



Neutral Citation Number: [2020] EWHC 2306 (TCC)

Case No: HT-2018-000281

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

The Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: Monday 24<sup>th</sup> August 2020

Before :

**MR ROGER TER HAAR QC**

**Sitting as a Deputy High Court Judge**

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Between:

(1) MR CHRIS HART  
(2) MRS KERRY HART

**Claimants**

- and -

(1) MR RICHARD LARGE  
(2) MICHELMORES LLP  
(2) HARRISON SUTTON PARTNERSHIP

**Defendant**

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Jason Evans-Tovey (instructed by direct access) for the Claimants  
Simon Wilton (instructed by Kennedys LLP) for the Defendants  
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**APPROVED JUDGMENT**

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 24 August 2020 at 10:30 am.**

**Mr Roger ter Haar QC :**

1. In this action, following trial I circulated a judgment dealing with the substantive issues in the action. That judgment was to be handed down on the 24<sup>th</sup> April 2020 but following a request for some aspects to be changed to allow for a degree of anonymity I deferred the hand down of the judgment. The judgment was handed down under the Covid-19 Protocol on the 22<sup>nd</sup> May 2020.
2. In that judgment I awarded damages of £374,000 in respect of diminution of the value of the property which was the subject of the litigation and £15,000 by way of general damages.
3. On the 7<sup>th</sup> May 2020 I heard argument about the issues of interest, costs and permission to appeal (amongst other issues). A separate judgment dealing with these consequential issues was handed down on the same day as the principal judgment.
4. In that second judgment I awarded interest of £143,124.16; that the First Defendant (“Mr Large”) should pay the Claimants (“the Harts”) 85% of their costs; and that Mr. Large should pay £67,500 as an interim payment in respect of the Harts’ costs.
5. I also heard an application for permission to appeal on three grounds. I refused permission to appeal on two of those three grounds, but granted permission in respect of the third ground which relates to the recoverable measure of loss.
6. Mr Large applied to the Court of Appeal for permission to appeal on the other two grounds also. On the 7<sup>th</sup> July 2020 Coulson L.J. refused the further permission sought.
7. The appeal has been listed to float between the 8<sup>th</sup> and 9<sup>th</sup> December 2020.
8. On the 7<sup>th</sup> May 2020 Mr Large made an application to the Court for a stay of execution. I decided that the application should be the subject of a formal application to be made by the 25<sup>th</sup> June 2020. In the event the application was made on the 23<sup>rd</sup> June 2020.
9. Judgment in respect of the stay application was handed down on the 7<sup>th</sup> August 2020. The application was successful to an extent, particularly allowing the Defendant to retain monies relating to the costs of the forthcoming appeal.
10. There remain two matters for consideration:
  - (1) The costs of the stay application;

- (2) The precise terms of the undertaking to be given by Mr. Large under the terms of the order for a stay.

### **Costs of the Stay Application**

11. Each party claims to have been the winner and submits that I should make an order in their or his favour.
12. In considering the appropriate order for costs I bear in mind and apply the provisions of CPR Rule 44.
13. The Claimants point out that they are presently the victors in the litigation, subject of course to the decision of the Court of Appeal: they are entitled to receive now the fruits of their victory save only to the extent that for them to do so would stifle the Defendant's appeal. Whilst in the event I did order a stay, it was not a complete stay: the Defendant will have to pay now a substantial amount in excess of the monies which have been paid by insurers. It was not until a late stage that any offer of immediate payment was made, and then only because of considerable probing by the Claimants, and only after a very late correction in respect of the Defendant's evidence as to the available assets had been made. Further, the amount which the Defendant has been allowed to retain was significantly reduced by my decision from what was sought.
14. The Defendant submits that he is the winner: there was no offer of any stay before the hearing. Had he not obtained an order for a stay, his appeal, for which I granted permission in part, would be stifled. Whilst it is accepted that some information emerged very late, there was no intention to deceive.
15. In my judgment, it is difficult to describe either party as the "winner". It seems to me that in a difficult situation for both parties financially, it was reasonable for both parties to act as they did. For the Claimants, it was reasonable for them to act to limit the erosion of the pot of assets which would be available to satisfy the judgment in their favour. In that context, it was reasonable for them to probe what the true asset position was and is.
16. For the Defendant, faced with a potentially ruinous judgment, it was reasonable to seek the stay that he did, and, whilst correction was necessary, I do not find that there was any deliberate attempt to hide assets or to mislead the Court in any way.
17. Given the legitimate concerns of each party, and the legitimate differences as to how the Defendant's appeal should be conducted, it seems to me inevitable that the hearing which took place before me as to whether there should be a stay and, if so, on what terms, would take place. I regard both parties' costs of that hearing as being inevitable costs relating to the appeal.
18. In those circumstances, I order that the costs of the stay application will be costs in the appeal.

### **The Terms of the Order**

19. Apart from the terms of the order as to costs, resolved above, there is a difference between the parties as to the terms of the undertaking which is to be required of the Defendant as a condition of the grant of the stay.
20. In my decision on the stay application, I decided that the Defendant was entitled to keep back £37,000, calculated as to £13,000 in respect of work in progress for which the Defendant is liable to his lawyers and as to £24,000 in respect of the costs of the appeal on the basis that the appeal will be conducted by counsel on a direct access basis.
21. The Claimants seek to have the undertaking formulated on a basis which limits the extent of the Defendant's freedom of manoeuvre.
22. Insofar as the £13,000 is concerned, I accept that the undertaking to be given relates to the use of a sum up to that amount to be paid out to satisfy any liability existing for work in progress as at the time of the hearing before me.
23. In respect of the £24,000, I can foresee that it might be convenient for some work to be done by a solicitor rather than counsel. However, I expect the principal cost to be incurred to be counsel's fees. In those circumstances, so long as the £24,000 is expended solely upon costs relating to the appeal, there will be no breach of the undertaking.
24. I hope this is sufficient for the parties to finalise the order.