are not relevant to these proceedings. In the third adjudication dated 17 August 2023, the adjudicator found that the plaintiff's application for payment dated 28 April 2023 had become the notified sum and that the defendant had failed to serve a valid pay less notice in respect of that notified sum in accordance with the contract. The adjudicator therefore declined to make any award in favour of the defendant.

[7] Arising from that decision the plaintiff then commenced the present adjudication proceedings and sought an award on foot of the sum that the adjudicator had determined in adjudication three to be the notified sum under the contract.

[8] On 17 August 2023, Mr Moore was appointed as adjudicator, and he delivered his decision and award on 13 August 2023. He ordered as follows:

> "… (the plaintiff) is entitled to payment of the notified sum of £447,700.43 and such sum shall be paid within seven days of the date of this decision.
>
> (5) (The plaintiff) is entitled to interest in the sum of £8,846.68 up to the date of my decision being 13 September 2023 on a daily rate of £88.93 thereafter up to the date of payment.
>
> (6) (The defendant) shall pay £6,662.50 plus VAT of £1,332.50 being a total of £7,795 in respect of my fees within seven days of my decision.
>
> (7) Until payment in full has been received, the parties remain jointly and severally liable for the fees and expenses incurred by me pursuant to this adjudication together with any accruable interest. I will inform the parties when this liability has been discharged.
>
> (8) If either party shall pay my fees in their entirety, then the other party shall forthwith reimburse that party the correct portion of my fees so paid."

[9] The defendant failed to pay the sums ordered by the adjudicator and Mr Ward, Director of the plaintiff company, avers in his affidavit sworn on 27 October 2023 that the said sums remain due and owing to the plaintiff.

[10] The plaintiff claims £456,547.11 due pursuant to the decision of Mr Moore, dated 13 September 2023 together with interest and costs.

[11] The parties accept that the adjudication decision was a "smash and grab" adjudication and that at some point in the future there will be true value proceedings. The parties, however, disagree about the likely outcome of these proceedings. The plaintiff submits that the defendant will be ordered to pay it a sum in excess of £1M and submits that there is no possibility any award will be made in favour of the defendant. In contrast the defendant submits that it will be successful in obtaining an award against the plaintiff in the true value proceedings.

[12] The defendant does not contest the enforceability of the adjudication decision. The sole ground of resistance advanced by the defendant is that enforcement proceedings should be stayed. The defendant seeks a stay on the basis that due to the plaintiff's impecuniosity there is a real risk it would not be able to pay any sum which may be awarded to the defendant in the true value proceedings.

Relevant legal principles- stay of execution

[13] Order 14 Rule 3(2) provides:

> "(2) The court may by order, and subject to such conditions, if any. as may be just, stay enforcement of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action."

[14] As set out in Order 14 the question of whether a stay should be granted in any particular case is always a matter for the discretion of the court. In the context of adjudication enforcement general guidelines in respect of the proper approach to be taken were set out in *Wimbledon Construction Company 2000 Ltd v Vago* [2005] EWHC 1086 at para [26] where Coulson J stated as follows:

> "26. 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 … 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 Services v Rockingham Motors Speedway* [2004] TCLR 6).

(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 within the meaning of Order 47 rule 1(1)(a) 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 Dalh-Jensen UK Ltd* [2001] All ER 1041 and *Rainford House v Cadogan Ltd* [2001] BL 46 F).

(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 Engineering Ltd* case); 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 Glencore Enterprises Ltd* (Unreported 16 January 2000 TCC)."

[15] This list represents a summary of the main points established by the cases up to that time. It was not intended to be an exhaustive list of every possible factor which may arise in future cases and indeed, later in *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2008] EWCA Civ 2695 an additional principle was added which stated:

> "If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay."

[16] Accordingly, as I stated in *Historic Royal Palaces v Piperhill Construction Ltd* [2023] NIKB 30 at para [37]:

> "[37] In exercising the discretion to stay enforcement proceedings the court will have regard to the principles emerging from the jurisprudence governing the exercise of the court's discretion to grant a stay but will bear in mind that the overriding consideration for the court is whether, as a matter of justice and fairness, a stay is required in all the circumstances."

[17] In the context of adjudication enforcement cases, however, the discretion must be exercised bearing in mind the legislative intent of the Construction Contracts (Northern Ireland) Order 1997 ("the 1997 Order"). The legislative purpose of the legislation has been explained in several cases including *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 and *Carillian Construction Ltd v Devonport Royal Dockyard Ltd* [2005] All ER 202. This jurisprudence makes very clear that the general rule is that the decision of an adjudicator is binding until the underlying dispute is finally determined. It reflects the "pay now, argue later" principle. Having regard to the legislative intent behind the adjudication scheme Coulson J noted in *Hillview Industrial Developments UK Ltd v Botes Building Limited* [2006] EWHC 1365 at para [33] as follows:

> "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."

Relevant legal principles – stay based on impecuniosity

Are the merits of the underlying dispute a relevant consideration?

[18] The defendant submits that it is entitled to a stay based on the probable inability of the plaintiff to repay the judgment sum at the end of the substantive trial. The plaintiff, however, contends that there is no prospect of any award being made in favour of the defendant and accordingly submits that the court should not grant a stay based on alleged impecuniosity of the plaintiff as a scenario will not arise where it will have to pay any award to the defendant.

[19] In assessing whether an award will or will not be made in favour of the defendant the court is essentially carrying out a "merits test" of the underlying claim and the question therefore arises whether the merits of the dispute is a relevant factor for the court to consider in the exercise of its discretion whether to grant a stay based on impecuniosity.

[20] There is a long line of authority which establishes that the merits of the underlying claim are irrelevant to the enforcement of adjudication decisions - see *Carillion Construction Ltd v Devonport Royal Dockyard* [2005] All ER 202 para 52 and *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 at para 4. Accordingly, the courts will generally enforce adjudication decisions and the only exceptions to this rule are when there is a lack of jurisdiction, breach of natural justice or a short self-contained error on behalf of the adjudicator which can be determined without the need for oral evidence.

[21] The question whether the court should take the merits of the underlying dispute into account in the exercise of its discretion arose in *Quadro v F P McCann* [2021] EWHC 1490. In *Quadro* the plaintiff sought summary judgment of an adjudication award and the defendant applied for a stay. The defendant submitted that "whilst irrelevant to the question of enforcement of an adjudication decision, the merits of the underlying claim are a relevant factor in the court's discretion regarding a stay and the more likely the decision is to be `reversed' so to speak the more expedient it is to grant a stay." In this case the claimant had been awarded significant damages for repudiatory breach of contract. The court accepted there was considerable force in the submission that the adjudicator had erred and accepted there was considerable merit in the defendant's case that this award would be either set aside or significantly reduced. Whilst the court had sympathy for the defendant's submission that there were "obvious issues" relating to the underlying merits of the adjudicator's decision the court nonetheless concluded at paragraph 16 as follows:

> "There is certainly, as far as I am aware, no authority to support a general proposition that the merits of the underlying claim are a relevant factor when deciding whether or not to grant a stay in the context of its adjudication enforcement. Further, to my mind it goes against the long line of authority that we are all familiar with to the effect that unless there is a breach of natural justice or other permanent jurisdictional issue, even a manifest error of law is not a valid ground for not enforcing an adjudicator's decision."

[22] The learned trial judge quoted Fraser J in *Trident Maintain Ltd v Falcon Investments* [2016] EWHC 3895 where he stated at para 29:

> "If an adjudicator decides party X must pay party Y a particular sum of money, it would be contrary to the purpose of the Act that a court, on an application of this nature [that is, on an application for a stay], would be justified or entitled to take a second view on whether or not that adjudicator's decision was correct either in fact or law."

[23] The court therefore concluded at para 19:

> "Further he went on to reject the submission that he should take the merits into account as part of all the circumstances when deciding whether or not to grant a stay and he reiterated that the factors the court should take into account where those set out in the *Wimbledon v Vago* decision which did not include any reference to the underlying merits of the adjudicator's decision. It is therefore clear that I should not take into account the underlying merits but I should focus on the factors set out in *Wimbledon v Vago* and the cases that followed it."

[24] Whilst *Quadro* is a persuasive authority it is not binding upon this court and for the reasons set out below I do not intend to follow it as I consider it is appropriate for the court to take into account the likelihood or otherwise of an award being made in the defendant's favour in future true value proceedings when it is exercising its discretion to grant a stay.

[25] When deciding whether to exercise its discretion to stay enforcement proceedings the overriding consideration for the court is whether as a matter of justice and fairness a stay is required in all the circumstances. I consider there is a risk of manifest injustice if the court does not consider merits where a stay is requested on the basis of impecuniosity. This is because, if the court does not take

merits into account a situation could arise where a plaintiff will be denied payment of an award in circumstances where there is no reasonable prospect of a defendant ever obtaining an award against him. As noted in *S & T (UK) ltd v Groce Developments Ltd* by Jackson LJ at para 108,

> "One important policy of [the Act] is to promote the cashflow in the construction industry. In other words, there should be prompt payments followed by any necessary financial adjustments."

Part of the legislative purpose underlying the adjudication scheme is that small contractors are not kept out of their money, and it is therefore important that these payments are made to enable appropriate cashflow. Accordingly, I consider the court can and should consider merits in any stay application based on impecuniosity.

[26] Secondly, I do not consider this approach is contrary to the existing jurisprudence. In *Quadro* the court refused to consider merits as a factor in determining whether to grant a stay or not on the basis that this was not referenced in *Wimbledon*. In *Wimbledon,* however, Coulson J stated that the guidelines were of a general nature and were not set in stone and of necessity were based only on the cases determined to that date. Indeed, since *Wimbledon* was decided, a new factor was added to the list of guidelines in the case of *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] EWCA 2695. I therefore consider the fact *Wimbledon* does not mention this as a relevant factor is not a bar as it does not contain exhaustive guidelines.

[27] Thirdly, I consider the approach I have suggested will not undermine the "pay now argue later" principle as it will only apply in cases where a stay is based on the impecuniosity of the plaintiff and where a decision on merits can be made without the need for a mini trial or determined by reference to copious affidavits. Accordingly, I consider this exception is akin to the exception to enforcement of adjudication decisions where the adjudicator has erred in respect of a short and self-contained dispute which can be determined without the need for oral evidence. Fourthly, I consider there is some authority in support of the approach I have set out. In *Equitix ESI CHP (Wrexham) Ltd v Bester Generacion* Ltd [2018] BLR 281 Coulson J stated at paragraph 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."

What test should be applied in assessing the merits of the underlying dispute?

[28] In determining the merits of the future proceeding I consider the court should apply the test set out in *American Cyanamid*, for the grant of interlocutory injunctions, namely whether the defendant has established that there is a "serious issue to be tried" or a "real possibility" it will succeed in obtaining an award at trial. This is because I consider an application for a stay based on the plaintiff's inability to satisfy a future award is akin to an application for an interlocutory injunction.

[29] If the defendant is not able to establish that there is a real possibility it will obtain an award at trial then a stay should not be granted on the basis of impecuniosity and the court does not need to go on to consider the question of the plaintiff's finances.

[30] If, however, the court is satisfied there is a "real possibility" the plaintiff will be successful in obtaining an award the court can then, in the exercise of its overall discretion give appropriate weight to any clear view it forms from reading the evidence of the relative strength of the parties' cases. In *Series 5 Software v Clarke* [1996] 1 All ER 857, a case concerning the grant of in interlocutory injunction Laddie J stated that the court can give appropriate weight to any clear view it forms from reading the evidence of the relative strength of the parties' cases in deciding whether to grant an injunction. The court, however, must do so without the need for a mini trial or having before it copious affidavit evidence. At this interlocutory stage the court should not attempt to resolve critical disputed questions of fact or difficult points of law on which the claim of either party may ultimately depend.

Has the defendant established a "real possibility" of obtaining a future award?

Submissions of the parties

[31] The court has had the benefit of affidavit evidence filed by Mr Ward Director of the plaintiff company which was sworn on 11 January 2024 and affidavit evidence filed by Mr Hughes sworn on 1 December 2023 on behalf of the defendant. As appears from the affidavit evidence there are many factual disputes between the parties.

[32] In his affidavit Mr Hughes states that as of May 2023 the plaintiff owed the defendant £189k approximately and since that date the amount owed has risen by over £300k in respect of further defects which have only recently come to light. According to his evidence the plaintiff owes the defendant something in the order of £500k. In a "payment certificate" dated 17 June 2023 prepared on behalf of the defendant the defendant claims £105,000 is due and owing by the plaintiff. This figure is calculated based on monies due to the plaintiff for works done less damages due for "delay" and for "defects" and then readjusts the payment due after offsetting the monies retained for remediation of defects. Accordingly, there is a

conflict in the evidence of the defendant in respect of the sums due and owing by the defendant.

[33] The plaintiff disputes that the defendant is entitled to any award and submits that the defendant will be ordered to pay in excess of £1M to the plaintiff.

[34] The plaintiff disputes that the plaintiff is entitled to "delay" damages. Mr Ward avers that the building works were completed on time and refers to completion certificates provided by Belfast City Council and a report by surveyors dated 1 October 2022 which confirms the properties were "deemed to be complete." He therefore avers that any delay in handover was created by the defendant and in these circumstances a claim for delay damages is completely unjustified and unmeritorious.

[35] Secondly, Mr Ward avers that the defendant has wrongly inflated the figure due for remediation of defects. In a payment certificate issued in May 2023 the defendant assessed the cost of defect remediation for the entire project at £97k approximately. Some seven weeks later in the payment certificate dated 17 June 2023 this figure increased to £221k approximately. The plaintiff submits the increase arose due to the inclusion of costs for re-rendering which is not a defect but a request for new work and therefore avers the defendant has incorrectly inflated the figure. The plaintiff also notes that the defendant has retained £525k as security against the cost of remediation of defects and as the costs of remediation are less the balance will be due to the plaintiff.

[36] In addition the plaintiff avers that the termination notice served by the defendant is not valid and constitutes a repudiatory breach giving rise to a claim in the plaintiff's favour.

[37] The plaintiff further submits that the evidence of Mr Hughes, which is the only evidence in support of the defendant's claim, is not independent and lacks credibility because it was his firm's failure to administer the payment mechanism of the contract properly which led to the adjudication award and as a consequence it is submitted that Mr Hughes is now tailoring his evidence to avoid visitation of the award upon the defendant as the liability arose due to his firm's procedural errors.

[38] The plaintiff therefore claims that the real likelihood is that the defendant will be ordered to pay in excess of £1M to it and that there is no prospect any award will ever be made in favour of the defendant. Accordingly, the plaintiff submits that the court should refuse the stay because the defendant has failed to establish there is a real likelihood an award will be made in its favour.

Consideration – Has the defendant established a "real possibility" of obtaining a future award

[39] The court has not heard oral evidence about the various factual disputes and, accordingly, I am not in a position to assess the credibility of the witnesses. There will be a trial on the merits of the various disputes between the parties at a later stage when the rights of the parties will be determined. At that stage the court will hear oral evidence and will be able to determine any issues in respect of credibility of the witnesses.

[40] At this stage the court must assess merits based on the affidavit evidence alone. Based on that evidence, I am satisfied that the defendant has established there is a real possibility it may succeed in obtaining an award against the plaintiff. I find that the "payment certificate" dated June 2023 sets out a basis upon which, taking the defendant's case at its height, it can establish the plaintiff owes it £105,000.

[41] As outlined above I consider that as part of the exercise of its discretion the court can give appropriate weight to the strength/weaknesses of each party's case if there is clear evidence regarding the relative strength of the parties' cases. There are many hotly disputed claims between the parties regarding whether delay damages are recoverable; the amount of damages due for defects and whether the monies retained exceed the amount due for defects; and whether damages are payable for repudiatory breach. I am not able to form a clear view about these disputes based on the affidavit evidence and they can only be resolved after a full trial. In these circumstances I am not able to form a clear view of the relative strength of the parties' cases and therefore this is not a factor that I can consider in the balancing exercise.

[42] Having been satisfied that there is a serious issue to be tried the court now turns to consider the alleged impecuniosity of the plaintiff.

Impecuniosity – further relevant guidelines

[43] In deciding whether to grant a stay based on impecuniosity the relevant guidelines are set out in *Wimbledon* are paras (d), (e) and (f) and state as follows:

> "(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 …
>
> (e) If the claimant is in insolvent liquidation… then a stay of execution will usually be granted; and
>
> (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; 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."

[44] In *BN Rendering Ltd v Everwarm Ltd* [2018] EWHC 2356 at paras 12-13 of her judgment O'Farrell J identified certain principles as applicable to applications involving consideration of the *Wimbledon v Vago* criteria. In particular O'Farrell J noted that:

> "(i) The evidential burden lies with the party applying for the stay and the burden is high.
>
> (ii) The party seeking the stay is not entitled to embark on a fishing expedition and demand access to confidential commercial information from the respondent.
>
> (iii) The question that the court must ask is not as to the financial position now or in the past of the company but when any final determination is likely to be made and sum repaid.
>
> (iv) The exercise that the court's discretion is a balancing exercise … [and that] if the financial information made available by the claimant is unsatisfactory that may lead to a refusal to enforce the adjudication decisions."

[45] O'Farrell J further noted the fact that in appropriate circumstances the court may order a guarantee or other form of security as a condition attached to enforcement of the adjudication decision.

[46] Accordingly, the relevant legal principles related to impecuniosity can be summarised as follows:

(a) The burden is on the defendant to make out the grounds for a stay.

(b) The defendant must establish a "real possibility" of obtaining a future award against the plaintiff in the substantive trial.

(c) The defendant must then establish "the probable inability of the claimant to repay the judgment sum" or as stated in *Gosvenor* establish there is a "a real risk" of the plaintiff's inability to pay or as set out at para 52 of *Total M&E Services* prove there is "a very real risk of future non-payment."

(d) The time for assessment of the plaintiff's financial position is the date when any final determination is likely to be made.

(e) The court may, not must grant a stay.

(f) If the plaintiff is in insolvent liquidation, then a stay will usually be granted.

(g) Even if it is established the plaintiff's present financial position suggests 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 the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made; or 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.

(h) In the exercise of its discretion the court is carrying out a balancing exercise. In LXB RP (Crown Road) Ltd v Squibb Group Ltd [2016] EWHC 2669 the court stated at para 11:

> "A decision to enforce or not is an exercise of the court's discretion, which must balance a well-known interest in enforcing valid adjudication decisions … against the perceived or actual risk of future injustice if the party subsequently becomes unable to reciprocate in the payment of what it owes under the same contract."

(i) As part of this balancing exercise, it can consider the financial information made available by the claimant. The court can also, however, consider the fact that the party seeking the stay is not entitled to go on a fishing expedition and seek access to confidential commercial information.

The standard of evidence required to meet the test

[47] In *Holyoake v Candy* [2018] Ch 297 Gloster J set out the nature of the evidence required to meet the test as follows:

> "There must be a real risk, judged objectively, that a future judgment would not be met … solid evidence will be required to support a conclusion that relief is justified though precisely what this entails in any given case will necessarily vary according to the individual circumstances."

Similarly, in *Gosvenor* at para 43 Coulson LJ held that "the necessary test was high, and that mere assertions and isolated discrepancies in the accounts were not sufficient" and in *Total M&E Services Ltd v ABB Building Technologies Ltd* [2002] EWHC 248 the court refused an application on the grounds of impecuniosity as there was "no compelling evidence as to the risk of non-payment." The court further stated that "vague fears or unsubstantiated rumours of insolvency" do not merit much attention.

The evidence regarding the financial position of the plaintiff

[48] The question therefore is, "Does the evidence presented in respect of the plaintiff's financial position establish that it is probable it will be unable to repay any future award made to the defendant or in other words is there a very real risk of future non-payment by the plaintiff?

[49] The court had the benefit of a report from James Neill, Chartered Accountant dated 29 November 2023 and a report from Mr Jennings Chartered Accountant dated January 2024 and a further addendum report by James Neill dated 29 January 2024. Further evidence in respect of the financial position of the plaintiff was given by Mr Hughes and Mr Ward in their respective affidavits.

[50] In his initial report Mr Neill concluded:

> "It is my opinion that the combination of cashflow pressures experienced by the company in FY22 [financial year] increased bank lending, reducing profits and the recent publication of a winding-up petition by LTFL, calls into question [the plaintiff's] ability to meet its debts as they fall due and raises concerns in relation to the cashflow test of insolvency as outlined in Article 103 of the Insolvency (Northern Ireland) Order 1989."

[51] Under the Insolvency (Northern Ireland) Order 1989 a company is deemed insolvent if they cannot pay their debts as they fall due. This is referred to as "the cashflow test." The second ground on which a company can be deemed as insolvent is based on its balance sheet. The so called "balance sheet" test.

[52] In the body of his report Mr Neill outlines some of the cashflow pressures experienced by the company in FY 2022. He notes that there was a significant drain

on the company cash reserves resulting in the company taking out a bank overdraft in the order of £270k approximately. Accordingly, the only cash available to management to fund short-term working capital and credit obligations was that remaining within the company's existing overdraft facilities. He was unaware of the company's overdraft limit.

[53] Mr Neill further noted that there was a significant reduction in profits in the financial years 2021 and 2022 although he noted that the company continued to operate profitably. He also noted that there had been a winding-up petition filed against the company by a third-party creditor and, in his view, this was an indication that the company was not paying its debts as they fell due.

[54] Mr Neill also noted in respect of the debt-to-equity ratio that he would deem a debt equity ratio of 2 or below typical of a financially stable company. He noted that the plaintiff company's debt equity ratio was 2.1 in financial year 2022 and he further noted this was high in comparison to the industry standard.

[55] For all these reasons Mr Neill concluded that there was a concern that the company may not be able to pay debts as they fell due and, accordingly, it satisfied the cashflow test for insolvency.

[56] Mr Neill accepted that the company was not insolvent on the balance sheet test of insolvency.

[57] In contrast Mr Jennings concluded in his report as follows:

> "(1) The company's balance sheet position is positive with net assets of £3M at 30 September 2023.
>
> (2) Despite a declining profit margin between 2020 and 2022 the company has remained profitable in recent years throughout difficult market conditions in the construction sector and has projected increased growth in turnover and profitability in the next two financial years, having confirmed contracts for projects in excess of £72M in turnover, £45M of which is due to complete by 2025.
>
> (3) The company experienced a decline in cashflow in 2022 and in the first 9 months of 2023 (with an overdraft balance at 30 September 2023 of £388k), driven primarily as the result of the dispute with Radius Housing Ltd and the non-payment of debt due in the sum of £448k. There are, however, future positive cashflows and income in the

pipeline for 2024 and 2025 as noted above. The net cash inflow is projected to be £417k for 2024 and £898k for 2025.

(4) The company has a positive cash balance at 31 December 2023 of £184,392 and is awaiting imminent cash receipt of £665k in relation to R and D claims from HMRC.

(5) The company has had no difficulty in meeting liabilities as they fall due and therefore there are no concerns regarding the solvency of the company. I understand that there are no other outstanding liabilities which could lead to enforcement action such as statutory demands or enforcement orders."

[58] There is no dispute between the experts that the company is balance sheet solvent. Mr Neill in the addendum report, however, notes that the solvent balance sheet is predicated on the plaintiff's debtor book of £7M and, accordingly, any failure in the plaintiff's attempts to recover these balances could materially impact the solvency of the balance sheet.

[59] The main dispute between the parties relates to whether the company is cashflow solvent and accordingly in a position to pay any award when it falls due to the defendant.

[60] Having carefully considered the expert reports I am satisfied that there was a decline in profit for the company between 2020 and 2022 which arose as the result of difficult market conditions. This is referenced in the Construction Industry Training Board NI (CITB) 5 Year Outlook Report which states that 2020 and 2021 were challenging years for construction in Northern Ireland and Construction News in October 2023 stated, "the construction sector has declined further in Northern Ireland as part of a wider private sector downturn." A separate construction survey published by the Construction Employer's Federation (CEF) identified increased material costs, inflation, access to skilled labour and lack of government in Northern Ireland as the main challenges. It is therefore my view that the challenges faced by the plaintiff company during these years is consistent with those faced by the industry in general. It is therefore not surprising that the company experienced a decline in profitability with an associated decline in cashflow in these years and had to obtain a bank overdraft.

[61] Since that time, however, as appears from the plaintiff's management accounts and the evidence given by Mr Ward there has been positive cashflows. As of December 2023, there was a positive cash balance of £184k approximately and the company is awaiting imminent cash receipts of £665k from HMRC.

[62] The plaintiff has further set out details regarding the winding-up petition and it is noted that there was a dispute between the plaintiff and the third party, but the petition was withdrawn and has been paid in full and that no other liability is now outstanding against the company.

[63] One of the main grounds for showing it was not insolvent related to the plaintiff's evidence that it had secured future contracts worth in excess of £70M. In his affidavit Mr Ward avers that there will be further positive cashflow from confirmed contracts for projects in excess of £72M in turnover and this evidence is accepted by Mr Jennings and forms part of his reasons for concluding the plaintiff will be able to pay future debts when they fall due.

[64] In contrast Mr Neill in his addendum report notes Mr Jennings' projection of positive cashflow based on forecasted income of secured contracts, and states, "No evidence has been provided to verify the contractual position of these contracts and I am therefore not able to provide any commentary on the accuracy of the income and cash forecasts." Mr Neill then concludes his addendum report as follows:

> "It is my opinion that the continued cashflow pressure experienced by the company up 30 September 2023, together with a significantly large reduction in revenue during financial year 2023 are key areas of concern regarding the current financial strength of the company."

[65] There was a dispute between the parties about whether these contracts were subsequently provided to Mr Neill. Mr Dunlop submitted Mr Neill had only seen some of the contracts which were provided in a confidentiality ring, and these were not concluded contracts. Mr McCausland disputed this and submitted all the contracts had been provided in a confidentiality ring and the documents established the contracts were concluded. No affidavit evidence has been provided on this issue and no further report has been filed by Mr Neill. Accordingly, his last stated opinion was that set out in the addendum report which is predicated on the basis he could not verify the future contracts.

[66] In my opinion the defendant has not met the high threshold of showing that there is a very real risk of non-payment of a future award by the plaintiff. Mr Neill has not concluded that the plaintiff company is insolvent either on the balance sheet test or the cash flow test. There is no evidence it is teetering on the brink of insolvency. Mr Neill has just noted areas of concern.

[67] In *RN,* O'Farrell stated that in exercising its discretion the court could consider a failure by the claimant to produce financial information. I am satisfied, however, that the plaintiff has provided financial information by way of accounts and management accounts. It has also provided information about the future contracts in the confidentiality ring and provided affidavit evidence about future

contracts which is uncontradicted. In his affidavit Mr Ward avers that the plaintiff has entered into concluded contracts for future work amounting to £70M in turnover. The defendant is not able to gainsay his evidence. I am therefore satisfied that Mr Neill's conclusion is not decisive on the issue of plaintiff's financial ability to pay a future award as it was predicated on the basis there was no evidence the plaintiff had secured future contracts. In contrast this court must consider the plaintiff's ability to pay on the basis that the undisputed evidence is that it has secured future contracts which will generate turnover in excess of £70M.

[68] In addition to the expert evidence lay evidence was given by Mr Hughes about the plaintiff's impecuniosity. He referred to the plaintiff's failure to pay design fees in respect of another contract in or around November 2023 and further noted their failure to pay the adjudicator's fees.

[69] Mr Ward in his affidavit disputed the contentions made by Mr Hughes. He stated that the design fees were now paid and further stated that the payment certificate of June 2023 took account of the adjudicator's fees as it was agreed between the parties that these would be paid by the defendant.

[70] I do not consider it necessary to resolve the dispute between the parties about whether the plaintiff paid the design fees in a timely manner and/or paid the adjudicator's fees given that these disputes arose in January 2023 and June 2023 respectively and the plaintiff's financial position has changed since that time as appears from the more recent management accounts filed.

[71] I consider that the financial position of the plaintiff is best assessed by those who have access to all the relevant information including accounts and management accounts and therefore in determining the issue whether the plaintiff company can pay a future award I have given more weight to the independent expert evidence than the evidence of the parties.

[72] On the basis of the evidence available to the court it appears that the plaintiff has an existing positive bank balance of £184k approximately and is awaiting imminent cash receipt of £665k from HMRC. In addition, it has several future contracts which will bring in a significant positive cashflow in the next few years. Given that the burden is on the defendant to prove there is a real risk of non-payment of a future award by the plaintiff, I am satisfied that this heavy burden has not been made out.

Conclusion

[73] I have found that the defendant has failed to show that there is a real risk the plaintiff will be unable to repay any future judgment sum. In the balancing exercise I consider the balance therefore falls in favour of enforcement and a refusal to grant a stay. I therefore grant a summary judgment in the terms of the order and refuse the stay application.

[74] I will hear the parties in respect of costs.