Neutral Citation Number: [2024] EWHC 580 (TCC)

Case No: HT-2022-000244

**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: 14 March 2024

**Before**:

**MR ROGER TER HAAR KC**

**Sitting as a Deputy High Court Judge**

**Between:**

**PINEWOOD TECHNOLOGIES ASIA PACIFIC LIMITED**

**Claimant**

**- and –**

**PINEWOOD TECHNOLOGIES PLC**

**Defendant**

**Alice Hawker** (instructed by **LK Law LLP**) for the **Claimant**
**Tamara Oppenheimer KC** (instructed by **Trowers & Hamlins LLP**) for the **Defendant**

Hearing date: 1 March 2024

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**APPROVED JUDGMENT**

This judgment was handed down remotely at 10:30am on 14 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**Mr Roger ter Haar KC :**

1. There are two applications before the Court:

   (1) The Defendant's application that unless the Claimant within seven days makes certain payments (defined below as "the Judgment Debt"), the Claimant's claim be struck out; and

   (2) The Claimant's application for an extension of time to pay the Judgment Debt.

**The Facts**

2. The Defendant is a UK-registered company which develops and supplies a dealer management system for the automotive industry, known as the "Pinewood DMS". The Defendant typically contracts with independent partners known as "resellers" to market and sell the Pinewood DMS outside of the UK.

3. The Claimant and the Defendant (which are unrelated companies) entered into two reseller agreements dated 28 July 2017 (the "First Reseller Agreement") and 8 January 2019 (the "Second Reseller Agreement") under which the Defendant appointed the Claimant as its authorised exclusive reseller of the Pinewood DMS in certain specified territories in the Asia Pacific region (the "Reseller Agreements").

4. The Claimant claims that the Defendant breached various alleged obligations to update and develop the Pinewood DMS pursuant to clause 10.5 of the Reseller Agreements. In its original (unamended) Particulars of Claim, the Claimant claimed "*a sum presently calculated at approximately USD 312.7 million*",

which was said to comprise damages for various costs and expenses allegedly incurred by the Claimant and alleged lost profits.

5. The Defendant denies the claim in its entirety. In summary, the Defendant's position is that:

   i) It is denied that the Defendant breached clause 10.5 of the Reseller Agreements as alleged or at all.

   ii) The Claimant's claim for loss and damage was woefully unparticularised, (in part) proceeded on an incorrect legal basis, and appeared to be wholly unrealistic and exaggerated.

   iii) In any event, the claims were excluded by clause 16.2 of the Reseller Agreements, alternatively capped at: (a) £134,528 pursuant to clause 16.3 of the First Reseller Agreement, and (b) £0 pursuant to clause 16.3 of the Second Reseller Agreement.

6. The Defendant applied for reverse summary judgment on the basis of the last of these arguments. Following a hearing before Joanna Smith J on 12-13 July 2023, the Court handed down judgment on 13 October 2023 (the "Judgment"), granting reverse summary judgment on the entirety of the Claimant's claim save in relation to its claim for "Incurred Costs" (as defined in paragraph 16 of the Judgment) (the "Incurred Costs Claim").

7. At that time, the Incurred Costs Claim was valued by the Claimant in the sum of US$896,535.39. This has now increased to an alleged US$4,635,148.39 in the Draft Amended Particulars of Claim.

The counterclaim

8. It was and is the Defendant's case that since January 2021, the Claimant has been indebted to the Defendant in respect of outstanding fees due under the First Reseller Agreement, which remain unpaid despite repeated demands for their payment. The Defendant counterclaimed for these sums.

9. By the Judgment and the October Order, the Court granted summary judgment on the counterclaim in the sums of US$212,105 and THB 15,517,413 plus interest.

The October Order

10. Judgment was handed down at a hearing on 13 October 2023, at which the Court also made the October Order. The Court ordered that the Claimant pay the following sums to the Defendant:

    i) the sums of US$212,105 and THB 15,517,413;

    ii) interest amounting to US$33,479.72 and THB 2,544,764.05 as at the date of the October Order and accumulating at the daily rates of US$53.75 and THB 3,932.50; and

    iii) £172,958.09 by way of payment on account of the Defendant's costs;

    (the "Judgment Debt").

11. During the 13 October 2023 hearing, the Judge heard submissions from the parties on consequential matters. The Claimant applied for permission to appeal, which was refused, but did not apply to the Judge for further time to pay or for a stay of execution of the October Order (or any part of it).

12. Pursuant to CPR 40.11, payment of the Judgment Debt was due within 14 days, i.e. by 27 October 2023. It is common ground that the Claimant did not pay the Judgment Debt (or any part of it) within that time and the Judgment Debt remains outstanding in full. It follows that the Claimant is in breach of the October Order.

Subsequent events

13. The Claimant applied for permission to appeal to the Court of Appeal by Appellant's Notice dated 2 November 2023. The Appellant's Notice did not include any application for a stay of execution of the October Order pending the appeal. Permission to appeal was refused by order of Coulson LJ dated 7 December 2023. On 11 December 2023, the Defendant put the Claimant on notice that, if the Judgment Debt was not paid within seven days, it would issue an application for an unless order.

14. The Defendant issued the application for an unless order which is before the Court on 19 December 2023.

15. On the same date, the Claimant offered to pay the Judgment Debt in instalments between 22 December 2023 and 22 February 2024. In response, the Defendant noted that, whilst it was not prepared to withdraw its application for an unless order, if the Judgment Debt was paid in accordance with the Claimant's proposal, then it was unlikely that the Claimant would ever have to respond to the application and the application would fall away.

16. On 22 December 2023, the Claimant issued its application for an extension of time for payment of the Judgment Debt. By this application it sought a different

payment timetable to the one it had proposed three days prior: the application sought an order for payment of the Judgment Debt in instalments between 26 January 2024 and 29 February 2024. The evidence in support of the application asserted that the Claimant "*has no assets and it has no income*" and that the litigation was being funded by (unidentified) directors and their (unidentified) friends and family. The Claimant submitted that the payment schedule sought in the Extension Application was "*both reasonable and realistic in all the circumstances*".

17. On 19 January 2024, the Claimant made *ex parte* applications to courts in the United States pursuant to Section 1782 of Title 28 of the United States Code, seeking disclosure orders against third parties connected to the Defendant (the "1782 Applications"). The 1782 Applications were purportedly made in support of the Claimant's alleged "fraud" claim against the Defendant. The relevance of the 1782 Applications appears to be that the time and money devoted by the Claimant to those applications has or may have affected the Claimant's ability to satisfy the Judgment Debt.

18. On 22 February 2024, the Claimant served a Third Witness Statement from Mr David Donald Neilsen in response to the application for an unless order and in support of the application for time to pay the Judgment Debt. Mr Neilsen is the Managing Director of the Claimant.

19. In paragraph 7 of the statement he said:

> For all the reasons set out below, Pinewood AP has not been in a financial position to pay the large sums due under the October Order as quickly as Pinewood UK seek. That said, Pinewood AP acknowledges that those sums are due and owing and intends to pay them. In these circumstances, it suggests the following

> payment schedule in order to discharge the sums owing under the October Order:
>
> 7.1 Within 7 days of the 1 March 2024 hearing, payment of £131,998 currently held by King & Spalding International LLP, Pinewood AP's previous solicitors, in respect of the security Sum (as defined below), in part-payment of the sums due under the October Order;
>
> 7.2 On 1 June 2024, payment of US $150,000 in part-payment of the sums due under the October Order; and
>
> 7.3 Payment of the remaining sums due under the October Order (£514,967.15) in monthly instalments of US $50,000 on the first of each month subsequently, with the final payment on 1 August 2025 of US $49,892.06 (together with additional interest which has accrued over that period).

20. In the witness statement Mr Neilsen explains the claims which the Claimant wishes to put forward and the steps being taken through the 1782 Applications to obtain evidence to support its case.

21. At paragraphs 49 to 60 of the witness statement, Mr Neilsen gives evidence as to the Claimant's financial position:

> 49. At the date the Extension Application was made, Section C of the application notice set out the background out to the application and the context in which further time was being sought. In brief, Pinewood AP is a Hong Kong company which no longer trades. It was formed for the sole purpose of re-selling Pinewood UK's DMS. As such Pinewood AP has no assets or income. This litigation is being funded by ten individual investors. It is right to say that no representations were made on Pinewood AP's behalf at the consequentials hearing on 13 October 2023 to the effect that it required more time in order to pay the Sums due under the Order.
>
> 50. At this time, Pinewood AP was advised (without any waiver of privilege) to pursue an appeal of the October Order; however the attempt to appeal failed and on 7 December 2023 the Court of Appeal made an order refusing permission to appeal ….
>
> 51. Following the Court of Appeal's refusal, Pinewood AP decided to engage new solicitors, Quillon Law LLP ("Quillon"), who filed and served a Notice of Change on 14 December 2023 …

52. Despite Quillon requesting more time to take instructions upon its recent instruction on 19 December 2023, Pinewood UK issued its Unless Order Application. On the same day Pinewood AP proposed staged payments of the sums due under the October Order; with the last such date being 22 February 2024. On 20 December 2023, Pinewood UK rejected this proposal.

53. Pinewood AP was therefore forced to make the Extension Application, seeking payment of the sums due under the October Order in instalments, ending at the end of February 2024.

54. I understand there was therefore communications between the parties' barristers' clerks and the Court in January 2024 which resulted in the listing of the Current Applications on 1 March 2024 – a date after which all of the proposed payments in the Extension Application would fall due.

55. In the circumstances, pending the Court's determination of the concept of staged payments over time, no sums have been paid by Pinewood AP to Pinewood UK.

56. Pinewood AP has since decided to instruct new solicitors, LK. A Notice of Change was filed and served on 14 February 2024 ….

57. On 16 February 2024, LK wrote two letters to Pinewood UK's solicitors, T&H. The first letter sought to agree a transfer of the Security Sum (as defined below) to LK's client account. The second letter sought an adjournment of the hearing on 1 March 2024, in light of LK's very recent engagement and referred to a proposed application for a stay of execution of the October Payment, but proposed payment of the Security Sum straight away ….

58. The Security Sum (of £131,998) was required to be paid into King & Spalding's client account pursuant to a Consent Order, approved by Mr Justice Waksman, on 8 November 2022 (the "Security Sum") …. I understand the Security Sum was intended to cover Pinewood UK's costs up to the end of pleadings.

59. On 20 February 2024, letters were sent by T&H to each of myself, Josephine Lee and Joe Simone seeking information as to the funding by Pinewood AP of these proceedings…

60. I do not understand the basis on which Pinewood UK is entitled to the information they seek.

22. On 27 February 2024, the Claimant issued an application to amend its application to extend its time for payment, aligning the formal application with the varied timetable proposed in Mr Neilsen's third witness statement.

23. By letter dated 26 February 2024, the Defendant's solicitors asked for information as to who is funding these proceedings. By letter the following day the Claimant's solicitors challenged the Defendant's entitlement to this information.

## The Claimant's Application for Extension of Time

24. The Defendant's application for an unless order was first made before the Claimant's application, but in my view it is appropriate to consider the Claimant's application first, since the outcome of that application has an impact on the outcome of the Defendant's application, as will be seen below.

25. It is common ground between the Parties that in considering this application, I should apply the well established principles set out by the Court of Appeal in *Denton v TH White Ltd*[1]. In broad terms this requires me to:

(1) Assess the seriousness and significance of the breach;

(2) Consider why the default occurred; and then

(3) Make a determination taking into account all the circumstances of the case.

[1] [2014] EWCA Civ 906; [2014] 1 WLR 3296

26. As to the first principle, the Claimant accepts that the failure to pay the sums due under the October Order in accordance with the terms of that Order was not a trivial breach.[2]

27. As to why the default occurred, Ms Hawker submits in her skeleton argument:

> 26. As to why the default occurred, the situation is multi-layered. PTAP's resources have been drained by a number of sources, all of which lead back to PWUK.
>
> 27. On a broader view, on PTAP's case, PWUK's past actions led to the failure of what promised to be a fruitful venture, and indeed appears to be a promising one for PWUK. It is not surprising, therefore, that the current resources of the respective parties are disparate.
>
> 28. On a narrower and more immediate perspective, PTAP's resources have been directed as follows:
>
> > 28.1 PTAP instructed its solicitors and counsel to apply for permission to appeal, which was only refused by the Court of Appeal on 7 December 2023 …
> >
> > 28.2 On 19 January 2024, PTAP made applications in the United States pursuant to Section 1782 of Title 28 of the United States Code, in the states of Oregon and Florida, to obtain documents to buttress existing circumstantial evidence against PWUK in respect of further potential claims …
>
> 29. Thus, the default occurred because PTAP has been fighting several fires with very limited resources and has not been in a position to pay the significant sums due under the Order.

28. I do not find this a convincing explanation of why the default occurred. The default was a failure to pay the sums which the Court had ordered should be paid.

29. This is not a case where because the Claimant was busy elsewhere or on other matters it forgot the requirements of the October Order. On the contrary, as the

[2] Ms. Hawker's skeleton argument, paragraph 25.

evidence of Mr Neilsen makes clear, the problem was that the Claimant did not have within its own resources the monies to satisfy the Order.

30. However, the evidence is non-existent as to whether those supporting this litigation have the resources to satisfy the Order. Further, the evidence is wholly lacking as to the basis upon which the two earlier offers of payment were made: who was going to provide the funds and on what basis? Why has that availability of relatively immediate funds disappeared? Moreover, there is no indication of the basis upon which the present proposal is put forward. It is clear that part would come from the "Security Sum" but otherwise the source of the payments is unclear, nor is the basis for the timing of the payments clear. As to that part which would come from the Security Sum, that is unsatisfactory. The Claimant consented to an order under which it agreed to provide security for costs: if it wishes that order to be varied or discharged, then that should be the subject of a separate, specific, application. Apart from that procedural problem, there is an issue of principle: should the security which otherwise has been regarded as appropriate be diminished or removed because of the adverse Order? That would seem to be problematic as a matter of justice between the Parties, but I say no more in case an application to vary the Security for Costs order has yet to be considered by this Court.

31. There is another point which arises out of the interplay between the Defendant being provided with security for costs and the proposed payment schedule: does that proposed schedule allow for the possibility that this Court may order the Claimant to provide significant further sums by way of security for the Defendant's costs? Whether that is a possibility depends, in large part, as to

whether an order for security would stifle the Claimant's claim, which in turn depends upon whether the Claimant has access to financial support which would enable it to pursue this litigation.

32. In this inadequate evidential position, the Court would in my judgment be entitled simply to refuse the Claimant's application.

33. However I do not think a total refusal of the application would be just. Instead I am going to allow a further period to 1 June 2024 for payment to be made in full. I reach this conclusion for the following reasons:

(1) I accept the premise of the Defendant's arguments that it has an Order in its favour which should be honoured;

(2) I have also accepted that no adequate explanation for non-payment has been put forward;

(3) Against those powerful factors, it seems to me that if I order an extension of time for payment and a stay of this action until 1 June 2024 (or earlier payment of the Judgment Debt in the meantime) the Defendant will not need to incur any significant further costs save for those which may arise out of the stay itself (for example any application to lift the stay) or payment of the Judgment Debt;

(4) In the likely progress of this action to trial if it is actively pursued, a delay of three months is unlikely to prejudice the Defendant, nor is there any other significant prejudice to the Defendant apparent;

(5) If, as the Claimant says through Mr Neilsen and its counsel, it intends to satisfy its obligations under the October Order, this pause will give it time to make arrangements if arrangements can be made.

## The Defendant's Application for an Unless Order

34. The order sought by the Defendant is that unless the Claimant satisfies its payment obligations within seven days, its claim shall be struck out without further order.

35. When, in the course of the hearing, I suggested that a course which the Court might take would be to grant an extension of time for payment to 1 June 2024, Ms Oppenheimer KC, appearing for the Defendant, submitted that, if I took that course, then the unless order should bite in the event of non-payment by 1 June 2024, rather than within 7 days of the date of my order.

36. In that way, as I have said above, the form of the order which I might make is affected by the decision on the Claimant's application.

37. There is a disagreement between the Parties as to the principles upon which I should determine this application.

38. The Defendant relies principally upon the statement of principles contained in the judgment of Sir Richard Field in *Michael Wilson & Partners Ltd v Sinclair*[3]:

> "In my judgment, the following principles are applicable when dealing with an application that a party to ongoing litigation should be debarred from continuing to participate in the litigation by reason of having failed to pay an order for costs made in the course of the proceedings:

[3] [2017] EWHC 2424 (Comm); [2017] 5 Costs LR 877 at paragraph [29]

> (1) The imposition of a sanction for non-payment of a costs order involves the exercise of a discretion pursuant to the court's inherent jurisdiction.
>
> (2) The court should keep carefully in mind the policy behind the imposition of costs orders made payable within a specified period of time before the end of the litigation, namely, that they serve to discourage irresponsible interlocutory applications or resistance to successful interlocutory applications.
>
> (3) Consideration must be given to all the relevant circumstances including: (a) the potential applicability of Article 6 ECHR ; (b) the availability of alternative means of enforcing the costs order through the different mechanisms of execution; (c) whether the court making the costs order did so notwithstanding a submission that it was inappropriate to make a costs order payable before the conclusion of the proceedings in question; and where no such submission was made whether it ought to have been made or there is no good reason for it not having been made.
>
> (4) A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Article 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability.
>
> (5) Where the defaulting party appears to have no or markedly insufficient assets in the jurisdiction and has not adduced proper and sufficient evidence of impecuniosity, the court ought generally to require payment of the costs order as the price for being allowed to continue to contest the proceedings unless there are strong reasons for not so ordering.
>
> (6) If the court decides that a debarring order should be made, the order ought to be an unless order except where there are strong reasons for imposing an immediate order."

39. That statement of the relevant principles was preceded in the judgment by recitation and analysis of relevant authority, including *Crystal Decisions UK*

*Ltd v Vedatech Corp*[4]; *Musion Systems v Activ8-3D*[5] and *Gamatronic (UK) Ltd v Hamilton*[6].

40. Because of the Claimant's reference to a line of family law cases in the Court of Appeal, it is important to note that the Court of Appeal's reasoning in *Crystal Decisions UK Ltd v Vedatech Corp* underpins Sir Richard Field's statement of applicable principles.

41. In those cases the judges emphasised that the Court is particularly likely to resort to a strike out order if it is the only way of sanctioning a party for non-compliance with a court order. In my view, this consideration underlies Sir Richard Field's principle (5).

42. In the context of the Claimant's application, I have already recited such evidence as there was before me as to the Claimant's financial position, and have commented upon the deficiencies in the evidence in that regard. In this case Sir Richard Field's principle (4) is highly relevant. This principle was also applied by HH Judge Pelling QC in *Aramco Trading v Gulf Petrochem FZC*.[7]

43. In *Gama Aviation (UK) Ltd v MWWMMWM Ltd*[8], the same approach was applied, no distinction being drawn between a failure to satisfy an order for costs and a failure to pay a judgment sum.

[4] Patten J. at first instance: [2006] EWHC 3500 (Ch): permission to appeal refused [2008] EWCA Civ 848, see paragraphs [24] and [25] of Sir Richard Field's judgment, cited by Saini J in *Siddiqui v Aidiniantz* [2020] EWHC 699 (QB) at paragraphs [24] to [28]
[5] [2012] EWPCC 5
[6] 4 May 2016; Case No. HQ 13 X 0094
[7] [2021] EWHC 2650 (Comm) at paragraph [21].
[8] [2021] EWHC 3667 (Comm) at paragraphs [26] – [40]

44. The same principles have been applied by HH Judge Pelling QC in *Hangar 8 Management Ltd v Taleveras Group of Companies Ltd*[9].

45. It is also relevant to note that in *Orb ARL v Ruhan*[10] Popplewell J. held that maintaining public confidence in the Court's ability and willingness to secure compliance with its orders is an important and legitimate objective of an unless order in itself.

46. However, Ms Hawker draws attention to another line of authority. This starts with the decision of the Court of Appeal in *Hadkinson v Hadkinson*[11], in which Denning LJ said[12]:

> …. the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.

47. The *Hadkinson* line of authorities was discussed by the Court of Appeal in *de Gafforj v de Gafforj*[13]:

> 9. The nature of the *Hadkinson* order was described in this way by Sir Ernest Ryder in *Assoun v Assoun* [2017] EWCA Civ 21 at [3]:
>
> > "Such an order is draconian in its effect because it goes directly to a litigant's right of access to a court. It is not and should not be a commonplace. As developed in case law, it is a case management order of last resort in substantive proceedings (for example for a financial remedy order) where

[9] [2019] EWHC 2483 (Comm) at paragraph [11]
[10] [2016] EWHC 850 (Comm) at paragraph [178]
[11] [1952] P. 285
[12] At p.298
[13] [2018] EWCA Civ 2070

> a litigant is in wilful contempt rather than a species of penalty or remedy in committal proceedings for contempt."

To this I would add that it is not a species of what has been described in one of the cases as 'enforcement by the back door'.

10. An order of this kind can be made at any stage of proceedings, both at first instance and on appeal. Its history and modern development is set out in the judgment of Eleanor King J in *C v C (Appeal: Hadkinson Order)* [2011] 1 FLR 434 at [27]-[41].

11. For present purposes, it is enough to note the exceptional nature of the order and to record the conditions that are necessary before it can be made. I would summarise these as follows:

1. The respondent is in contempt.

2. The contempt is deliberate and continuing.

3. As a result, there is an impediment to the course of justice.

4. There is no other realistic and effective remedy.

5. The order is proportionate to the problem and goes no further than necessary to remedy it.

12. As to the first and second of these conditions, in *Mubarak v Mubarik* [2006] EWHC 1260 (Fam) at [65] it was held by Bodey J that non-payment in breach of a maintenance order is in itself a contempt of court, regardless of ability to pay, and at [66] that questions of ability to pay come into play when the court decides whether and how to act on the contempt. I agree with both propositions.

13. As to the third condition, it is not necessary to limit by further definition what it means to impede the course of justice, but it is likely to include what Sir Mark Potter P described in *Laing v Laing* [2005] EWHC (Fam) at [18] as 'making it more difficult for the court to ascertain the truth or to enforce the orders it makes'.

14. The fourth condition underscores the obvious point that a *Hadkinson* order will not be made if the court has other powers that can be effectively deployed.

15. Lastly, a *Hadkinson* order is a flexible one with a range of possible sanctions. In *C v C* the court required a lump sum to be brought onshore as a condition for an appeal continuing, failing which it was to be dismissed. In *Mubarak*, the husband was required to give instructions to trustees and to make legal services payments if he was to continue to be heard in financial

> remedy proceedings. In *Laing*, the husband was required to make good arrears of maintenance before his application to vary was heard. In *Hadkinson* itself, the Court of Appeal refused to hear a mother's appeal until she had returned a child to England. The form of order will be tailored to the needs of the case. What is important is that the sanction is no stronger than it need be to remove the impediment to justice.

48. It is clear that this line of authority at a minimum expresses the conditions which must be satisfied before an order is made which has the effect of preventing a party from pursuing a case before the Courts in different terms from the way the principles were expressed in the other line of authority which are referred to above.

49. I would express some doubt as to whether in truth the conditions 1 to 5 listed in paragraph [11] of the Court of Appeal's decision in *de Gafforj v de Gafforj* ("the five conditions") are in practice different from the principles set out in *Michael Wilson v Sinclair* and the other cases referred to above.

50. If there is any substantial difference in the result in particular cases, it seems to me judges in family law cases would be obliged to follow the *Hadkinson* line of authorities and judges in cases outside that area (where particular considerations probably apply because of the interests of persons other than the partner/partner and/or parent/parent who are the principal protagonists, most obviously children of the disputing parties) are obliged to follow the decision of the Court of Appeal in *Crystal Decisions UK Ltd v Vedatech Corp*.

51. However, what is common ground in the two lines of cases is that a debarring order leading to or associated with a strike out order is, as Richards LJ said in

another round in the fertile number of judicial pronouncements in the *Emmott* disputes across the world, "a last resort"[14].

52. On the facts of the case before me, it seems to me that application of "the five conditions" would produce the same result:

(1) Is the Claimant in contempt? Whilst the language is different, here there has been a failure to comply with an order of the Court;

(2) Is the contempt deliberate and continuing? In the absence of any satisfactory explanation for the failure to pay, it appears that the Claimant (or those funding this litigation) are deliberately failing to honour the October Order/Judgment Debt;

(3) As Popplewell J. held in *Orb ARL v Ruhan* maintaining public confidence in the Court's ability and willingness to secure compliance with its orders is an important and legitimate objective of an unless order in itself. This seems to me to be an impediment to the course of justice, satisfying the third condition. It is important when tracing the continuous thread of judicial thinking to note that in the passage from Denning LJ's judgment cited above, one of the examples of justice being impeded cited by him was that the contempt would [or might] make it more difficult for the court to enforce its orders. See also, to the same effect, paragraph [13] of the judgment of the Court of Appeal in *de Gafforj v de Gafforj*;

(4) The evidence before me shows that there is no sanction available to the Court to force the Claimant, a corporation based in Hong Kong, to honour

[14] [2015] EWCA Civ 774; [2015] 4 Costs LR 707

the October Order/Judgment Debt other than to require compliance as a condition of continuing with this action;

(5) The satisfaction of the fourth condition powerfully shows that the unless order would be proportionate to the problem and goes no further than necessary to remedy.

53. In respect of sub-paragraph (4) above, I accept and rely upon Ms Oppenheimer's submission in paragraph 28.1 of her skeleton argument, which is firmly based in the witness evidence before me:

> Pinewood UK has no alternative means of enforcing the October Order through different mechanisms of execution. According to its own evidence, Pinewood AP is a Hong Kong company which no longer trades, and it has no assets or income. The process of enforcement in Hong Kong is not straightforward, can take a long time, and may require Pinewood UK to put up security for costs. It would also be very difficult (if not impossible) for Pinewood UK to progress a winding-up petition against Pinewood AP in Hong Kong, and doing so would put Pinewood UK at risk of adverse costs orders. Further, and in any event, pursuing any form of enforcement or winding-up in Hong Kong would be pointless in circumstances where Pinewood AP has no assets or income which could be used to satisfy the Judgment Debt.

54. Because of the Claimant's reliance upon the *Hadkinson* line of authorities, I have concentrated upon the result of applying the five conditions. However, for the avoidance of doubt I have also considered the application of the other line of authorities and am satisfied that applying those principles an unless order is justified for the reasons set out in paragraphs 25 to 30 of Ms Oppenheimer's skeleton argument.

55. For the above reasons I am satisfied that there should be an unless order as sought by the Defendant save that the operative date will be aligned with the extension of time for payment granted above (1 June 2024).