Neutral Citation Number: [2022] EWHC 1385 (TCC)

Claim No: HT-2022-000029

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

Royal Courts of Justice
Rolls Building
Fetter Lane
London EC4A 1NL
Date: 08/06/2022

Before:

MR ADRIAN WILLIAMSON QC
(siting as a Deputy High Court Judge)

- -

Between:

FTH LIMITED	**Claimant**
- and -	
VARIS DEVELOPMENTS LIMITED	**Defendant**

- -
- -

Paul Darling OBE QC and David Hopkins (instructed by Shemmings Hathaway LLP) for the Claimant

Tom Owen (instructed by DKLM LLP) for the Defendant
Hearing dates: 6 May 2022

- -

JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Wednesday 8th June 2022.

Mr Adrian Williamson QC:

Introduction

1. In these proceedings, the Claimant ("FTH"), a company subject to a Company Voluntary Arrangement ("CVA") seeks to enforce two Adjudication Awards dated 14th February 2020 and 11th September 2020.

2. The Defendant ("Varis") does not dispute that these are valid Awards, but resists the grant of summary judgment, alternatively seeks a stay, on the basis of FTH's financial position and its own cross-claims. This case, therefore, raises once more the question of whether the Court will summarily enforce Adjudication Awards where the Claimant is subject to a CVA.

3. I shall deal with the application for summary judgment and the stay application at Sections B and C below, before setting out my conclusions at Section D. But it is first necessary to summarise the factual background.

A: Background

4. The parties entered into a design and build contract in August 2018 ("the Contract").

5. On 22nd October 2019, Varis issued a Pay Less Notice against FTH's application. This showed a Gross Valuation of circa £3.3m. After allowance for retention and previous Certificates, £317k was due, but this was withheld on the basis of an alleged failure to provide Collateral Warranties.

6. By notice dated 25th October 2019, Varis purported to terminate the Contract. However, by notice dated 29th November 2019, Varis issued a further Pay Less Notice showing a valuation after retention of circa £3.3m and an amount due of circa £90k, but subject to numerous alleged withholding items.

7. On 20th January 2020, in the first adjudication between the parties, Mr. Redmond upheld the validity of the Pay Less Notice of 22nd October 2019.

8. On 14th February 2020, in the second adjudication, Mr. Bingham concluded that Varis' termination was invalid and that they had repudiated the Contract.

9. On 13th May 2020, FTH entered a CVA. The CVA proposal said that the CVA was to last for 12 months (with power to extend), with the aim of producing a dividend for unsecured creditors of 56p in the £. The statement of affairs showed liabilities of £2.2m, including trade creditors of circa £1.9m and a debt to HMRC of £172k. These liabilities did not include any provision for a cross-claim from Varis.

10. The proposal stated:

> *"Brief details of key terms of this proposal*
>
> *1) The balance in the Company Bank account together with any monies received by the Company in respect of retention claims will be paid to the Company and used for the sole purpose of meet* [sic] *the ongoing costs of pursuing the claims against Varis Developments Ltd (VDL) and Filmer Road (FR), as detailed below. Any surplus not required for this purpose will be injected into the CVA. Should these funds be insufficient to meet the ongoing costs, or the retention funds are not received in time, any shortfall will be met by FH.*
>
> ...

3) After the deduction of FH's costs as detailed above, 85% of any funds received in respect of the net proceeds of the VDL and FR claim will be injected into the arrangement. The remaining 15% will be paid to the Company to provide cashflow for trading going forward, if viable.

...

Anticipated dividend
under the Arrangement
(after professional costs)

56p in the £ (see Appendix 4 for further details). This is based upon a projection that £1,300,000 will be available for the benefit of the arrangement. As detailed in the proposal, this figure cannot be calculated with any certainty as it is based upon:-

i) the resolution of claims against VDL and FR;

ii) the associated costs of resolving the claims which will be dependent upon whether the claim is resolved by way of settlement, mediation or further Adjudication is required to determine the final claim amounts;

iii) Recovering funds from VDL and FR."

(the reference to "FH" is to a director, Mr Hughes)

11. On 11th September 2020, Mr. Bingham issued Adjudicator Award 3. In summary, this provided:

"8.5 ***COLLECTION***

	Collection	***£***
	Assessment by YS associates accepted by the Adjudicator	*3,409,330.71*
	Adjustment [at para 8.2.6 above]	*90,455.33*
	Loss & Expense [at para. 8.3.11 above] (Loss of Chance)	*32,845.77*
	Adjustment [at para 8.4 above]	*38,117.00*

	Total	***£3,570,748.81***

"8.6 ***Net Cash Due***

	Total Gross Due	*£3,570,748.81*
	Retention	*£Nil*
	Less previous Cash	*£2,900,191.09*
	Balance	*£670,557.72*
	Plus VAT [at para 8.2.6 above]	*£86,801.22*
	Total	***£757,358.94****"*

12. It should be noted that Award 3, as appears above, was largely based upon Varis' pre-termination Valuation and, of course, assumed that Varis had no claim arising out of the termination, in view of Award 2.

13. On 28th September 2020, Varis indicated through their solicitors that they would resist any application for summary judgment. They intimated a cross claim of *"around £1.3 million"*, based upon their losses arising from their *"entitlement to terminate"*. Further particulars of this cross claim, now put at £1.7m, are set out in a letter of 6th November 2020. This letter was also sent to the CVA Supervisors on that same day as or accompanying a proof of debt.

14. These proceedings were issued on 3 February 2022.

B: Summary Judgment

15. Where a company in insolvent liquidation has obtained an adjudication decision in its favour, that decision will not generally be enforced by way of summary judgment: see

Bouygues (UK) Ltd. v Dahl-Jensen (UK) Ltd [2000] B.L.R. 522 at paras. 29-36 per Chadwick LJ.

16. The essential reason for this approach is explained by Lord Briggs in Bresco v Lonsdale [2020] B.L.R. 497 at para. 28 as follows:

> *" The basic scheme whereby an unsecured creditor's claims may only be pursued by way of proof and participation in a pari passu distribution of any available surplus after discharge of prior claims, whereas the liquidator may pursue the company's claims in full, and with every available tool for enforcement, risks causing a real injustice where there are cross-claims between the company and one of its creditors arising from their mutual dealings. Leaving aside the special position of fiduciaries, there is no fairness in a creditor having to accept only a proportion of the debt due, while the company can recover on its cross-claim against the same creditor in full."*

17. Different considerations may apply where a company subject to a CVA has obtained such a decision. Coulson LJ set out the potentially different approach in Bresco v Lonsdale [2019] 182 Con L.R. 1 in the Court of Appeal, at para. 108:

> *"... the general position relating to a CVA may, depending on the facts, be very different to the situation where the claimant company is in insolvent liquidation. In the latter case, claims being made by the company are part of what might be called a damage limitation exercise, whereby the liquidators endeavour as best they can to pay dividends to creditors. A CVA is, or can be, conceptually different. It is designed to try and allow the company to trade its way out of trouble. In those circumstances, the quick and cost-neutral mechanism of adjudication may be an extremely useful tool to permit the CVA to work. In those circumstances, courts should be wary of reaching any conclusions which prevent the company from endeavouring to use adjudication to trade out of its difficulties. On one view, that is what adjudication is there for: to provide a quick and cheap method of improving cashflow."*
>
> (emphasis added)

18. The facts in Bresco (in fact the relevant aspect of the conjoined appeals was the dispute between Cannon and Primus) are set out at paras. 64 to 79 of the Judgment of

Coulson LJ. It should be noted that Coulson LJ, in upholding the Judgment of HHJ Waksman (as he then was), below, observed that:

> *"[78] Judge Waksman QC's judgment can be found at [2018] EWHC 2143 (TCC). One point should be made at the outset. The judge expressly concluded (at [25]) that:*
>
> > *'On any view if Primus was to make all or most of its recovery it will emerge solvent with all debtors paid and something left over, and that was the basis for having the CVA to enable it to do so.'*
>
> *This is therefore a very different case to the straightforward situation where the claiming company is in insolvent liquidation and the liquidator is engaged in the process of recovering what he can in order to make a distribution to creditors. Here, not only was the CVA designed to allow Primus to trade out of its difficulties but, on the judge's findings if the CVA was allowed run its proposed course, Primus would avoid liquidation altogether.*
>
> *[79] It is clear from the Judgment that the only argument Cannon raised as to why there should not be summary judgment was based on the decision of Akenhead J in Westshield. That was a case about a company in a CVA where summary judgment was not granted. Judge Waksman QC, in his usual way, carefully analysed Westshield and concluded that Akenhead J was not saying that, merely because a company is in a CVA, summary judgment should be refused. The relevant passages in his judgment begin at [91]:*
>
> > *'[91] For all of those reasons it cannot be said, adopting the observations of Chadwick LJ, as echoed by Akenhead J, that summary judgment is always to no advantage to a party because inevitably there will be a netting-off exercise taking account of the counterclaim. Where both parties are already in litigation, where the claims and counterclaims have already been advanced or will be advanced, where the supervisor has already taken the view and considered that Cannon is no longer a creditor, a different situation applies ...."*
>
> (emphasis added)

19. A number of first instance decisions before and after Bresco have considered whether summary judgment should, in the particular circumstances, be granted in favour of a

company in a CVA. For example, in Westshield Ltd. v Whitehouse [2013] EWHC 3576 (TCC) and Indigo Projects London Ltd. v Razin [2019] 184 Con.L.R.. 251 summary judgment was refused. Indeed, although this may only emphasise how fact sensitive this jurisdiction is, Bresco is something of an outlier in that Primus, the Claimant there in a CVA, obtained summary judgment.

20. Such authorities are of limited assistance in this case because they turn upon their own facts. Nor does Bresco provide very definitive guidance as to how the Court should approach a case where a claimant subject to a CVA seeks summary enforcement of an adjudicator's decision. Clearly there is jurisdiction to grant summary judgment, but whether the Court will do so in any given case depends on the facts of that case.

21. I have concluded that the proper approach is to consider, on the facts of this case, whether there is a real risk that the summary enforcement of an adjudication decision may deprive Varis of security for its cross-claim. (Compare John Doyle Construction Ltd v Erith Construction [2020] B.L.R. 671, para. 54(5) and 62(3), per Fraser, J). If so, as a matter of discretion pursuant to CPR Part 24, I should decline to order summary enforcement. John Doyle was a liquidation case but I consider that the underlying principles apply to a CVA as well.

22. In relation to the facts, Mr. Darling QC and Mr Hopkins, who appear for FTH, rely heavily upon two assessments in particular.

23. First of all, they point to the report to creditors made by the CVA Supervisors on 2nd February 2022, which contains the following relatively upbeat statements:

*"**3. Duration of the Arrangement***

3.1 Paragraph 27 of the Proposal provides:

> *"The Supervisors shall have the ability to exercise their discretion in relation to all issues arising under the or in connection with the arrangement and/or to take the views of the arrangement Creditors via a decision procedure"*

3.2 In the circumstances, the Supervisor have used their discretion to further extend the duration of the Arrangement to enable the outcome of the Company's claim against VDL to be enforced as this is considered to be in the interest of creditors as a whole.

4. Company's trading Position

4.1 At the time the Company's Proposal was put forward, the Company had ceased trading, albeit that it was hoped that trading could resume again in the future in the event of recovery of funds. The terms of the Proposal provide that any funds generated from future trading, (which was anticipated would take place in the event that recoveries allowed cashflow to be generated in the future) would be excluded from the Arrangement.

4.2 As previously advised, the director advised that in 2021(not 2012 as stated in our previous report which was a typographical error) the Company has resumed trading working on two projects with historic clients which had a combined turnover of circa £1million. We were advised that these have been funded by FH and it is intended that some of the profit would be used to fund the ongoing litigation against VDL. We requested additional information in relation to these projects.

4.3 We are advised the company received £32,375 in respect of the retention funds and completed 2 projects within the last 12 months. Figures have been updated as follows:

1) *Danamere 1 Ltd - total income from project £607,475.45*
2) *ABP Food Group - total income from project £268,807.19*

4.4 Further projects were secured as follows:-

i) *Penge - Project Value of £1million building 7 apartments. This project has commenced and is in design stage*
ii) *ABP York - Project Value 200k.Order received 22/10/21. Design stage has commenced, delay getting to site due to delay in delivery of cladding*
iii) *Janan Meats - Project Value 300k. Order received 07/01/22. Mobilising on site in February*

iii) ABP Guildford - Project Value 850k. Order to follow, Works to commence in January (commencement critical to satisfy a planning condition)

5. Creditors' Claims

5.1 As set out in the company's proposal, based on information available at the time of preparing the proposal, the Company's creditors were estimated as follows:

- *Trade Creditors: £1,864,118.65*
- *Overdraft: £26,000.00*
- *HMRC £172,000.00*
- *Director's loan £33,410.50*
- *Connected Creditors £ 174,731.97*
- *Leasing/Finance £uncertain*

5.2 We have received claims from creditors totalling £2,286,674.51, including HMRC's final claim in the sum of £259,787.6 and several claims from leasing/finance companies in respect of the shortfalls. This does not include details of VDL counter claim as a proof of debt was not completed. As stated above, the directors do not consider that such claim exists.

5.3 Creditors will recall we previously invited creditors to submit details of their claims to enable an expeditious review in the event that there was any recovery from the claims. A number of creditors have still not submitted claims to date.

5.4 The claims submitted have not been fully reviewed as it is not known whether there will be a dividend distribution. This is normal procedure in such cases. We are advised that as part of the accounting process, the directors have reviewed the position with the company's Accountant and that the Company's liabilities in the November 2019 balance sheet are lower than those included in the Company's statement of Affairs."

24. Secondly, they rely upon a letter from a firm of accountants, Evans Mockler, dated 16th March 2022, which is also expressed in positive terms. It is said that FTH are now forecasting turnover for the year to 31st December 2022, of £3m, and that:

"Our review has confirmed there was a fundamental change in the financial position of FTH from the time the company entered the contract with VDL. In 2018 FTH was a relatively small but growing business and the VDL contract was a substantial contract for FTH. The financial difficulties and subsequent

CVA of FTH, can be traced to the period during which VDL began reducing and eventually ceased making payments to FTH.

In our opinion, in the event VDL is ordered to make payment of £757,359, FTH would be in a position to make a distribution to the CVA creditors and consequently CVA would be terminated having applied the provisions of the agreement. Furthermore, our view is that should the CVA be terminated then FTH will be financially sound with positive net assets and cash flow.

In addition, we can confirm that FTH recommenced activities this year and the company is currently trading profitably as indicated by the Financial Statements for the year ended 30 June 2021 together with the Management Accounts for the four months ended 31 October 2021. For your reference we have also included Financial Statements for the eighteen months ended 30 June 2020. The Financial Statements for the year ended 30 June 2021 reflect a very respectable period of trading as the company effectively recommenced trading activities in early 2021 and turnover was £942,949 for the subsequent six month period."

25. Mr. Darling and Mr Hopkins emphasise that the CVA Supervisors are experienced professionals, well conscious of their legal responsibilities. Likewise, they say that Evans Mockler, although not CPR style independent experts, are a reputable professional firm.

26. As against that, Mr. Owen, Counsel for Varis, submits that there is a real risk, notwithstanding these reassuring statements, that summary enforcement would deprive Varis of security for its cross-claim. In support of this submission, he makes a large number of detailed points as to FTH's financial position and the nature of this CVA. I think that many of these points are well made.

27. First of all, the CVA in this case, unlike that considered in Bresco, is not, on its face, designed to allow FTH *"to trade its way out of trouble"*, to use Coulson LJ's phrase in Bresco. It is apparent from the provisions of the CVA quoted above that, even if the CVA fulfils all financial expectations, there will only be a recovery of 56p in the £.

Even this recovery assumes that 85% of any funds received in respect of the two claims will be injected into the arrangement, after the deduction of the costs of Mr. Hughes.

28. Secondly, it is clear that FTH's two claims will not in fact produce the recovery foreshadowed in the CVA. One is the present claim, but the other relates to a contract at Filmer Road. However, it is now apparent from the letter of 2nd February 2022 that there will be no recovery on this claim (as against a hoped for sum of circa £450k). Important consequences flow from this:

(1) Absent the Filmer Road monies, Evans Mockler accept that, as at the end of 2019, FTH were not cash flow solvent;

(2) The projected recovery of 56p in the £ is now entirely unachievable. This assumed that *"85% of net proceeds of VDL and FR claims (after costs)"* would produce £1.3m: see CVA proposal Appendix 4. FTH have not provided me with an equivalent figure absent a successful outcome at Filmer Road, but it is evidently going to be much lower, with a consequential, significant reduction in the recovery in the £ for creditors;

(3) The £1.3m recovery is "after costs". I do not know what these costs amount to, but they are likely to make further inroads into the overall possible recovery.

29. Taking these factors into account Mr Owen submits that the overall recovery will be much more akin to 10p-15p in the £ than the projected 56p. Whilst I do not have sufficient information before me to come to a precise figure, I think that the recovery will be much less than 56p in the £. This is, therefore, much closer to "the

straightforward situation where the claiming company is in insolvent liquidation and the liquidator is engaged in the process of recovering what he can in order to make a distribution to creditors": see Bresco, para. 78 per Coulson LJ.

30. Thirdly, Mr. Owen submits, and I agree, that little comfort can be taken from general assertions that FTH are now carrying out work and receiving revenue. Unless there is some evidence (which there is not) that they are trading profitably, such assertions are of little assistance.

31. Fourthly, the positive statements in the Evans Mockler Report must be set against the totality of the material available to me. In particular, the report of the CVA Supervisors in November 2021 was prepared at a time when a beneficial settlement of the Filmer Road claim was thought to be imminent: see para. 5.4. Even so, it was said that *"any return to creditors is uncertain"*, para. 7.5, with emphasis supplied.

32. Fifthly, and unlike the position in the Primus v Cannon dispute, the Varis cross-claim (put at £1.7m) has not been considered by the CVA Supervisors at all. Clearly, were this to succeed in whole or in significant part, the CVA would fail and FTH would go into liquidation with very little, if any, recovery for creditors. Indeed, the CVA Supervisors say, in their letter of 16th March 2022 that they had been *"informed"* that the adjudication took into account the counterclaim. This is true but only if and to the extent that the award on Adjudication 2 is ultimately judged to be correct. If that award could be reopened, then a counterclaim falls to be considered.

33. Sixthly, Varis have submitted an expert report from a licensed insolvency practitioner and chartered accountant, Mr. Satow, dated 7th March 2022. FTH object to my receiving this report on the basis that there has been no permission given for expert evidence in this case. However, it seems to me that, I can, in any event, treat this as a part of Varis' submissions. He makes the point at paras. 5-8 to 5.16 that the CVA was for 12 months only, and has not been validly extended. I think there is force in this contention, to which FTH have not adequately responded.

34. Finally, Mr. Owen made a number of relatively detailed criticisms of the various accounting documents put forward by FTH in these proceedings. I agree with him that these raise unanswered questions, but do not think it necessary to lengthen this Judgment by traversing the details of the points made.

35. For these reasons, I have concluded that Varis have shown that there is a real risk that summary enforcement would deprive them of security for their cross-claim. I will return to the effect of this conclusion below.

C: Application for a Stay

36. Under CPR r.83.7(4), the Court has a discretion to order a stay of execution if:

> *"(a) there are special reasons which render it inexpedient to enforce the judgment or order;"*

37. Given my conclusion above, Varis do not need to be protected by a stay, but I will nonetheless deal briefly with this issue.

38. This jurisdiction has been the subject of guidance in the well-known case of Wimbledon Construction Company 2000 Ltd. v Vago [2005] B.L.R. 373 at para. 26:

> *"(a) Adjudication (whether pursuant to the 1996 Ace or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.*
>
> *(b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.*
>
> *(c) In an application to stay the execution of summary judgment arising out of an adjudicator's decision, the court must exercise its discretion under Ord 47 with considerations (a) and (b) firmly in mind (see the* AWG Construction *case).*
>
> *(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 Ord 47, r l(l)(a) rendering it appropriate to grant a stay (see the* Herschell Engineering *case).*
>
> *(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 the* Bouygues *and* Rainford House *cases).*
>
> *(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 the* Herschell Engineering *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 the* Absolute Rentals *case [2000] CILL 1637).*
>
> *With those principles in mind I now turn to the evidence in this case concerning the claimant's financial position."*

39. As regards the reference in the above passage to *"the evidence"*, it is clear that Courts expect parties in the position of the present Claimant who wish to avoid a stay to provide detailed and reliable financial information. Such parties should not be *"economical*

with the information relating to its financial position": see Equitix ESI v Bester Generation [2018] 177 Con L.R. para. 67.

40. The first question, therefore, is whether Varis can show that FTH will probably be unable to pay the judgment sum of £757k at the end of a substantive trial. The answer to this, based on the analysis set out above, is plainly *"yes"*. If it were ultimately shown that Award 2 was wrong, then FTH would go into liquidation with little, if any, return for the creditors including Varis.

41. As regards factor (f):

(1) This is not a case where FTH's financial position is the same as its financial position when the Contract was made in 2018. FTH's finances clearly deteriorated in late 2019, leading to the CVA being entered into in May 2020.

(2) I do not think that FTH's financial position is due, wholly or in significant part, to Varis' failure to pay the £757k awarded by Mr. Bingham in September 2020.

42. In relation to this latter point, it should be noted that, even on the basis of the Evans Mockler letter of 16th March 2022, FTH would not have been solvent on a cash flow basis in late 2019/early 2020 absent payment both of the £757k and the monies said to be due at Filmer Road. As I have pointed out above, these latter monies were, we now know, never going to be paid. Moreover, and again, as set out above, the CVA proposal only offered limited comfort to creditors even if all hoped for recovery were to be made.

43. As regards the financial position of FTH at the time it entered the CVA, this was not a situation where Varis were starving a contracting party of cash. The October and November 2019 gross valuations were essentially adopted in the calculation of sums due in Adjudication 3. As pointed out above, Varis' entitlement to withhold the sums otherwise due was upheld in Adjudication 1.

44. Moreover, the *"estimated statement of affairs as at 19 April, 2020"* shows a total deficiency of circa £2.25m, based upon unsecured non-preferential claims of circa £2.27m. These claims do not include any amount claimed by Varis, and they also do not appear to take account of a *"deficiency in respect of lease/ finance agreements"* which is said to be *"uncertain"*. In short, FTH's financial position looked bleak in April 2020, whatever the position vis-à-vis Varis.

45. Further, and generally as to stay, I think this is a case, like Equitix, where the Claimant has been somewhat economical with information relating to its financial position. The uncertainties in the information supplied would make me more inclined to grant a stay, were this a live issue.

D: Conclusion

46. My conclusion on *"real risk"*, at Section B, above, means that FTH are not entitled to summary judgment in this case. That is because I exercise my discretion under CPR Part 24.2 not to grant summary judgment, notwithstanding FTH have what are accepted to be valid awards in their favour. Alternatively, I would hold that there is some *"other compelling reason"* not to give summary judgment, on the same basis.

47. If it had been necessary to do so, I would have granted Varis a stay of any judgment entered.

48. Counsel are invited to agree the order arising from this Judgment, and any consequential matters, failing which these matters can be dealt with at a further short CVP hearing.